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"I worry that we as enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing break-through technologies."

"There is a growing trend supporting what I would view as a misuse of antitrust or competition law, purportedly motivated by the fear of so-called patent hold-up, to police private commitments that IP holders make in order to be considered for inclusion in a standard. This trend is troublesome.

"The enforcement of valid patent rights should not be a violation of antitrust law. A patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent."

"SSO rules purporting to clarify the meaning of 'reasonable and non-discriminatory' that skew the bargain in the direction of implementers warrant a close look to determine whether they are the product of collusive behavior within the SSO."

– Makan Delrahim, Assistant Attorney General for the Antitrust Division, Department of Justice (DOJ), *Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference*, November 10, 2017

Acting FTC Chairman Maureen Ohlhausen on the decline in pay-for-delay deals…

"In our most recent staff report . . . we noted that the frequency of potentially problematic pay-for delay deals has finally started to decline in the wake of the *Actavis* decision."

"[P]erhaps firms are starting to get the message that fending off legitimate patent challenges by paying generics to delay entry will not be tolerated by either the enforcement agencies or the courts."

– Maureen Ohlhausen, Acting Chairman, Federal Trade Commission (FTC), *The First Wealth is Health: Protecting Competition in Healthcare Markets*, 2017 ABA Fall Forum, November 16, 2017

Acting FTC Chairman Maureen Ohlhausen on net neutrality and antitrust enforcement…

"Antitrust enforcement protects the competitive process and therefore can promote net neutrality–if that is what consumers want."

"Case-by-case antitrust enforcement focused on competitive harm will allow ISPs, edge providers, and content providers to **all** experiment with innovative business models that will face the ultimate marketplace test: whether they benefit consumers." (emphasis in original)

"Now some criticize the FTC's enforcement-based approach. But, as our bipartisan 2007 report concluded, case-by-case enforcement is the best tool for the types of practices that often benefit consumers but might harm consumers in certain instances. This approach allows beneficial practices while curbing abuse. In contrast, per se prohibitions – the inflexible approach taken by the FCC in 2015 – prevent beneficial practices, and, because rules don't enforce themselves, government would still have to bring specific cases to address any abuses."

– Maureen Ohlhausen, Acting Chairman, Federal Trade Commission (FTC), *Putting the FTC Cop Back on the Beat,* The Future of Internet Freedom: An R Street Institute and Lincoln Network Event, November 28, 2017

Deputy Assistant Attorney General Roger Alford on the impact of extraterritorial antitrust enforcement on intellectual property…

"Taking extraterritorial impact into account with respect to remedies also has a clear connection to the goal of fostering innovation. Where remedies involve the terms on which intellectual property is licensed, it is particularly likely that extraterritoriality will be an issue. Internationally active firms may prefer and may even need global licensing terms for intellectual property. . . . Moreover, the intellectual property laws of a particular jurisdiction may be, as they are in the United States, a clearly articulated policy to support innovation by permitting a patent holder to extract the full value of the patent holder's rights. As a result, an antitrust remedy that impacts the protections another jurisdiction offers under its intellectual property laws is one in which comity concerns may well arise."

– Roger Alford, Deputy Assistant Attorney General for International Affairs, Antitrust Division, Department of Justice (DOJ), *Remarks at the American Chamber of Commerce in South Korea*, January 29, 2018

Assistant Attorney General Makan Delrahim on maximizing innovation incentives…

"With an eye to promoting dynamic competition, I humbly submit that competition law enforcers around the world must give careful consideration to the interests that drive innovation, including by allowing innovators to reap the full rewards of their investment in research and development. This means that the focus of our analysis must be less on short-term pricing, and more on the innovation and growth that delivers value to consumers over the longer term."

– Makan Delrahim, Assistant Attorney General for the Antitrust Division, Department of Justice (DOJ), *Remarks at the U.S. Embassy in Beijing*, February 1, 2018

E-Bulletin Updates

US CASES

Ninth Circuit Affirms Dismissal of Patent Antitrust Case After Non-Infringement Verdict

Cascades Computer Innovation, LLC v. RPX Corp. et al., 16-15782 (9th Cir. Dec. 11, 2017).

On December 13, 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of an antitrust suit accusing defendants RPX Corp., Samsung Electronics, and others of conspiring with one another to avoid licensing smartphone patents held by plaintiff Cascades Computer Innovation ("Cascades"). The Ninth Circuit agreed with the lower court's determination that Cascades failed to allege an antitrust injury because a separate Illinois federal jury found that the defendants did not infringe the underlying patent at issue.

Plaintiff Cascades is a non-practicing entity that acquires and licenses patents to third parties. After acquiring a group of 38 patents known as the Elbrus patent portfolio, Cascades sought to license these patents both individually and collectively to mobile device manufacturers.

Cascades first attempted to negotiate a license agreement on the Elbrus portfolio or its individual patents with RPX, a patent aggregator that buys and licenses patents for its constituent members that include Samsung, HTC, and other manufacturers. After failing to reach an agreement with RPX, Cascades tried to negotiate agreements with the individual members. Again, Cascades failed to reach a license agreement.

Soon thereafter, Cascades filed patent infringement cases against Samsung and HTC in the Northern District of Illinois, claiming that the defendants were infringing Patent No. 7,065,750 (the "'750 patent") in the Elbrus portfolio. Cascades also filed an antitrust lawsuit in the Northern District of California alleging that RPX, Samsung, and the other device manufacturers participated in an unlawful conspiracy to refuse to license the '750 patent from Cascades.

While Cascades settled its IP claims with HTC, it pursued its claims against Samsung all the way to trial. On September 21, 2015, however, a jury found that while the '750 patent was valid, Samsung did not infringe upon the '750 patent. Accordingly, the Illinois court dismissed all patent infringement claims against Samsung.

