



Antitrust Italia
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Standards and competition

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*(speaking in a personal capacity - the views expressed are not
necessarily those of the European Commission)*



IP and competition law have the same goals

- No inherent conflict between IP and competition law
 - Both share the same objectives
 - Consumer welfare and promotion of innovation
- Standardisation creates a specific context
 - Creates benefits: interoperability/innovation
 - But there is an antitrust risk
 - Choice of one technology to the exclusion of others
 - May lead to market power which can be exploited

SEPs and market power

- SEPs may mean market power
 - Commercial indispensability of standard
 - Lock-in to standard
- May mean market power which would not have existed absent the standard
 - Depends on *ex ante* alternatives
 - *Ex ante* price - good indication of FRAND



How do you keep the benefits but protect against the risks?

- *Ex ante* disclosure of essential patents
 - Allows informed decision by participants
 - Protects against "patent ambush"
- Commitment to license on FRAND terms
 - Access to standard for all
 - *Quid pro quo* for being included in the standard
 - Designed to constrain *ex post* exercise of market power resulting from standard (pricing, other terms)



FRAND Commitments

"287. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is **accessible to the users** of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees." (Horizontal Guidelines)



SEP-based injunctions

■ SEP-based injunctions

- Seeking to exclude from the market based on SEP

■ Potential negative effects

- May exclude products from the market
- May lead licensees to accept harmful terms that they would otherwise have not (e.g. royalty level, other clauses)
- Seeking of injunctions is potentially anti-competitive (i.e. not only enforcement)



Framework for analysis

- Injunctions are generally a legitimate remedy
- SEP-based injunctions potentially anti-competitive
 - Standardisation creates a specific antitrust context
 - Commitment to license on FRAND terms
 - *Quid pro quo* for the patent to be included in the standard
 - The company has chosen to provide access to all in exchange for monetisation - not to exclude
- There should be a willing licensee



Motorola Decision

- 2007-2010: Negotiations failed
- April 2011: Motorola seeks SEP injunction in Germany
- Apple's licensing offers
- The continuation of the injunction proceedings
- The enforcement of the injunction
- The Settlement Agreement



Apple's "Orange Book" licensing offers

<p>1st Licensing Offer 20 July 2011</p>	<ul style="list-style-type: none"> - Covers SEPs in suit - Joint setting of FRAND rate by Apple and Motorola with limited review by court
<p>2nd Licensing Offer 4 October 2011</p>	<ul style="list-style-type: none"> - Covers all of Motorola's German SEPs reading on GSM, GPRS, EDGE, UMTS, Wi-Fi /WLAN standards. - <u>Judicial rate-setting (full review of FRAND rate)</u> - No limitation to future challenge of validity - iPhone 4S not explicitly included
<p>3rd, 4th and 5th Licensing Offers 10 November 2011, 14 December 2011 and 5 January 2012</p>	<p>= 2nd Licensing Offer <i>AND</i></p> <p>Further changes concerning in particular pending validity actions and past damages</p>
<p>6th Licensing Offer 30 January 2012</p>	<p>= 5th Licensing Offer <i>AND</i></p> <ul style="list-style-type: none"> -<u>Termination clause in case of challenge of validity</u> -<u>Explicit inclusion of the iPhone 4S as infringing product</u>



Dominance

- Relevant market: technology which SEP covers
- No substitutes
- 100% market share
- Indispensability
- Lock-in
- No countervailing buyer power



Abuse

- Seeking and enforcement of injunctions generally legitimate
- Exceptional circumstances:
 - Standard-setting
 - Commitment to license on FRAND terms
- Anti-competitive effects
- No objective justification ("Willing Licensee")
- Balancing of Fundamental Rights



Exceptional Circumstances

(278) Finally, a patent holder, including a holder of SEPs, is generally entitled to seek and enforce injunctions as part of the exercise of its IP rights. The seeking and enforcement of injunctions cannot therefore, in itself, constitute an abuse of a dominant position.

