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ALTERNATIVE REMEDIES IN STANDARD ESSENTIAL PATENTS DISPUTES

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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

Introduction

The possibility by owners of Standard Essential Patents (SEPs) to seek and obtain injunctions against infringers of their SEPs is generally limited due to the concern of harmful holdup by patent holders. The article will first analyse five different strands by which the use of injunctions by SEPs holders has been restricted in the US and the EU. It will then discuss some options that courts may take in addressing a different type of concern – holdout by standard implementers.

Why injunctions for SEPs have been limited

SEPs are patents that are necessary to implement to comply with a standard.¹ A concern with SEPs is that they confer increased market power to their holders, once the standard has been adopted and implementers have incurred significant sunk cost to manufacture standard-compliant products, after which switching to alternative technology may no longer be possible.² For example, compliance with

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¹ See: *Microsoft v Motorola*, 2013 WL 2111217 (W.D. Wash. 2013) p. 24; *Ericsson v D-Link*, 773 F.3d 1201 (Fed. Cir. 2014) p. 1209.

² See: US Department of Justice and the Federal Trade Commission, *Antitrust Enforcement of Intellectual Property Rights: Promoting Innovation and Competition* (2007) (US DOJ and FTC, Promoting Innovation and Competition) p. 35-36; J Farrell, J Hayes, C Shapiro, T Sullivan, 'Standard Setting, Patents, and Hold-up'

the standard may be necessary for the participation in the market; such is the case with 3G and 4G telecommunications standards, to which all modern smartphones must comply.

Some academics and officials from competition law authorities share a concern that SEP holders may engage in “patent holdup” by using injunctions and even the threat of injunctions to force standard-implementers to agree to onerous licensing terms, exceeding patent’s true economic value.³ If the patent is truly essential and valid, meaning that each manufacturer must use it to produce standard-compliant goods, the SEP holder may use its enhanced bargaining power to demand not only royalties that reflect the value of the patented technology, but also the switching costs of implementers. Put differently, the SEP owner may demand royalties that are significantly higher than the royalties it could have demanded before the standard was adopted (when there were competing technologies), or the royalties it could have demanded had the technology not been included in the standard.⁴ Patent hold-up may potentially lead to many negative effects; it may overcompensate patentees, raise prices for consumers, exclude from the market product of implementers who do not accept holdup licensing terms and, ultimately, undermine the standard-setting process.

To mitigate the concern of patent holdup, Standard Setting Organisations (SSOs) require SEP holders to license their SEPs to all implementers on fair, reasonable and non-discriminatory (FRAND) terms.⁵ Some authors have interpreted FRAND commitment as precluding SEP holders from seeking injunctive relief for infringement of their SEPs.⁶ They argue that the purpose of FRAND commitment is to prevent holdup, and that FRAND damages should be an adequate remedy for SEP holder.⁷ Simply put, denying injunctive relief is the most powerful way to prevent holdup.⁸

On the other hand, others point out that there is no empirical evidence of patent holdup,⁹ it is also theoretically improbable,¹⁰ and prohibiting injunctive relief opens the door for the opportunistic

(2007) 74 *Antitrust L.J.* 603, 607; P Chappatte, ‘FRAND Commitments – The Case for Antitrust Intervention’ (2009) 5 *European Comp. J.* 319, 325-326.

³ For definitions of patent holdup see: US DOJ and FTC, Promoting Innovation and Competition (n 2) p. 35-36.; Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011) (FTC: The Evolving IP Marketplace) p. 22; M Lemley, C Shapiro, ‘Patent Holdup and Royalty Stacking’ (2007) 85 *Tex. L. Rev.* 1991, 1992-1994.

⁴ Chappatte (n 2) p 326; Farrell et. all (n 2) p. 612.

⁵ Bekkers R, Upgedrove A, ‘A Study of IPR Policies and Practices of a Representative Group of Standard Setting Organisations Worldwide’ (2012) US National Academy of Science (analysing 12 representative SSOs and finding that all, at minimum, provide for licensing of SEPs on FRAND terms).

⁶ M Lemley, C Shapiro, ‘A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents’ (2013) 28 *Berkeley Tech. L. J.* 1135, 1144; Farrell et. all (n 2) p. 638; J Miller, ‘Standard Setting, Patents and Access Lock-in: RAND Licensing and the Theory of the Firm’, (2007) 40 *Indiana L. Rev.* 351; T Cotter, ‘Comparative Law and Economics of Standard-Essential Patents and FRAND Royalties’ (2014) 22 *Tex. Intell. Prop. L.J.* 311, 342-343; D Lichtman, ‘Understanding the RAND Commitment’ (2010) 47 *Houston L. Rev.* 1024, 1043.

⁷ See also: D Carlton, A Shampine, ‘An Economic Interpretation of FRAND’ (2013) 9 *JCLE* 531, 550; J Ordovery, A Shampine, ‘Implementing the FRAND Commitment’ October 2014, *The Antitrust Source* p. 7; S Michell, ‘Bargaining for FRAND Royalties in the Shadow of Patent Remedies Law’ (2011) 77 *Antitrust L. J.* 889, 908.

⁸ M Lemley, ‘Ten Things to do About Patent Holdup of Standards (And One Not To)’, (2007) 48 *Boston College L. Rev.* 149, 167.

⁹ A Galestovic, S Haber, R Levine, ‘An Empirical Examination of Patent Holdup’ (2015) 11 *JCLE* 549; G Sidak, ‘The Antitrust Division’s Devaluation of Standard Essential Patents’ (2015) 104 *The Georgetown L. J. Online* 48, 61.