Following the Illinois verdict, RPX and Samsung moved for judgment on the pleadings in the antitrust case, arguing that Cascades lacked standing to maintain any antitrust actions against the defendants following the Illinois court's verdict that Samsung did not infringe the '750 patent.

Judge Yvonne Rogers of the Northern District of California agreed, holding that failure to license an invalid patent cannot serve as the basis for a cognizable antitrust injury. The Ninth Circuit unanimously affirmed her decision, reasoning that the defendants' failure to license a patent that was not used in any of the defendants' final products had no effect on the price or quality of defendants' goods, and therefore any alleged unlawful conduct was not of the type that the antitrust laws were intended to prevent.

Although the Ninth Circuit's decision is unpublished and nonprecedential, it marks a big win for patent aggregators and their constituent members, as it potentially inoculates them from antitrust scrutiny if a court separately finds that they are not infringing the patent or patents at issue. Moreover, the Ninth Circuit's decision aligns the Circuit with other lower court decisions from the Eastern District of Pennsylvania and the District of Connecticut.

Sources:

Cascades Computer Innovation, LLC v. RPX Corp. et al., 16-15782 (9th Cir. Dec. 11, 2017).

Cascades Computer Innovation, LLC v. RPX Corp. et al., 12-cv-01143-YGR (N.D. Cal. 2016).

Dorothy Atkins, *9th Circ. Affirms Samsung Win In Patent Antitrust Suit*, LAW360 (Dec. 13, 2017), https://www.law360.com/articles/994240/9th-circ-affirms-samsung-win-in-patent-antitrust-suit.

US: 9th Circ. Affirms Samsung Antitrust Win, COMPETITION POLICY INTERNATIONAL (Dec. 13, 2017), https://www.competitionpolicyinternational.com/us-9th-cir-affirms-samsung-win/.

Y. Peter Kang, *Samsung Escapes Bulk Of Antitrust Suit Over IP Licensing*, LAW360 (Feb. 24, 2016), https://www.law360.com/articles/762967/samsung-escapes-bulk-of-antitrust-suit-over-ip-licensing.

Live Nation Settles Antitrust Suit with Songkick for $110 Million

On January 12, 2018, Live Nation Entertainment and Songkick announced that they reached a settlement agreement pursuant to which Live Nation will pay $110 million and acquire Songkick's assets, including its ticketing commerce platform, anti-scalping algorithm, API applications and patent portfolio.

The settlement marks the end of a two-year legal battle that began in December 2015 when Songkick sued Ticketmaster and Live Nation, alleging antitrust violations. Specifically, Songkick alleged that Ticketmaster and Live Nation, which merged in 2010, used their vertically integrated monopoly in concert ticketing and promotion to prevent competitors like Songkick from engaging in artist presale ticketing. Songkick later amended its original complaint to include allegations that an employee of a company called CrowdSurge with which Songkick merged, hacked into Songkick's records with old password information to obtain sensitive information on ticket sales, customer information and merchandise revenues. The case was set to go to trial in late January.

Sources:

Dave Simpson, *Live Nation Settles Songkick Antitrust Suit In $110M Deal*, LAW360 (Jan. 12, 2018), https://www.law360.com/articles/1001925/live-nation-settles-songkick-antitrust-suit-in-110m-deal.

Ben Sisario, *Live Nation Settles Suit with Ticketing Start-Up, Buying Its Assets*, N.Y. TIMES (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/business/media/live-nation-songkick.html.

Amended Complaint, *Complete Entm't Res. LLC d v. Live Nation Entm't*, No. 15-cv-9814 (C.D. Cal. Feb. 15, 2017).

US AGENCIES

Second Circuit Rules Against DOJ Ban on Fractional Licensing

United States v. Broadcast Music, Inc., No. 16-3830 (2d Cir. Dec. 19, 2017)

On December 19, 2017, the Second Circuit ruled in favor of Broadcast Music, Inc. ("BMI"), finding that the practice of including only partial performance rights in a blanket license, i.e., fractional licensing, is permitted under BMI's longstanding consent decree with the DOJ. The court advised the DOJ to formally modify the consent decree or bring a separate antitrust action if it had competition concerns about fractional licensing.

BMI is a performance rights organization ("PRO") that pools copyrights held by composers, songwriters, and publishers to collectively license performance rights to music users such as radio and television stations, restaurants, and online music services. BMI typically offers blanket licenses, which provide access to BMI's entire music repertory consisting of millions of songs, regardless of which songs are played or how often. Fractional licensing refers to the practice of including in a blanket license only partial performance rights to a particular song, when, for example, that song is co-authored by multiple songwriters who use different PROs. The practice can force users to seek licenses from co-authors belonging to different PROs.

BMI has operated under a DOJ consent decree since 1941, when the DOJ challenged BMI's practice of offering blanket licenses as an illegal restraint of trade. In 2014, at the urging of BMI and another PRO, the DOJ reviewed the consent decree to determine if changes were warranted to keep pace with the changing music industry. Not only did the DOJ find that updates were unnecessary, it announced that the decree required "full-work licensing"—meaning that BMI could only offer access to songs in which it controlled one hundred percent of the rights. DOJ reasoned that "only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses that distinguish [PROs'] activities from other agreements among competitors that present serious issues under the antitrust laws." A full-work license would provide infringement protection to a music user seeking to perform any work in the PRO repertory, whereas a fractional license would require a music user to license the fractional interests held by a musical work's co-owners.

Unsatisfied with the DOJ's decision, BMI sought a declaratory judgment in 2016 that the consent decree did not require full-work licenses, which the Southern District of New York granted. The Second Circuit affirmed, focusing on the language of the consent decree and agreeing with the lower court that the consent decree "neither bars fractional licensing nor requires full-work licensing."

As a result, if the DOJ wants to ban fractional licensing, it must pursue formal changes to the consent decrees or bring a new lawsuit challenging the practice. The court noted that "[i]f the DOJ decides that the consent decree, as interpreted by the district court, raises unresolved competitive concerns, it is free to move to amend the decree or sue under the Sherman Act in a separate proceeding."

