The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.

Bruce H. Kobayashi
Joshua D. Wright

In their recent article in this Journal, Cary et al. critique our prior article, Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup. In that article, we assess the marginal costs and benefits of applying antitrust law to the so-called patent holdup problem, contend that the costs of applying antitrust rules outweighs the benefits, and argue that our analysis is consistent with the Supreme Court’s antitrust jurisprudence. Cary et al. argue, in contrast to our analysis, that patent holdup generates the type of harms that should be addressed by antitrust law, and that our analysis of the marginal benefits of antitrust are not consistent with the Court’s antitrust jurisprudence. This reply clarifies our earlier analysis and responds to Cary et al.’s critiques. Regarding their critique of our analysis of the marginal benefits of antitrust, we demonstrate that the primary source of our disagreement is their assumption that the costs of antitrust enforcement in the patent holdup context are zero. This assumption leads Cary et al. to conclude erroneously that the net benefits of applying (costless) antitrust enforcement to patent holdup are always positive. Accordingly, they never grapple in a meaningful way with our marginal analysis of the costs and benefits of imperfect antitrust enforcement in the patent holdup context. Further, we again demonstrate that the Supreme Court’s recent antitrust jurisprudence embraces the type of marginal analysis we offer, including endorsing considerations of the costs associated with both judicial error and the direct costs of administration and litigation as inputs into analyses aimed at identifying the optimal scope and content of antitrust law.