¹⁰ D Spulber, ‘Innovation Economics: The Interplay Among Technology Standards, Competitive Conduct, and Economic Performance’ (2013) 9 *JCLE* 777, 796-800; V Denicolo, D Geradin, A Layne-Farrar, J Padilla, ‘Revisiting Injunctive Relief: Interpreting *eBay* in High-Tech Industries with Non-Practicing Patent Holders’ (2008) 4 *JCLE* 571, 589-597.

behaviour of standard implementers i.e. “holdout”.¹¹ Namely, injunctions are seen as the tool to bring implementers back to the negotiation table.¹² Otherwise, implementers may decide to behave opportunistically and use the strategy of systematically infringing patents, waiting to be sued by SEP holders and litigate the validity of each and every patent in the portfolio. This may be favourable to implementers, because if they are successful in invalidating the patent or showing non-infringement, they do not have to pay anything to the patent holder. While, on the other hand, if the patentee is successful, implementers then only have to pay court-determined FRAND royalty. Implementers may successfully use this strategy in order to extract a better deal if costs of litigation are relatively low compared to profits made in downstream markets, litigation takes time and SEP holders are cash constrained.¹³ Therefore, SEP holders may settle for below or on the lower end of FRAND rate,¹⁴ in order to avoid protracted and costly patent litigation, which may typically last for years and cost millions,¹⁵ during which period implementer will freely use SEPs without compensation. As a result, without injunctions some implementers may behave as "grasshoppers" who steal innovations and then "refuse to license even the strongest patents at event the most reasonable rates."¹⁶ In the end, some authors point out that there is nothing in the FRAND commitment suggesting that the SEP holder has waived its right to seek injunctions.¹⁷

It follows that holdup and holdout should not be analysed in isolation. Although the literature is divided on the existence of these notions, courts and antitrust authorities on the both sides of the Atlantic have restricted the use of injunctions by SEP holders. The following section will analyse different methods and justifications used in restricting injunctive relief. However, little has been done in securing the interests of SEP holders against holdout by implementers and, as some cases will demonstrate, holdout is present in SEP litigation.

How injunctions for SEPs have been limited

Five different strands can be identified in practice which limited injunctions for the infringement of SEPs.. Namely, injunctions have been seen as: i) contrary to the principles of equity; ii) contrary to public policy; ; iii) unfair method of competition: iv) competition law offence, and lastly v) abuse of rights. It follows that different jurisdictions negatively perceive injunctions for SEPs and have adopted various approaches for limiting their use.

Principles of equity (US courts)

¹¹ Also known as “reverse patent holdup”, the terms in this article will be used interchangeably. See: D Geradin, M Rato, ‘Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-up, Royalty Stacking and the Meaning of FRAND’ (2007) 3 *European Comp. J.* 101, 119; D Geradin, ‘Reverse Hold-ups: The (Often Ignored) Risks Faced by Innovators in Standardised Areas’ (2010) *Pros and Cons of Standard-Setting*; P Camasca, G Langus, D Neven, P Treacy, ‘Injunctions for Standard-Essential Patents: Justice is Not Blind’ (2013) 9 *JCLE* 285; G Langus, V Lipatov, D Neven, ‘Standard-Essential Patents: Who is Really Holding Up (and When)?’ (2013) 9 *JCLE* 253 (finding that both patent holdups and holdouts may arise in equilibrium).

¹² J Ratlif, D Rubinfeld, ‘The Use and Threat of Use of Injunctions in the RAND Context’ (2013) 9 *JCLE* 1, 14.

¹³ R O’Donoghue, J Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing, Oxford and Portland, Oregon 2013) p. 702–703.

¹⁴ It is generally accepted that there exists no single FRAND royalty for SEPs but that FRAND is a range within which a licensing offer would constitute a FRAND offer. See G Sidak, ‘The Meaning of FRAND, Part I: Royalties’ (2013) 9 *JCLE* 931, 989; *Microsoft v Motorola* (n 1) p. 4 (determining FRAND royalty range for Motorola’s SEPs portfolio); C-170/13, *Huawei Technologies v ZTE* ECLI:EU:C:2015:477 p. 63-66 (explaining that both parties should submit licensing offer and counter –offer on FRAND terms).

¹⁵ For example in the US, average costs of patent litigation when more than \$25 million is at risk is around \$5 million, and in small claims with less than \$1 million at risk, average cost of litigation are around \$600 000 dollars. See AIPLA, 2015 Record of the Economic Survey, p. 37

¹⁶ Randall R Rader, ‘The State of Patent Litigation’, E.D. Texas Judicial Conference 2011 p. 18. See also: Sir Robin Jacob, ‘Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation’ (2013) 9 *CPI* 15. .

¹⁷ G Sidak, ‘The Meaning of FRAND, Part II: Injunctions’ (2015) 11 *JCLE* 201, 219-220.

US courts have used traditional principles of equity to deny injunctive relief to SEP holders. US Patent Act provides that a permanent injunction “may” be granted “in accordance with the principles of equity, on such terms as the court deems reasonable”.¹⁸ The decision to grant or deny an injunction is at the discretion of US district courts, reviewable on appeal only for abuse of discretion.

In 2006, the Supreme Court held in *eBay v MercExchange*¹⁹ that, to obtain injunction, patent holder must prove the following four requirements: i) that it has suffered an irreparable injury; (ii) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; ii) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (iv) that the public interest would not be disserved by a permanent injunction.²⁰

The *eBay* test equally applies to SEP cases as well.²¹ It is extremely difficult for SEP holder to satisfy *eBay* criteria and, to date, no permanent injunction in the US was issued for infringement FRAND committed SEP.²² Injunctions were typically denied because it could not be established that patentee would suffer irreparable harm and that damages would not provide sufficient compensation.²³ For example, in *Apple v Motorola* the Federal Circuit held that: “Considering the large number of industry participants that are already using [Motorola’s patent], including competitors, Motorola has not provided any evidence that adding one more user would create [irreparable] harm.”²⁴ The court also noted that many other licenses that Motorola concluded regarding the SEP in questions, “strongly suggest that money damages are adequate to fully Motorola compensate for any infringement”.²⁵

Similarly in *Microsoft v Motorola*,²⁶ the court held that Motorola failed to demonstrate that it will suffer irreparable harm absent injunction because Microsoft committed to accepting a license on FRAND terms for Motorola’s SEP portfolio, the litigation is continuing to determine the details of such a license, and at some point in the future, either by agreement of the parties or by court adjudication, a license agreement will become a reality.²⁷ The impending license agreement would also provide an adequately remedy to Motorola as a matter of law, instead of an injunction.²⁸

Public policy (International Trade Commission)

The US International Trade Commission (ITC) is a federal agency that enforces Section 337 of the US Tariff Act of 1930, which protects from importation goods that infringe upon valid US patent. The ITC has the possibility to grant only two types of remedies: exclusion,²⁹ and case-and-desist orders,³⁰

¹⁸ 35 U.S.C. § 283.