Assistant Attorney General for the Antitrust Division Makan Delrahim used the Second Circuit's decision as an opportunity to comment on the "challenges of behavioral consent decrees in antitrust cases," which he said "effectively become perpetual regulations that the [DOJ] and the courts are often not well-suited to enforce."

Sources:

United States v. Broadcast Music, Inc., No. 16-3830 (2d Cir. Dec. 19, 2017).

United States v. Broadcast Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. Sep. 16, 2016).

Press Release, U.S. Dept. of Justice, *Justice Department Completes Review of ASCAP and BMI Consent Decrees, Proposing No Modifications at This Time*, (Aug. 4, 2016), https://www.justice.gov/opa/pr/justice-department-completes-review-ascap-and-bmi-consent-decrees-proposing-no-modifications.

Ed Christman, *Court of Appeals Sides With Songwriters, Publishers, on Fractionalized Licensing: 'This Is a Massive Victory*,' BILLBOARD (Dec. 19, 2017), https://www.billboard.com/articles/business/8071046/court-appeals-fractionalized-licensing-songwriters-publishers-reactions.

Bill Donahue, *2nd Circ. Strikes Down DOJ Ban On 'Fractional' Licensing*, LAW360 (Dec. 19, 2017), https://www.law360.com/articles/996442/2nd-circ-strikes-down-doj-ban-on-fractional-licensing.

EUROPE

EC Publishes Communication Setting Out EU Approach on SEPs

On November 29, 2017, the European Commission published its much-anticipated communication on the EU's approach to standard essential patents ("SEPs"). The communication describes the Commission's view of certain key principles regarding access to patents essential to standards for the growing 5G and Internet of Things ("IoT") sectors. The communication is not a statement of either law or Commission enforcement policy. Instead, it is a policy document intended to foster a dialogue within the IoT ecosystem and to further the development of consensus-driven practices that will encourage both investment in new technologies and the wide deployment of 5G and IoT standards.

The guidance considers several steps that standards-development organizations ("SDOs") could take to reduce the transaction costs of providing access to essential patented technologies, including updating declared essential patent databases with more user-friendly interfaces; improved searching capabilities; and links to patent office databases to easily track patent status, ownership, and transfer. It also calls for more up-to-date information on declarations and a "higher degree of scrutiny" of essentiality claims by independent third parties who have the requisite technical capabilities and market recognition. The Commission recognizes, however, that steps to increase transparency can impose a burden that may deter participation in standards-development activities. It thus recommends that steps to improve transparency be proportionate to the benefits and only added gradually for new and key standards.

The Commission also considers principles for providing access to essential patented technologies. It emphasizes that patent owners that agree to provide access to essential technology on fair, reasonable and nondiscriminatory ("FRAND") terms must be fairly compensated for their contribution "so they continue to invest in R&D and standardization activities." To encourage entry and implementation of the standard, firms should be provided with access to essential patent technologies on FRAND terms, which is a flexible standard based on good faith private negotiations. According to the Commission, private parties "are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates, through good faith negotiations."

The Commission also encourages stakeholders "to pursue sectoral discussions with a view to establishing common licensing practices, based on the principles reflected in this Communication." Those principles include recommendations that license terms bear a clear relationship to the economic value of the patented technology, and that parties give consideration to the total cost of access to all patents needed to implement the standard. It also called on SDOs and essential patent owners to develop "effective solutions to facilitate the licensing of a large number of implementers in the IoT environment . . . via patent pools or other licensing platforms."

The Commission also offers its view on key takeaways from CJEU's judgment of Huawei v. ZTE, in light of subsequent regional court decisions. It provides that potential SEP licensees need "sufficiently detailed and relevant information" to determine the relevance of the SEP portfolio and assess the FRAND terms. Such information can include the essentiality of a patent for a standard, the allegedly infringing products of the SEP user, the proposed royalty calculation, and the non-discrimination element of FRAND. Counter-offers should be concrete and specific and contain information on the exact use of the standard in a specified product. The Commission concluded that it will work with stakeholders to develop and use methodologies that allow for efficient and effective SEP litigation, will further push for alternative dispute resolution over litigation, and will monitor the impact of Patent Assertion Entities in Europe.

The communication closes by encouraging the integration of open source software and standards development processes. The Commission will monitor this interaction and collaborate with stakeholders, open source communities, and SDOs to facilitate the relationship and "recommend solutions for smooth collaboration between the two communities."

Source:

European Commission, *Setting Out the EU Approach to Standard Essential Patents*, Nov. 29, 2017, https://ec.europa.eu/docsroom/documents/26583.

INTERNATIONAL

CADE Commissioner Recommends Exclusionary Conduct Conviction for Automakers

The Brazilian Administrative Council for Economic Defense (CADE) is currently addressing the complicated nexus between robust intellectual property rights and competition law. In a trial session held on November 22, 2017, CADE Commissioner Paulo Burnier recommended the conviction of automakers Volkswagen, Fiat, and Ford for the abuse of intellectual property rights relating to replacement car parts. The case has been in litigation since 2007. The Commissioner proposed a fine in the minimum amount permitted under Brazilian law, amounting to 0.1% of the automaker's revenues in 2009 (approximately $1.3m USD).

The Brazilian Association of Auto Parts Manufacturers (ANFAPE) filed an initial complaint in 2007 alleging that Volkswagen, Fiat, and Ford had abused their intellectual property rights by enforcing those rights against independent auto parts manufacturers, effectively eliminating independent manufacturers' ability to compete in the market.

In June 2016, the General Superintendent's Office of CADE recommended conviction of the Brazilian subsidiaries of Volkswagen, Fiat, and Ford Motor Company. CADE determined that the automakers abused their industrial property rights, thereby creating an unfair barrier to competition by independent manufacturers. Further, CADE found that Volkwagen, Fiat, and Ford harmed competition through aggressive litigation to enforce their patent rights. In an Official Recommendation, CADE stated that the automaker's abuse of intellectual property rights may have excluded thousands of independent manufacturers, and created individual monopolies over replacement auto parts. Such exclusionary conduct may have led to increased prices to consumers.