(294) By committing to license on FRAND terms and conditions, Motorola recognised that, given the standardisation context, it has chosen to monetise its standard essential technology through licensing on fair, reasonable and non-discriminatory terms and not to use it to exclude implementers of the GPRS standard provided that it is appropriately remunerated for the use of its technology. On the basis of that commitment, manufacturers of GPRS-compliant products can reasonably expect that Motorola makes its SEPs available on FRAND terms and conditions to all implementers.



Anti-competitive effects

- Temporary exclusion from the market
- Acceptance of disadvantageous licensing terms Apple would likely not have accepted in negotiations absent the injunction
- Effects on standard setting



Anti-competitive effects

- Motorola's entitlement to terminate the licence if Apple challenges the validity of the SEPs covered by the Settlement Agreement ("the termination clause")
- The inclusion of the iPhone 4S in the list of infringing products covered by the Settlement Agreement
- Apple's acknowledgement of Motorola's claims for past damages



Objective justification

(437) [...] With its Second Orange Book Offer, Apple proposed to enter into a licensing agreement with full judicial review and determination of the proposed FRAND royalties with retroactive effect by a court. As regards the scope of the Second Orange Book Offer, as outlined in recitals (125)-(126), it covered all Apple products infringing the licensed SEPs in Germany. Hence, this offer was a clear indication of Apple's willingness to enter into a licensing agreement on FRAND terms and conditions.

(439) Second, Apple's initial refusal, after its Second Orange Book Offer, to agree to licensing terms that would *de facto* prevent it from challenging the validity and infringement of Motorola's telecommunication SEPs in Germany is not a sign of unwillingness to enter into a licence agreement for those SEPs on FRAND terms and conditions.



Objective justification

(427) A SEP holder which has given a commitment to license on FRAND terms and conditions is entitled to take reasonable steps to protect its interests by seeking and enforcing an injunction against a potential licensee in, for example, the following scenarios:

- (a) the potential licensee is in **financial distress** and unable to pay its debts;
- (b) the potential licensee's **assets are located in jurisdictions that do not provide for adequate means of enforcement** of damages; or
- (c) the potential **licensee is unwilling** to enter into a licence agreement on FRAND terms and conditions, with the result that the SEP holder will not be appropriately remunerated for the use of its SEPs. [...]



Balancing of rights and interests

- The rights linked to IP are protected by Article 17 of the EU Charter of Fundamental Rights
- The right to seek to oppose potential infringements of patent rights through court proceedings is a corollary of that property right
- Article 52(1) of the Charter allows restrictions if:
 - provided for by law
 - correspond to objectives of general interest
 - do not constitute a disproportionate and intolerable interference impairing the very substance of those rights
 - necessary to protect the rights and freedoms of others



Samsung Decision (29 April 2014)

- Statement of Objections outlined preliminary view that seeking of SEP-based injunctions was abusive
- Legally binding commitments for 5 years:
 - Not to seek injunctions in EEA based on Mobile SEPs
 - Where licensee signs up to specified licensing framework
 - Initial 12-month negotiation period
 - If no agreement, then FRAND determination by a third party
 - ❖ Court if either side chooses
 - ❖ Arbitration if both agree



Other issues

- What is FRAND?
- How should portfolio licensing be approached?
- What about Non-Practising Entities?
- What will the ECJ rule in *Huawei/ZTE*?



Conclusion

- Case-by-case analysis but based on core principles
- Motorola Decision provides a general safe-harbour
 - Third-party (Court) FRAND determination
 - Should not mean giving up rights to challenge validity, infringement and essentiality
- Samsung Decision provides a practical implementation of a safe-harbour



Conclusion

"These principles strike the right balance between the interests of patent holders, who should be fairly remunerated for the use of their intellectual property, and those of the implementers of standards, who should get access to the standardised technology without being 'held up' through abuses of market power. The prohibition decision against Motorola should set a precedent and provide guidance to the industry."

(Vice-President Almunia, April 2014)