¹⁹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

²⁰ *Ibid.*, at 391.

²¹ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014) (“the framework laid out by the Supreme Court in *eBay*, ... provides ample strength and flexibility for addressing the unique aspects of FRAND committed patents and industry standards in general.”).

²² See: Kirti Gupta, Mark Snyder, ‘Smartphone Litigation and Standard Essential Patents’ (2014) IP2 Working Paper Series No. 14006 (finding that in litigation between smartphone manufacturers during 2001-2013 no injunction has been granted for any patent determined to be SEP). To only exception is *Commonwealth Scientific & Research Organisation v Buffalo Technology Inc.* (492 F. Supp. 2d 600 (E.D. Tex. 2007) (injunctions was granted for patent found to be essential to WLAN standard. However, in that case the defendant did not plead FRAND defence)

²³ See: *Apple v Motorola* 757 F.3d 1286 (Fed. Cir. 2014); *Apple v Motorola* 869 F.Supp.2d 901 (N.D. Illinois 2012); *Microsoft v Motorola*, 2012 WL 5993202 (W.D. Washington 2012).

²⁴ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014)

²⁵ *Ibid.*

²⁶ *Microsoft v Motorola*, 2012 WL 5993202 (WD Washington 2012).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ 19 U.S.C. § 1337(d)(2)); (19 U.S.C. § 1337 (d)(1)).

³⁰ 19 U.S.C. § 1337 (f)(1). The remaining text will use the term “exclusion orders” as referring to both types of remedy.

prohibiting further importation and sale of infringing products. The ITC is not statutorily authorised to grant monetary damages, which is reserved for district courts.

A special characteristic of the ITC is that it is not bound by *eBay* ruling.³¹ The Federal Circuit held that legislative history of Section 337 shows that Congress intended exclusion orders to be the normal remedy when the ITC finds patent infringement.³² However, The ITC may deny exclusion orders if the effects would be against public interest factors enumerated in the Tariff Act, namely: i) public health and welfare; ii) competitive conditions in the economy; iii) the production of competitive articles in the US and iv) consumers' interest.³³ It is exceptional for the ITC to use this provision and it has, to date, denied exclusion orders in only three cases.³⁴ After issuance of the exclusion order, the US Trade Representative, on behalf of the President, has a possibility within 60 days to disapprove the exclusion order for policy reasons.³⁵ Such disapprovals are also very rare, and after finding of infringement, exclusion orders follow almost automatically. This characteristic made the ITC more attractive venue for patent litigation, as it is more likely to get injunctions in the ITC than in district courts.³⁶

The ITC to date issued only one exclusion order for the infringement of FRAND SEPs against Apple in its dispute with Samsung.³⁷ However, this exclusion order was ultimately disapproved by the US Trade Representative because of public policy interest and remained unenforced.³⁸

The case concerned Samsung's complaint that certain models of Apple's iPhones and iPads infringed Samsung's FRAND-committed SEPs. During the proceedings, Apple argued that exclusion orders are incompatible with FRAND commitment, would facilitate patent holdup and are contrary to public interest considerations. The ITC held that there is no *per se* prohibition from granting exclusion orders on FRAND committed SEPs.³⁹ It found that Apple had not presented empirical evidence that patent holdup occurred in practice and "absent empirical evidence of actual harm to consumers or innovation, what remains are policy arguments that the risk of hold-up occurring is sufficiently great to warrant denying an exclusion order to Samsung in this investigation."⁴⁰ The ITC held that it is not a policymaking body and is not empowered to make that decision.⁴¹ The ITC also review the history of negotiations between the parties and found that Apple has not proved a failure by Samsung to negotiate in good faith.⁴² On the other hand, the ITC was concerned that Apple engaged in holdout, by using SEPs without compensation to the patent owner and refusing to pay any royalties until after the full litigation and appeal on patent's infringement, validity and enforceability, forcing the patent

³¹ *Spanson, Inc. v. ITC*, 629 F.3d 1331, 1358 (Fed. Cir. 2010).

³² *Ibid.* 1358-1359.

³³ 19 U.S.C. § 1337 (d)(1).

³⁴ *Certain Fluidized Supporting Apparatus and Components*, USITC Inv. No. 337-TA-182/188, Pub. 1667 (1 October 1984); *Certain Inclined-Field Acceleration Tubes and Components Thereof*, USITC Inv. No. 337-TA-67, Pub. 1119 (1 December 1980); *Certain Automatic Crankpin Grinders*, USITC Inv. No. 337-TA-60, Pub. 1022 (1 December 1979).

³⁵ 19 U.S.C. § 1337 (j) 2.

³⁶ See: FTC: The Evolving IP Marketplace (n 3) 239-240; C Chien, M Lemley, 'Patent Holdup, the ITC and the Public Interest' (2012) 98 *Cornell L. Rev.* 1, 15-16 (finding that number after eBay the overall injunction rate in district court has declined to 75%, while injunction rate at the ITC remained at 100%).

³⁷ Letter from Michael B.G. Froman, Executive Office of the President, the US Trade Representative, to Hon. Irving A. Williamson, Chairman, U.S. International Trade Commission, 3 August 2013 (US Trade Representative Letter) available at: https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF

³⁸ *Certain Electronic Devices, Including Wireless Communications Devices, Portable Music and Data processing Devices, and Tablet Computers*, USITC Inv. No. 337-TA-794 (4 June 2013) (Commission Opinion).