Final judgment on the conviction was adjourned for further review by CADE. Commissioner Burnier's decision could have a significant impact on the structure of the automotive parts markets in Brazil: currently, OEMs finance and support the development of replacement car parts and contract with independent auto parts manufacturers for service. Going forward, independent auto parts manufacturers may be able to participate directly in the market without contracting with OEMs.

Sources:

Press Release, Administrative Council for Economic Defense (CADE), June 20, 2016, http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-sees-anticompetitive-conduct-of-car-assemblers-that-prevent-auto-parts-replacement-by-independent-manufacturers.

Brazil: CADE Recommends Action vs. Volkswagen, Fiat, and Ford Over Competition Barriers, CPI LatinAmerica, June 28, 2016, https://www.competitionpolicyinternational.com/brazil-cade-recommends-action-vs-volkswagen-fiat-and-ford-over-competition-barriers/.

Eduardo Molan Gaban & Christian Manzueto, *Brazil: Administrative Council for Economic Defence (CADE): Competition Law v. Intellectual Property Law*, Lexology, Dec. 1, 2017, https://www.lexology.com/library/detail.aspx?g=bbd5abbe-ad80-4258-a51f-81af454c4935.

CADE's Ruling on Dispute Between Automakers, Auto Parts Manufacturers to Affect Industrial Design Registration (Translated from *Valor Economico*), PARR, Nov. 17, 2017, https://app.parr-global.com/intelligence/view/prime-2539619 (subscription required).

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Intersection of Antitrust and Patent Laws in **Huawei v. Samsung** *and Leading Cases in China's Supreme People's Court's Intellectual Property Annual Report*

Yan Wang and Frank Zhou[1]

I. Introduction

In China, the young but fast-developing antitrust laws are closely related to IP laws. This is in part because antitrust law and IP rights both deal with facets of monopoly, creating a natural connection between the two. Both areas of law have informed the other's development, with points of intersection impacting their respective policy course and statutory expansion. Recent judicial reflection and assessment of case law is creating an official pathway towards better-developed antitrust and IP case adjudication.

Perhaps the hottest antitrust/IP interaction of late is the antitrust risk of, and corresponding limitation on, exercising patent rights of standard essential patents ("SEPs") and the FRAND obligations, as evidenced by the SEP-related sections in the proposed amendment to the Patent Law[2] and latest judicial interpretation on IP issues.[3] However, the Supreme People's Court ("SPC") has not yet elaborated its opinions on the SEP and FRAND matters, which were addressed in the *Huawei v. IDC*[4] antitrust and FRAND rate cases.[5] On the other hand, as the role of Chinese entities like Huawei is transforming from licensee to licensor, it is not easy to predict whether the SPC would adopt the same approach in the *Huawei* cases in the future.[6] For example, in the *Huawei v. Samsung*[7] decision just pronounced on January 11, 2018, the Shenzhen Intermediate People's Court, which was the first instance court for the *Huawei v. IDC* decision, supports Huawei's 4G SEP-based injunctive relief against Samsung.

This article discusses two key developments at the intersection of antitrust and IP in China: (i) the guidance for FRAND obligations in the *Huawei v. Samsung* cases, and (ii) the selection of three Guiding Cases in

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[1] Yan Wang and Frank Zhou are attorneys at Han Kun Law Offices in Beijing, China.

[2] *See* the proposed Amendment to the Patent Law § 85, http://www.sipo.gov.cn/ztzl/ywzt/zlfjqssxzdscxg/xylzlfxg/201512/t20151202_1211994.html.

[3] *See* Interpretations of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II) § 24.

[4] (2013) YGFMSZZ Nos. 305, 306.

[5] Both cases were decided by the Guangdong High People's Court. The (2013) YGFMSZZ No. 305, *i.e.* the FRAND rate case, holds the licensing rate for IDC's declared SEPs should be FRAND and within the subject matter jurisdiction of the Chinese court, while the (2013) YGFMSZZ No. 306, *i.e.* the antitrust rate case, holds IDC's lawsuits with injunction claims based on SEPs are likely to be found as abusing the dominant market position.

[6] *See Huawei v. IDC*, (2013) YGFMSZZ Nos. 305, 306.

[7] (2016) Y03MC No. 816, 840. The decisions are first instance decisions, which can be appealed to the Guangdong High People's Court.

the SPC's Intellectual Property Annual Report.

II. The Guidance for FRAND Obligations in *Huawei v. Samsung* Cases

The Shenzhen Intermediate Court (the "Court") recently ruled in favor of Huawei in two patent infringement cases against Samsung, ordering injunctive relief in both instances.[8] The Court found that Samsung failed to uphold its FRAND obligations when it intentionally and "maliciously" delayed cross-licensing negotiations, and when it proposed rates for its SEP portfolio at significantly higher rates than Huawei's similar portfolio.[9]

Huawei and Samsung had been in cross-licensing negotiations since 2011. In 2016, Huawei brought two patent infringement cases against Samsung, requesting injunctive relief. Huawei's two patents at issue are its 4G SEPs (ZL 201110269715.3 and ZL 201010137731.2). Both cases survived the invalidation proceedings initiated by Samsung following the infringement actions. At trial, each party accused the other of breaching its FRAND commitment during their cross-licensing negotiations.

The Court ultimately found that Samsung's accused products infringe upon Huawei's patents-at-issue, and that Samsung had failed its FRAND obligation. The Court considered both the actions of the parties during negotiations, and the proposed rates for Huawei's and Samsung's respective SEP portfolio in its deliberation.

