

## **Alternative Remedies in Standard Essential Patents Disputes**

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### **Abstract:**

The possibility to seek and obtain injunctions for the infringement of Standard Essential Patents (SEPs) is limited in both the US and the EU. The reasons for restricting the use of injunctions is due to concern of patent holdup, i.e. the possibility of SEP holder to force standard-implementers to accept onerous licensing terms, exceeding patent's true economic value, as well as seeing injunctions as incompatible with the commitment given by the patent holder that it will license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

Limiting the use of injunctions by SEP holders may enable implementers to engage in a holdout, i.e. delaying taking a license for as long as possible, forcing the patentee to engage in expensive and protracted litigation in order to settle for below FRAND terms.

Instead of focusing on injunctions, courts may use some procedural remedies in SEP disputes to restore the balance between the interests of patent holders and implementers. Courts could, at the beginning of the trial, order the defendant to make interim payments into escrow, or provide another type of security, reflecting the value of SEP holder's whole portfolio, and not just for the patents in the litigation. Once interim payments are in place, courts may separate patent and FRAND issue and try patent issues first, as such could provide parties a sense of the overall strength of the SEP portfolio. Courts may adjust the level of interim payments, after patent issues have been resolved, by setting the higher amount if most of the patents have been confirmed valid and infringed or, conversely, lower the amount if most of the patents have been found to be invalid and non-infringed.

Interim payments could therefore secure the interests of SEP holders and make holdout strategy more costly, while at the same time dispense the need for injunctions and mitigate the concern about holdup

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