³⁹ *Ibid.*, 112.

⁴⁰ *Ibid.*, 114.

⁴¹ *Ibid.*, 114.

⁴² *Ibid.*, 54.

holder to defend its rights through expensive litigation.⁴³ After finding that 1 SEP was infringed, the ITC enter limited exclusion order against Apple.

The US Trade Representative disapproved the exclusion order on the ground that the relevant public policy considerations, specifically concerns about holdup, generally weigh against permitting exclusion orders in cases involving SEPs subject to FRAND obligations.⁴⁴ He instructed the ITC to make „explicit findings” of holdup and holdout to „the maximum extent possible“ in future cases involving FRAND SEPs.⁴⁵ Thus, the first and only exclusion order on FRAND committed SEP never went into effect.

In the following case, the ITC examined actual evidence of holdup and holdout. In *Certain 3G Mobile Handsets and Components*,⁴⁶ InterDigital sought an exclusion order against Nokia and Microsoft’s mobile phones that infringed on Interdigital’s SEPs. After examining all arguments of the parties, the Administrative Law Judge Theodor Essex concluded that there was no evidence of patent holdup and found that InterDigital did not act in bad faith in licensing negotiations.⁴⁷ Judge Essex noted that infringer bears the burden of providing evidence of patent holdup and that Nokia and Microsoft failed to carry that burden.⁴⁸ He held that the ITC could not adopt a policy that favours “speculative and unproven positions” and assume that the remedy of an exclusion order should be removed in cases of FRAND committed SEPs.⁴⁹ Even if Interdigital would use the exclusion order to negotiate above FRAND licensing terms, the judge noted that Nokia and Microsoft would have the option to go to court and sue Interdigital for breach of FRAND commitment.⁵⁰ He also noted that many courts and government agencies have been analysing SEPs and that patent holdup is “unlikely because too many hostile eyes are watching”.⁵¹ In the end, the judge held that if injunctions and exclusion orders are so problematic, SSOs always have the option to change their IPR policies restricting their use.⁵²

On the other hand, Judge Essex found that Microsoft and Nokia engaged in holdout. He found Microsoft and Nokia were on notice of the infringement after the Federal Circuit’s decision on infringement, but they did not seek a licence and rejected all patent holder’s offers.⁵³ The judge held that infringer’ failure to negotiate in a meaningful way and refusal to take a license while continuing to make standard-compliant devices represented an evidence of holdout.⁵⁴ Ultimately, the ITC did not issue and exclusion order because the full Commission found that Nokia and Microsoft did not infringe Interdigital’s SEPs and, consequently, did not address the FRAND issues.⁵⁵

In sum, the ITC will take into account allegations about patent holdup and holdout when deciding on exclusion orders. The burden of proof is on the defendant to provide evidence of holdup. Nevertheless, even if ITC grants exclusion order there is a possibility of disapproval as the US Trade

⁴³ Ibid. 62-63.

⁴⁴ US Trade Representative Letter (n 37).

⁴⁵ Ibid, 3.

⁴⁶ *Certain 3G Mobile Handsets and Components Thereof*, USITC Inv. No. 337-TA-613 (27 April 2015) (Initial Determination on Remand).

⁴⁷ Ibid. 40-42.

⁴⁸ Ibid, 43-44; 30: “the respondents simply restate the possibility of a hold-up, without providing or citing to any evidence that has been presented in this case.”

⁴⁹ Ibid, 59-60.

⁵⁰ Ibid, 62-63.

⁵¹ Ibid. 62.

⁵² Ibid, 66. In March 2015, IEEE became the first SSO to expressly regulate the use of injunctions for FRAND committed SEPs. See: IEEE SA Standard Boards Bylaws p. 18.

⁵³ Ibid, 51-52.

⁵⁴ Ibid, 54.

⁵⁵ *Certain 3G Mobile Handsets and Components Thereof*, USITC Inv. No. 337-TA-613 (28 August 2015) (Notice of Commission Determination Finding no Violation of Section 337; Termination of Investigation).

Representatives appears to view exclusion orders against SEPs as contrary to public policy interest of promoting innovation and economic progress.⁵⁶

Unfair competition (Federal Trade Commission)

The US Federal Trade Commission (FTC) views the use of injunctions by SEPs holders as an unfair method of competition. Namely, the FTC investigated two cases where SEP holders requested injunctions and exclusion orders.⁵⁷ It took the view that the mere seeking of injunctions and exclusion orders against “willing licensees” represents a standalone violation of Section 5 of the FTC Act,⁵⁸ i.e. an unfair method of competition and unfair acts or practices.

The first case concerned Bosch’s proposed merger with a company SPX Services that held certain SEPs related to air conditioning equipment standards, which it committed to license on FRAND terms and sought injunctions against implementers of respective equipment.⁵⁹ The second case concerned Motorola’s request for injunctions and exclusion orders before courts and the ITC against Microsoft and Apple.⁶⁰

In the view of the FTC, seeking injunctive relief against a “willing licensee” is incompatible with FRAND commitment, as it may allow the SEP holder engage in patent holdup and obtain unreasonable licensing terms.⁶¹ It held that “negotiation that occurs under threat of an injunction may be weighted heavily in favour of the patentee in a way that is in tension with the[F]RAND commitment.”⁶²

The FTC held that SEP holders may only seek injunctions if the implementer: i) is not subject to United States jurisdiction; ii) has stated in writing or in sworn testimony that it will not accept a license on any terms; iii) refuses to enter a license agreement determined by court or arbitration; iv) files a claim for injunctive relief against SEP holder for its own FRAND SEPs; v) fails to assure that it is willing to accept a license on FRAND terms, or vi) a court determined that implementer used SEP for purposes other than implementing the standard.⁶³

However, both cases were concluded with consent orders, which do not represent an admission of liability or a binding legal precedent, and the position of the FTC remains untested at courts. Nevertheless, it signals the position of the FTC to view the mere seeking of injunctions by SEP holders as a violation of Section 5 of the FTC Act

Competition law infringement (EU)

In the EU, competition law regulates and constrains injunctions for the infringement of SEPs. In other words, seeking injunctions by SEP holders, under certain circumstance, may represent an abuse of dominant position.