The Court pointed to five ways in which Samsung had delayed the negotiations, thereby violating its FRAND commitment: (1) insisting the cross-licensing agreement should cover both SEPs and non-SEPs; (2) failing to respond to the claim charts provided by Huawei in a timely manner; (3) delaying to make its own offer or counter-offer regarding the licensing rates; (4) refusing the arbitration proposal by Huawei without justification; and (5) failing to make any meaningful settlement proposal in the court-led mediation. The Court also found Samsung's proposed FRAND rates to be anti-FRAND because they were three times higher than Huawei's for a portfolio of similar quantitative value.

This ruling is significant in the IP/antitrust domain: it potentially demonstrates how companies may exercise the patent rights of SEPs without triggering antitrust issues. Whether the SPC would find such legal relief as abusing the dominant market position is to be seen.

III. Leading Antitrust Cases in the SPC's Intellectual Property Annual Report

Within China's judicial system, the IP division of courts handles antitrust cases, regardless of the case's relation to IP issues or technology. In 2008, the year the Antitrust Law became effective, the SPC issued the first edition of its Intellectual Property Annual Report ("Annual Report").[10] The purpose of the Annual Report, per its own description, is to reflect the SPC's approach in analyzing and adjudicating novel and complicated issues in IP and competition cases.

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[8] The injunction may be lifted whenever Huawei decides, or when the parties enter into a licensing agreement.
[9] The Court also upheld Huawei's proposed FRAND rates for its global 3G and 4G SEP portfolios and its calculating methodology, which figured into its ruling on the FRAND obligations of each party.
[10] The ninth edition of the Annual Report, for 2016, was issued in early 2017.

In the 2016 Annual Report, the SPC makes two important observations regarding the development of antitrust case adjudication. First, it observes that the litigation capacity of parties is under-developed. In particular, the plaintiffs in some cases fail to meet their burden of proving the existence of dominant market position and the abuse of such position.[11] While the SPC does not draw any conclusions about the failure to meet burden-of-proof requirements, this particular observation likely serves as a reminder to parties of the negative legal ramifications in failing to discharge certain obligations during litigation, such as the burden-of-proof threshold.

The SPC's second observation examines the Chinese courts' approach to determining the existence of dominant market position and the abuse thereof, underscoring the lack of consistency in antitrust case analysis.[12] The SPC observes that in some cases, courts adopt a traditional three-step approach, where the court first clearly determines the scope of the relevant market; then analyzes the activities concerned; and finally determines whether alleged abuse exists. Other cases adopt an approach[13] that simply relies on the analysis of the obstruction or elimination of competition of the activities but does not separately determine whether the firm holds dominant market position.

The cases chosen for, and thoughts expressed in, the Annual Report also signal the policy trend of the SPC, particularly regarding antitrust laws. The cases found in the Annual Report become Guiding Cases, which, according to Provisions of the Supreme People's Court on Guiding Cases Works ("Guiding Case Provisions"), **shall** be referred to by Chinese courts in similar cases.[14] As of now, only two antitrust cases have been included in the Annual Report, in 2014 and 2016 respectively, thereby becoming Guiding Cases: *Qihoo v. Tencent* and *WU Xiaoqing v. Shaanxi Broadcast & TV Network Intermediary (Group) Co., Ltd*. In *Qihoo*, the main issue is the analysis of dominant market position amid competition of internet platform companies.[15] In *WU*, the issue involves tie-in sales in the cable TV service sector, which is highly regulated in China.[16] In addition to the pure antitrust cases, the Annual Report for 2014 included an SEP-related case, *ZHANG Jingting v. Hengshui Ziyahe Construction Co., Ltd.*, which is categorized as a patent case rather than an antitrust case, and seems to be an example of the "no automatic license" rule later promulgated in the Interpretations of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II) ("Patent Case Interpretation II") in 2016.[17] Each of these three cases is discussed below.

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[11] IP Division of the SPC, *SPC's Intellectual Property Annual Report and Cases Thereof* 14 (9th volume, 2017).

[12] *Id*.

[13] Actually, this approach derives somewhat from the similar approach adopted by SPC in *Qihoo v. Tencent*, (SPC (2013) MSZ No. 4). This article will discuss this case below, as it is also collected in the Annual Report for 2014.

[14] Article 7 of the Guiding Case Provisions stipulates "People's courts of all levels shall adjudicate similar cases with reference to the guiding cases issued by the Supreme People's Court."

[15] *See* SPC (2013) MSZ No. 4.

[16] *See* SPC (2016) MZZ No. 98.

[17] SPC (2012) MTZ No. 125.

A. *ZHANG Jingting v. Hengshui Ziyahe Construction Co., Ltd.*[18]

When the *Huawei v. IDC*[19] antitrust and FRAND rate cases attracted the attention of the public in China and internationally, the SPC selected Z*HANG* to illustrate a related SEP issue. In *ZHANG*, the SPC found there was no license automatically granted by an SEP-holder that participated in the creation of a voluntary standard that includes its patent.[20] This opinion was later incorporated into the Patent Case Interpretation II in 2016.[21]

In the case, the plaintiff participated in the creation of a provisional non-compulsory construction standard, which clearly disclosed the existence of the SEPs held by the plaintiff. The defendant followed the standard and implemented the SEPs in its construction project. The plaintiff brought suit, asking for both compensation for past use and an injunction against future use. The defendant rejected the plaintiff's settlement offer that it pay the licensing fee during litigation. The SPC overruled the decision of the appellate court: it found no patent infringement of the defendant under an automatic license, and only granted a small royalty as compensation, refusing injunctive relief.[22] The SPC reasoned that the defendant infringed the patent when, without paying the licensing fee, it implemented the SEPs disclosed in the non-compulsory standard.[23] The SPC, however, still did not support the injunctive relief sought by the plaintiff, because the issue was moot since the construction project using the asserted SEP was completed.[24]

It is worth noting that the appellate court's no-patent-infringement determination finds its footing in a previously published SPC answer letter to a legal question asked by a lower court in 2008 ("Answer Letter").[25] In this Answer Letter, the SPC opined that, if the SEP holder participated in the process of creating the national, industry or local standard, the SEP holder is deemed to have given an automatic license to third parties that implement the standard and the SEP.[26] In such a scenario, the SEP holder is only entitled to a compensation substantially that of a normal royalty, if it did not waive such royalty during its participation in the standard creation.[27] However, in *ZHANG*, the SPC opined that the Answer Letter was referring to that particular case, and should not be used as a general legal authority, thus

[18] *Id.*

[19] (2013) YGFMSZZ Nos. 305, 306.