⁵⁶ US Trade Representative Letter (n 37), p 3.

⁵⁷ *In the Matter of Robert Bosch GmbH*, 2013 Docket no C-4377; *In the Matter of Motorola Mobility LLC and Google Inc.*, 2013 Docket no C-4410.

⁵⁸ The standalone Section 5 FTC liability is broader than traditional antitrust prohibitions and includes “unfair methods of competition” and “unfair or deceptive acts or practices”. The unfair methods of competition covers acts and practices that contravene the spirit of the antitrust laws and those that, if allowed to mature, could violate the Sherman Act. On the other hand, “unfair or deceptive acts or practices” typically cover consumer protection issues and other conduct that directly affects consumers.

⁵⁹ *Bosch* (n 57)

⁶⁰ *Motorola/Google* (n 57).

⁶¹ *Bosch* (n 57), Analysis of Agreement Containing Consent Orders to Aid Public Comments p. 4; *Motorola/Google* (n 57), Analysis of Proposed Consent Order to Aid Public Comment p. 2

⁶² *Motorola/Google* (n 57) p 3-4.

⁶³ See: *Bosch* (n 57) Decision and Order, IV E; *Motorola/Google* (n 57), Decision and Order, II E.

The European Commission in 2014 adopted two decisions holding that seeking an injunction for infringement of FRAND committed SEP against “willing” licensees constitutes an abuse of dominant position.⁶⁴

The cases emerged from Motorola and Samsung’s disputes with Apple, where they sought injunctions against Apple’s products for the infringement of patents essential for 3G and 4G telecommunications standards. The cases ended with the Commission adopting infringement decision against Motorola, and commitments decisions with respect to Samsung,⁶⁵ where Samsung committed to approach and negotiate with prospective licensees up to 12 months and, if no agreement is reached, to seek a determination of FRAND terms by the court or, if both parties agree, arbitration.

The Commission took the position that seeking injunctive relief by the SEP holder represents an abuse of dominant position *unless* the SEP holder can show that the infringer is behaving like an “unwilling” licensee. The Commission, similarly as the FTC, held that the SEP holder may seek injunctions only if it proves that the infringer: i) is in financial distress and unable to pay its debts; ii) has assets that are located in jurisdictions that do not provide for adequate means of enforcement of damages; iii) is unwilling to enter into a licence agreement on FRAND terms;⁶⁶ or iv) is seeking injunctive relief with respect to its own SEPs.⁶⁷ The Commission placed this analysis in the objective justifications part of the decision, meaning that seeking injunctive relief is considered as abuse, and the burden of proof is on the SEP holder to demonstrate the “unwillingness” of the infringer.

According to the Commission, the infringer can always escape injunctions and prove it is willing to license if it agrees with court or arbitration determination of FRAND terms and accepts to be bound by such determination.⁶⁸ Also, challenging the validity, essentiality and infringement of SEPs is not considered as “unwillingness” to license on the part of the implementers.⁶⁹

The European Court of Justice’s preliminary ruling in *Huawei v ZTE* in 2015 established the definite framework for injunctions in the EU. The case emerged from a dispute before the Dusseldorf Regional Court where Huawei initiated proceedings against ZTE for infringement of its SEPs and seeking, among others, an injunction prohibiting infringement and recall of products.⁷⁰

The ECJ held that seeking injunctions by SEP holder may represent an abuse of dominant position under certain circumstances. However, the court imposed obligations on both parties. It provided that before seeking an injunction, the SEP holder must first approach and notify the implementer about infringement and designate specific SEPs that are infringed and the way they are infringed.⁷¹ The infringer should then express its willingness to conclude the licensing agreement, and the SEP holder should provide the specific, written offer for a license on FRAND terms, specifying, in particular, the amount of the royalty and the way in which is to be calculated.⁷² Infringer must then diligently and in

⁶⁴ *Motorola - Enforcement of GPRS standard essential patents* (Case AT.39985) Commission Decision C(2014) 2892, 29 April 2014; *Samsung - Enforcement of UMTS standard essential patents* (Case AT.39939), Commission Decision C(2014) 2891, 29 April 2014.

⁶⁵ The European Commission can close a competition investigation by adopting infringement decision, which finds the party investigated to have infringed EU competition law, or by commitments decision, where the party investigated agrees to adhere to a certain framework for a defined period of time which addresses Commission’s concerns. In commitments decisions, however, there is no actual finding of infringement of EU competition law.

⁶⁶ *Ibid*, para 427; *Samsung* (n 64) para 67.

⁶⁷ *Samsung* (n 64) para 79.

⁶⁸ *Motorola* (n 64) para 437; *Samsung* (n 64) para 98.

⁶⁹ *Motorola* (n 64) paras 439-440; Commission ‘Antitrust decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently asked questions’ MEMO 29 April 2014.

⁷⁰ C-170/13, *Huawei Technologies v ZTE* ECLI:EU:C:2015:477

⁷¹ *Ibid*, para 61.

⁷² *Ibid*, para 63.

good faith respond to the offer, without any delaying tactics.⁷³ If the infringer does not accept patent holder's offer, it must submit promptly and in writing his FRAND counter-offer.⁷⁴ If the SEP holder rejects the counter-offer, the infringer must then provide appropriate security (for example, by providing a bank guarantee or placing necessary amounts on deposit) and render accounts.⁷⁵ At that point, the parties may, by common agreement, request the FRAND royalty to be determined by an independent third party (presumably court or arbitration).⁷⁶

In the end, the ECJ confirmed that infringer should be allowed to challenge the validity, essentiality and/or infringement of SEPs both during the negotiations for the licensing agreement and after the licensing agreement has been concluded.⁷⁷

Further application of *Huawei* remains at national courts. To date, German courts applied *Huawei* criteria in several cases and, after assessing the conduct of both parties, generally found evidence of implementer's holdout, and granted injunctions. Courts found that implementers engaged in delaying tactic by not responding to licensing offers from patent holders, stalling negotiations, responding with non-FRAND offers and not providing appropriate security after their offers were rejected. For instance, in one case parties were negotiating for three years without success, many offers and counter-offers were exchanged, and implementer offered security only at an oral hearing.⁷⁸ In another case, delaying tactics was found on the side of the implementer who made counter-offer a year and a half after patent holder's offer and six months after patent holder filed suit.⁷⁹ Courts also found that offers of implementers were not-FRAND as they were limited only to patents-in-suit and only for Germany, while common commercial practice is to license SEPs on a worldwide portfolio basis.⁸⁰

Abuse of rights (Netherlands, Japan)

In the end, it is worth mentioning that courts in certain jurisdictions evaluate the SEP holder's claim for injunctions under the abuse of rights doctrine.

For instance, in the Netherlands before *Huawei*, and in Japan courts refused to grant injunctions to Samsung in its dispute against Apple on the basis of abuse of rights and breach of pre-contractual good faith. Namely, courts held that Samsung did not negotiate in good faith because it failed to respond to Apple's offers, initiating injunctions proceedings before making a first license offer, and did not disclose material information to Apple, such as rationale for the initially requested royalty rate, and the license agreements it has with other licensees.⁸¹ Therefore, abuse of right doctrine provides another justification for denying injunctions to FRAND-committed SEPs.

Alternatives to Injunctions – Some Procedural Remedies

As seen above, the US and the EU have used different methods in limiting injunctions for infringement of SEPs. What all methods have in common is the concern that injunctions may enable SEP holders to engage in holdup of implementers.

⁷³ Ibid, para 65.

⁷⁴ Ibid, para 66.

⁷⁵ Ibid, para 67.

⁷⁶ Ibid, para 68.

⁷⁷ Ibid, para 69.

⁷⁸ *Sisvel v Haier*, Dusseldorf Regional Court, 4a O 93/14 and 4a O 144/14 (03 November 2015). Overturned on appeal and instructed for Regional Court to assess whether offers of the parties were on FRAND terms. See *Sisvel v Haier*, Dusseldorf Higher Regional Court, 15 U 65/15 (13 January 2016).

⁷⁹ *NTT v HTC*, Mannheim Regional Court, 7 O 66/15 (29 January 2016).

⁸⁰ *Saint Lawrence v Deutsche Telekom*, Mannheim Regional Court, 2 O 106/14 (27 November 2015); *Pioneer v Acer*, Mannheim Regional Court, 7 O 23/14 (04 March 2016); *Saint Lawrence v Vodafone*, Dusseldorf Regional Court, 4a O 73/14 (31 March 2016).

⁸¹ AIPPI Report: Availability of injunctive relief for FRAND-committed standard essential patents, incl. FRAND defence in patent infringement proceedings, March 2014. p. 15.

However, holdup is just one side of the story; there is also a legitimate concern about holdout by implementers, especially if injunctions are difficult to obtain. A way to mitigate the possibility of holdout would be to make more costly for implementers to engage in such a practice and provide incentives in getting the dispute resolved. Courts typically should have at their disposal several mechanisms to restore the balance between parties. For example, at the beginning of proceedings, courts could order the implementer to make interim payments into escrow, or provide a different form of security (such as corporate or bank guarantee),⁸² which should be calculated for the whole SEP portfolio, and not just for SEPs in the proceedings. Next, courts should then separate patent from FRAND issues, and try the patent issues first. This would give parties the sense of the overall strength of the SEP portfolio. Once validity and infringement are decided at first instance, courts could then calibrate interim payments (or other form of security) to reflect the outcome of patent proceedings. Providing early security to patent holder makes holdout strategy more costly, while at the same time dispenses the need for injunctions as patentee's interests are protected.

Interim Payments

Once the patent holder sues on SEPs, courts should first decide on interim payments to be paid by the implementer. The advantage of early determination of interim payments is that they dispense the need for injunctions, as patent holder's interest are secured. It further mitigates the potential for holdout, as the implementer has to pay something at the beginning of the proceedings, which makes holdout strategy of avoiding the conclusion of FRAND licensing agreement more costly, and may encourage parties to settle or litigate only FRAND terms.

When to decide

Interim payments can be an effective remedy only if they can be set at the beginning of the proceedings and only if they can be awarded expediently, in the efficient and inexpensive procedure. For example, once the SEP holder sues, the court should promptly schedule a special hearing dedicated to setting and calculating the amount of security. This proposal differs from *Huawei*, which obliges the implementer to provide security from the moment its counter-offer is rejected. However, *Huawei* only applies if the SEP holder requested injunction (not if it requested damages only), meaning that courts are not obliged to look whether the implementer provided security unless the SEP holder sues for an injunction. Further, *Huawei* places the assessment of appropriate security at a later point in time, only after infringement and validity of patents are determined. During the litigation, the implementer may continue using patents without charge or, if it provided security, without court determination whether the amount is sufficient. Placing the assessment of implementer's security only after validity and infringement are determined does not provide an appropriate safeguard to SEP owners against holdout. Therefore, a special hearing for the determination of interim payments should be held at the beginning of the proceedings, before the commencement of patent trials, and regardless whether the patent holder requested injunctions or not.

How to set the amount of interim payments

The next question would be how to calculate the amount of interim payments? This should be done in the most efficient, timely and less costly manner as possible, so that parties may move on with the litigation. Otherwise, the hearing would risk turning into mini-trial on the merits, rendering this procedural remedy pointless.