[20] *See* SPC (2012) MTZ No. 125.

[21] See Interpretations of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II) § 24.

[22] SPC (2012) MTZ No. 125 at 37, 38.

[23] *Id.* at 34-36.

[24] *Id.* at 37.

[25] SPC's Answer Letter on the Issue of Whether the Exploitation of a Patent in the Specification for the Design of Ram-compaction Piles with a Composite Bearing Base, an Industry Standard Issued by the Ministry of Construction, by Chaoyang Xingnuo Company Which Has Conducted Design and Construction according to the Standard Constitutes a Patent Infringement (SPC 2008 MSTZ No. 4).

[26] *Id.*

[27] *Id.*

justifying its decision that that there was patent infringement.[28] Though the Answer Letter is not officially annulled, it is quite obvious that the SPC's opinions and policy on SEP issues have dramatically changed since the 2008 Answer Letter.

B. WU Xiaoqing v. Shaanxi Broadcast & TV Network Intermediary (Group) Co., Ltd.[29]

In *WU*, the SPC ruled that the sole cable TV service company approved to provide TV service in Shaanxi province engaged in illegal tie-in sales activity when it charged unwitting consumers an optional value-added service fee along with basic cable TV fees.[30]

Article 17.5 of the Antitrust Law prohibits tie-in sales activities without justification.[31] In this case, the defendant cable TV company is the only entity approved to operate cable TV business in Shaanxi province. The plaintiff was told to pay 30 RMB/month for the TV service and received an invoice listing the basic cable TV fee of 25RMB/month and a value-added service fee of 5RMB/month. Upon learning that the value-added service was optional, the plaintiff sued the cable TV company, alleging the defendant deprived him of his choice to not use the value-added service, thus illegally tying the two products together.

The SPC, as well as the first instance court and the appellate court, determined that the defendant held the dominant market position.[32] The appellate court held that the defendant did not deprive the plaintiff of the right to choose the value-added service, but that it failed to inform the plaintiff of the option to purchase the value-added service.[33] This, the appellate court concluded, had rendered the case a Consumer Protection Law issue rather than an Antitrust Law issue.[34] The SPC overruled the appellate court.[35] First, the SPC found that the tie-in sales existed because the available evidence failed to prove that consumers were free to pay only for the basic cable TV fee.[36] The SPC then examined whether there were justifications for such tie-in sales, including whether it was trade usage that the two services are provided together, and whether there would be negative impacts on the performance of the two services if they were provided separately.[37] The SPC concluded there were no such grounds and held that the charges were illegal tie-in sales activities under the Antitrust Law.[38]

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[28] SPC (2012) MTZ No. 125 at 35.

[29] SPC (2016) MZZ No. 98.

[30] *Id*.

[31] Article 17.5 of the Antitrust Law stipulates "an operator who holds a dominant market position is prohibited from engaging in the following practices of abuse of the said position: … (5) Conducing tie-in sales without justified reasons, or adding other unreasonable conditions to the trading…".

[32] SPC (2016) MZZ No. 98 at 23.

[33] SPC (2016) MZZ No. 98 at 20, 21.

[34] *Id.* at 21.

[35] *See id.*

[36] *Id.* at 24, 25.

[37] *Id.* at 25, 26.

[38] *Id.*

Though *WU* neither discusses complicated issues nor creates innovative rules, it may be hugely impactful in industries adjacent to cable TV, such as the public utility sector—an industry that is highly regulated and where holding the dominant market position may be quite common. *WU* is likely to encourage companies like the defendant's to ensure that consumers actually enjoy the choice of purchasing an optional service.[39] If entities insist on maintaining the original tie-in sales strategy and are willing to take risks in the courtroom, it would behoove them to find a pro-competition rationale behind this strategy, such as trade usage and negative impacts on service performance of separate fee-charging and provision of the services.

C. *Qihoo v. Tencent*[40]

Recently, the SPC adopted an innovative approach in determining whether an abuse of dominant market position exists. The SPC held that in situations such as the competition among internet platform entities in *Qihoo*, where the relevant market cannot be clearly defined and therefore the dominant market position is unclear, a court may proceed to analyze the effects on competition caused by the alleged antitrust activities in order to assess whether the accused entity holds a dominant market position.[41]

Though the complete set of facts of the case is complicated, those related to the critical legal issues selected for the Annual Report can be put quite simply. Qihoo alleged Tencent abused its dominant market position in the *internet* instant messaging service by tying its computer security and management software to its dominant internet instant messaging software. The first instance court found no abuse and rejected Qihoo's claims, though it did not clearly define the relevant market. Qihoo appealed to the SPC, and among other reasons, asserted that the first instance court failed to clearly define the relevant market by following the traditional three-step approach. The SPC upheld the first instance decision, supporting this new approach.[42] According to the SPC, defining the relevant market is normally a critical step in an antitrust case.[43] However, whether the relevant market can be clearly defined depends on the specific facts and evidence of each case.[44] Defining the relevant market is a tool for evaluating the market power of an operator, and the influence of the alleged monopolistic activity on competition.[45] Therefore, if direct evidence of obstruction or elimination of competition can support an evaluation of the market power and influence of the accused's activities, it may not be necessary to clearly define the relevant market.[46]

The innovative approach in *Qihoo* seems to be well-reasoned and has become guidance for all similar cases, as the case became a Guiding Case in early 2017. However, as the SPC cautioned in its Annual Report for *2016*, the co-existence of two approaches, i.e. the traditional three-step approach and the

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[39] *See id*.