Courts should generally have a discretion in setting the amount of interim payments. They could be guided by the following principles when deciding on the amount: i) it should reflect the value of the whole SEP portfolio, not just the patents in the litigation; ii) FRAND offers of the parties should serve as an upper and lower limit; iii) comparable prior licensing agreements for the SEPs in question or for

⁸² When referring to interim payments in this article, the same equally applies to other forms of securities.

other patents from the same standard could be taken into account; iv) whether there is a *prima facie* case of infringement; v) the negotiation history between the parties; vi) willingness of parties to be bound by court or arbitral determination of FRAND terms.

Interim payments should reflect the value of patent holder's whole SEP portfolio for relevant standard(s). This is because patent licenses are typically concluded for the worldwide SEP portfolio, which includes hundreds or thousands of patents for different standards or different versions of the same standard. Further, patent licensing agreements are normally concluded for the duration of several years, during which some patents expire, and some are added to the portfolio. Therefore, even if some patents are invalidated in the litigation, new patents will be later added to the portfolio. Because of these characteristic, i.e. numerous patents in the portfolio and fluidity in numbers, parties evaluate the value of the whole SEP portfolio, and discount for some patents they think are invalid and not infringed. Therefore, setting royalties for only a few SEPs will not end the dispute.⁸³

Next principle would be to cap the amount of interim payments in the range of parties FRAND offers for the whole SEP portfolio in question. In other words, parties should submit their estimate what is, in their view, FRAND rate for the SEP portfolio. *Huawei* already provides that patent holder should first submit its own FRAND offer, followed by implementer's offer in case of rejection. Courts could then set the amount of interim payments in the range between patent holder's and implementer's offer.⁸⁴ Lower range should be implementer's offer, while the patent holder's offer would represent the upper bound.

When deciding how to set the amount between parties' offers, courts may look at prior licensing agreements of the parties concluded for the same SEPs in question or for patents essential for the same standard. Comparable prior licenses may provide a quick and useful indication of the 'FRANDness' of offers.⁸⁵ For example, the patent holder could provide its prior licensing agreements concluded with other implementers for the SEPs in question, while the implementer may submit licensing agreements for other patents essential for the same standard or refer to relevant patent pools (if any). At this stage however, courts should not go into merits of these proposal,⁸⁶ but could only check whether offers are in line with previous practice. For example, if the patent holder could demonstrate that, all things equal, it has concluded licensing agreements with other implementers for the same SEPs in questions for the royalty of 1%, then this would be a strong indicator that interim payments may be set towards this bound. Similarly, the amount of interim payment could take into account the fact that the implementer concluded licensing agreements for patent essential for the same

⁸³ It should be noted that it has not yet been settled in practice and at the policy level whether FRAND terms should be assessed for the whole portfolio or just for patents in the proceedings. For example, German courts seem to rightly adopt the approach that FRAND offer must include a worldwide portfolio license. The Dusseldorf Regional Court in *Saint Lawrence v Vodafone* (4a O 73/14, 31 March 2016) recognised that in practice licensing agreements are concluded on a worldwide basis and cover the whole portfolio of SEPs. It granted injunctions because the counter-offer was limited only to Germany. On the other hand, it is still unclear whether courts in other countries will follow this approach. See for example in the UK: *Vringo v ZTE* [2013] EWHC 1591 (Pat.) (discussing whether the patentee is entitled to refuse to offer or refuse to accept per patent license and to offer a worldwide portfolio license only); also *Vringo v ZTE* [2015] EWHC 214 (Pat.) paras 101-117; *Unwired Planet v Huawei and others* [2015] EWHC 1029 (Pat.) paras 30-63 (discussing whether worldwide SEPs portfolio offer could be FRAND).

⁸⁴ See M Lemley, C Shapiro (n 6) (proposing baseball-style arbitration for resolving FRAND disputes where arbitrators would pick patent holder's or implementer's offer). This article, however, suggest that courts (or arbitrators) should be free to decide on the amount ranging between parties' offers, taking all circumstances in the account.

⁸⁵ G Sidak (n. 14) p.1000-1009 (explaining how analysing comparable licenses would be the best way to determine FRAND royalties);

⁸⁶ Assessing the comparability of prior licenses should be reserved for the stage of calculating FRAND royalties.

standard in question with royalties significantly less than 1%. However, detailed analysis of prior licenses should be left to full FRAND trial at a later stage of the proceedings.

Courts may also look whether there is a *prima facie* case of infringement. If the patent holder has established *prima facie* that its SEP is valid and infringed, that would be a factor to set interim payments closer to the SEP holder's range. In this case, courts may also decide to direct interim payments to be made directly to the patent holder. This was the approach of courts in India, where implementers were ordered to make interim payments to Ericsson pending the final outcome of a trial.⁸⁷

Negotiation history between the parties may also serve as an indicator to the court when setting interim payments. For example, bad faith or opportunistic behaviour may move interim payment amount closer to the range of the party that negotiated in good faith. However, in my view, the fact that implementer is disputing the validity and infringement of SEPs should not be taken against him. It is the position of the ECJ, as well as the EU and US antitrust authorities, that implementer should be free to challenge the validity and infringement of SEPs.⁸⁸ It may be well possible that SEPs in the portfolio are not of high quality, which should be left for courts to decide.

A final principle that may be used is to assess the willingness of parties to be bound by court or arbitration determination of FRAND terms. This principle may be operationalised by taking into account which party refuses to be bound by the determination of FRAND terms. For example, if implementer refuses to participate, or be bound by the determination of FRAND terms by court or arbitration; this may lead the court to set interim payments closer to patent holder's range, or vice versa. Taking this principle into account could incentivise parties to settle or litigate only FRAND terms.