[40] SPC (2013) MSZ No. 4.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 86.

[44] *Id*.

[45] *Id*.

[46] *Id*.

innovative approach in *Qihoo*, is problematic in providing consistency in case adjudication.[47] It suggests that in the near future, the SPC may consider another case to further elaborate this issue, trying to unify the legal approach.[48]

[47] IP Division of the SPC, *SPC's Intellectual Property Annual Report and Cases Thereof* 14 (9th volume, 2017).

[48] *See id.*

The European Commission's Communication on Standard Essential Patents

Not a dark alley, but no bright lines either

Paul Lugard and Sohra Askaryar[1]

I. Introduction

In October 2017 we reported on the European Commission's ("Commission") public consultation launched in April 2017 on its roadmap for "*Standard Essential Patents for a European digitalized economy*" and an advanced draft of a Communication from the Commission.[2] The Commission's initiative is aimed at promoting the European Digital Single Market[3] ("DSM"), in particular the 5G mobile telecommunications standard and other technologies related to the Internet of Things ("IoT").[4] The Commission identified three main areas of concern: (1) lack of transparency for implementers regarding their exposure to SEPs, (2) unclear valuation of patented technologies and the definition of FRAND rates, and (3) lack of certainty and predictability regarding the enforcement of IP rights.[5]

The views that the Commission expressed in its roadmap and a number of successive draft Communications initiated a heated debate between patent holders on one side, who feared an erosion of the value of their (future) intellectual property rights, and, more generally, diminishing returns on their investments in innovation, and patent implementers on the other side, who felt that they might be exposed to excessive royalty rates for the use of SEPs. The Commission's intention to interfere with the FRAND licensing framework set out in *Huawei/ZTE*[6] in particular caused great concern and criticism. Other topics discussed in the roadmap and successive drafts of the Communication were the role of Standard Development Organizations ("SDOs") in increasing transparency on SEPs, thereby allowing potential users to identify more easily their exposure to SEPs, and the facilitation of a more predictable enforcement environment for SEPs.

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2 Paul Lugard and Sohra Askaryar, *The European Commission's Draft Communication on Standard Essential Patents: A Useful Roadmap or a Dark Alley?*, PUBLIC DOMAIN (Oct. 2017). https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at315000_newsletter_201710.authcheckdam.pdf (subscription required).

3 On the Digital Single Market, see generally http://ec.europa.eu/growth/single-market/digital_en.

4 *See* https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1906931_en.

5 The European Commission had already identified these concerns in its April 2016 Communication on Standardisation Priorities for the Digital Single Market. *See* https://ec.europa.eu/digital-single-market/en/news/communication-ict-standardisation-priorities-digital-single-market.

6 *Huawei/ZTE* was a landmark judgment of the Court of Justice of the EU ("CJEU"). *See* Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH.

On November 29, 2017, the Commission published the final version of its Communication "*Setting out the EU approach to Standard Essential Patents.*"[7] It seems that feedback and criticism from both patent owners and patent implementers have not gone unnoticed. Significantly, in its Communication the Commission has elected to avoid taking a clear position on the highly controversial issue of the meaning of FRAND, and particular licensing terms and valuation principles. Instead, the Commission has taken on board the comments, acknowledging that the parties to a SEP licensing agreement, negotiating in good faith, are in the best position to determine the FRAND terms most appropriate to their specific situation. With regard to reforms of SDO systems, the Commission acknowledges the high costs involved, but does not address the concerns substantively. Finally, concerning the enforcement environment for SEPs, the final Communication mostly confirms the Commission's position described in earlier drafts of the Communication. However, it is worth noting that the Commission moved away from the view that the defense against injunctive relief should be available to any party in the value chain.

II. Increasing transparency on SEPs exposure

As was expected based on previous drafts of the Communication, the Commission maintains that SDOs play a key role in creating more transparency on SEPs exposure, thus setting the path for fair licensing negotiations. The Commission is critical that declarations are based on self-assessment by the patent holder, and not subject to scrutiny of the essentiality of the declared patent. According to the Commission this makes licensing negotiations and the anticipation of risks related to SEPs particularly challenging, especially for start-ups and small and medium-sized enterprises ("SMEs"). To remedy these shortcomings, the Commission recommends improving quality and accessibility of information recorded in SDO databases, and developing an information tool to assist licensing negotiations.

In order to achieve these goals, the Commission suggests providing more user-friendly SDO data collections that are fully searchable based on relevant standardization projects. Furthermore, the data collections should include links to patent office databases with updates of patent status, ownership and its transfer. In its Communication the Commission also refers to current SDO policies and expresses the view that improvements of databases should be combined with stricter enforcement of these SDO policies.

The Commission also criticizes the focus of SDO's current declaration systems on the technical standard setting process and their failure to consider the future licensing of SEPs. In the Commission's view improving the transparency of SDO data will greatly facilitate licensing negotiations. To achieve this, rightholders should be required to review their declarations at the time of adoption of the final standard (and subsequent significant revisions), and when a final granting decision on the patent is taken. Furthermore, patent holders should at least refer to the section of the standard that is relevant to the SEP and to the link with the patent family, in order to provide sufficient information for users to assess their patent exposure. As patent litigation becomes more common, and the possibility of future litigation increases along with it, the Commission suggests that SDO databases should include references to court cases and their main outcome of final decisions on declared SEPs, regardless of whether these outcomes are positive or negative.

[7] *See* https://ec.europa.eu/docsroom/documents/26583/attachments/1/translations/en/renditions/native.