Problems with Interim Payments

One potential problem with the use of interim payments is that some legal systems may not have a legal basis for this type of remedy in their civil procedure rules. This will probably be the case in civil law systems, which typically do not give courts discretion in crafting interim procedural remedies. UK courts, on the other hand, have the option to grant any interim remedy they see adequate, as well the possibility to order interim payments.⁸⁹

Another critique could be that interim payments may make litigating SEPs more costly and might incentivise patent assertion entities (i.e. patent trolls) to start increasingly asserting "low quality" SEPs with the aim of extracting a favourable settlement.⁹⁰ This concern could be adequately addressed by courts, by setting the amount of interim payments towards the lower bound of implementer's range if there are reasonable ground to suspect that SEPs are of low quality. Therefore, the amount of interim payments could be set at a level not to discourage implementers into litigating validity and infringement of SEPs if they have reasonable grounds for claiming that overall SEP portfolio is of low quality.⁹¹

⁸⁷ G Sidak, 'FRAND in India: The Delhi High Court's Emerging Jurisprudence on Royalties for Standard-Essential Patents' (2015) 10 *JIPLP* 609.

⁸⁸ *Huawei* (n 67) para 69; *Motorola* (n 62) para 322; *Google/Motorola Mobility* (n 55) Analysis of Proposed Consent Order to Aid Public Comment p 6.

⁸⁹ See: CPR PD 25.1; 25.7.

⁹⁰ For issues regarding patent assertion entities (PAEs) in the US see: The Federal Trade Commission: Patent Assertion Entity Activity 2016; In the EU: Joint Research Centre, Patent Assertion Entities in Europe 2016 (eds. N Thumm, G Gabison), EUR 28145 EN; doi:10.2791/134702.

⁹¹ Courts in some jurisdictions may be reluctant to award interim payments to PAEs because of the generally negative perception that they litigate only low quality patents and are interested in merely obtaining early settlement. Such concerns may be oversimplified and may not be applicable in the SEPs field. SEPs are the

Alternative - Interim Injunction

As noted, there may be jurisdictions that do not provide the option in their civil procedure rules for courts to order interim payments during the pendency of the dispute. In this case, an alternative solution might be to order interim injunction if the implementer refuses to make interim payments, or to provide another form of security.

Interim injunctions are in principle available if the plaintiff can demonstrate that it is likely to succeed on the merits, and if the conditions for final injunction are satisfied.⁹² However, the interim injunction is seen as an extraordinary remedy and will be available only if a patent holder can demonstrate urgency and prospect that monetary damages may not be an adequate remedy.⁹³ This means that, in practice, interim injunctions are rarely granted and could be almost impossible to obtain in SEP cases, especially since final injunctions are difficult to obtain and, further, FRAND commitment could be argued to preclude the need for urgent intervention and makes monetary damages sufficient remedy.⁹⁴

Nevertheless, in jurisdictions where ordering interim payments is not possible, courts may consider interpreting requirements for interim injunctions more flexibly to accommodate concerns of holdout. In other words, if implementer refuses to provide security, one way to make the implementer compliant is to order an interim injunction until security is paid.

Separate Patent from FRAND Issues

Once the implementer starts making interim payments, or provides another form of security, courts could then separate patent from FRAND issues and trial infringement and validity first. This is because determining whether SEPs in dispute are valid and infringed will have an impact on the value of patent holder's portfolio. It is typically expected that the plaintiff will put his best patents to trial, and if they are later found to be invalid and/or not infringed, this will reduce the value of its portfolio. Conversely, patents that are found to be valid and infringed are worth more and would increase the value of the whole portfolio.

UK courts took this approach in recent SEP cases and first tried patent issues, leaving FRAND to be decided at a later stage.⁹⁵ By ordering the defendant to make interim payments, holdout concerns are addressed.

Reassess the Amount of Interim Payments After Patent Issues Have Been Resolved

Once the court decides in the first instance whether patents are valid or infringed, it could then reassess the amount of interim payments that the implementer is paying. As explained, patents that are

result of R&D of various entities that participate in standard-setting process, such as vertically integrated companies, universities, technology development companies, etc. It may not be justified to value the same SEPs differently based on the entity that asserts them (i.e. to have one rule when SEPs are asserted by manufacturing or research entities, and other rules when the same SEPs are asserted by PAEs).

⁹² For example, in the US preliminary injunctions may be awarded if plaintiff can establish that he is: i) likely to succeed on the merits; ii) likely to suffer irreparable harm; iii) the balance of equities tips in his favour and iv) injunction is in the public interest (*Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365 (2008)). In the UK the test is on the balance of convenience – the advantages and disadvantages of restraining the defendant from infringing patent until judgment. When deciding on interim injunctions courts take into account the following factors: i) whether plaintiff has any real prospect of succeeding at trial; ii) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay; iii) the balance of convenience; iv) the maintenance of the status quo, and (v) any clear view the court may reach as to the relative strength of the parties' cases (*American Cyanamid Co v Ethicon Ltd* [1975] R.P.C. 513, 540-542).

⁹³ P Camasca et al, 'Injunctions for Standard-Essential Patents: Justice is Not Blind' (n 11) 293-294.

⁹⁴ Ibid 294 (showing up to 2013 only three preliminary injunctions were issued in Europe for infringement of SEPs. However, two were overturned on appeal and only one enforced. Study concludes that interim injunction are not granted against manufacturers that indicated genuine willingness to take license on FRAND terms)

⁹⁵ *Vringo v ZTE*, [2013] EWHC 1591; *Unwired Planet v Huawei and others* [2015] EWHC 1029 (Pat), para 12.

confirmed to be valid and infringed are worth more than those with uncertain validity or infringement. If SEP holder prevails in patent issues, the amount of interim payments that the implementer is paying should be set higher, reflecting the increased value of patentee's portfolio. Conversely, if the defendant prevails, the amount could be lowered or even fully returned.

Conclusion

Concern about patent holdup of standard-implementers has led to the restriction on the use of injunctions by SEP holders against infringers of their SEPs. However, less concern has been expressed against potential holdout facing SEP holders by recalcitrant infringers. Courts may restore the balance between parties by ordering implementers, at the beginning of the proceedings, to make interim payments into escrow, or to provide another type of security, reflecting the value of the whole SEP portfolio, and not just for patents in the litigation. Making implementer pay something at the beginning of trial will make holdout strategy more costly and would secure the interests of SEP holders, while at the same time dispensing the need for injunctions and thus mitigating the potential for holdup.