In addition, the Commission calls for more scrutiny of essentiality claims, preferably to be carried out by independent experts. With reference to reports from stakeholders, the Commission asserts that recorded declarations create a *de facto* presumption of essentiality in licensing negotiations, which in turn creates a lot of pressure for willing licensees to examine the essentiality of a large number of SEPs in licensing negotiations. More scrutiny in this area could avoid broad over-declarations and reduce the burden on implementers. The Commission maintains its position that patent agencies are best placed to take on the task of conducting essentiality checks. It is worth noting that the Commission announces its intention to launch a pilot project for SEPs in selected technologies with a view to facilitating the introduction of an appropriate scrutiny mechanism. As we have noted previously, this would potentially entail a significant change to the role and responsibilities of SDOs.

Presumably as a reaction to criticism that the Commission's recommendations to increase transparency on SEPs exposure would be very costly for SDOs, the Commission acknowledges in its Communication that proportionality considerations are essential in this context. However, the Commission also notes that proposed incremental improvements with controlled costs can substantially reduce overall transaction costs during licensing negotiations as well as infringement risks, and thus benefit both parties in negotiations. It would seem that in an attempt to balance cost and benefit, the Commission proposes to apply these standards on SDOs to new and key standards such as 5G, and extend them gradually to other areas.

III. General principles for FRAND licensing terms for SEPs

In an initial draft of the Communication, the Commission focused on principles for FRAND licensing terms for SEPs, in particular valuation principles for essential technologies, differential licensing terms depending on the use of the technology and the level in the value chain where technology is licensed. The Commission seemed eager to heavily regulate the definition of FRAND terms. For example, the Commission took the view that the value of the technology should be determined on an *ex ante* basis, before the technology is included in the standard. Furthermore, the Commission seemed inclined to significantly limit the discretion of licensors to decide which level in the value chain is licensed, thereby seemingly mandating a "license for all" regime.

Since this section would have had the most significant impact on FRAND negotiations and licenses, it sparked a fierce debate among stakeholders from both camps, i.e. patent holders and patent implementers. Critics warned that an intervention by the Commission on that scale, even if only in the form of a legally non-binding Communication, could have severe negative effects on licensing negotiations. It this respect, it was submitted that, despite the Commission's objective to promote new technologies, this could result in delays of the dissemination of 5G and the DSM.

It is therefore commendable that the Commission acknowledges in the final version of its Communication, that "*the parties to a SEP licensing agreement, negotiating in good faith, are in the best position to determine the FRAND terms most appropriate to their specific situation*." Consequently, the Commission refrains from setting a rigid regulatory framework around FRAND licensing, and instead establishes a "*first set of key signposts on the FRAND concept*" to "*guide parties in their negotiations and reduce litigation*."

The Commission's emphasis that "*there is no one-size-fit-all solution to what FRAND is*," and "*solutions can differ from sector to sector*," may disappoint some implementers and put the mind of those at rest who feared the endorsement of a "license for all" by the Commission. However, patent holders who hoped the Commission would more explicitly support a use-based licensing approach, will be equally disappointed to hear that the Commission does not support this approach. The Commission asserts that the non-discrimination element of FRAND "*indicates that rightholders cannot discriminate between implementers that are similarly situated*," and clarifies that FRAND terms must be assessed on a case-by-case basis. In its final Communication, the Commission encourages stakeholders to pursue sectoral discussions with a view to establishing common licensing practices, based on the following four principles:

(1) Licensing terms must bear a "*clear relationship to the economic value of the patented technology*" and should not include any value resulting from the inclusion of the technology in the standard. In cases where the technology has little market value outside the standard, other evaluation methods may be required, such as comparing different contributions and their relative importance to the standard. Contrary to previous drafts, in the final Communication the Commission does not pursue the notion that the value of the technology should be determined on an *ex ante* basis, before the technology is included in the standard.

(2) FRAND value should represent the "*present value added*" by the SEP, irrespective of the value attached to the market success of the final product.[8]

(3) FRAND valuation should ensure "*continued incentives for SEP holders to contribute their best available technology to standards*." The more uncertain developers of new technologies are about the return on their investment, the less motivated they will be to invest in further innovations.

(4) Royalty stacking should be avoided. Therefore, the parties should not consider individual SEPs in isolation, but rather "*take into account a reasonable aggregate rate for the standard, assessing the overall added value of the technology*." According to the Commission, increased transparency on SEPs exposure will support this objective. Furthermore, the Commission explicitly endorses and encourages the creation of industry licensing platforms and patent pools.

It is obvious that these principles are to a large extent aspirational and that their application in practice is difficult and will remain subject to discussion. In any event, compared to previous drafts of the Communication, the Commission has clearly chosen to take a back seat when it comes to defining "FRAND," at least for the time being. However, the Commission notes that it will "*monitor progress*

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[8] The *present value* is the value discounted to the time of the conclusion of the license agreement. According to the Commission, allowing for the discounting over time is important against the backdrop of license agreements running over several years in sometimes technologically fast-moving business environments (see footnote 29 of the Communication).

achieved and take complementary action on FRAND licensing, as needed." For this purpose, the Commission will set up an expert group to gather industry practice and additional expertise on FRAND licensing. It calls upon stakeholders to continue establishing reliable industry best practices and make good use of the communication channel the Commission opened with this initiative.

IV. A predictable enforcement environment for SEPs

The Commission asserts that SEPs are more frequently subject to litigation than other patents and concludes that a clear dispute framework is required in this area. The Commission recognizes that enforcement of IP rights in the context of SEPs is mainly focused on the availability of injunctive relief. Within the boundaries of antitrust law, patent holders should therefore be able to obtain injunctions against those users who refuse to enter a license agreement and pay royalties. However, the Commission acknowledges that technology users negotiating in good faith must be protected from accepting non-FRAND terms to fend off the threat of an injunction. The conflicting interests must be balanced carefully. The Commission acknowledges that further guidance may be required, and refers to the framework set out by the CJEU in *Huawei/ZTE*.

The Commission stresses that injunctive relief must be effective, proportionate and dissuasive, and that "*concrete requirements may vary according to the individual case*." However, the more reliable information on SEPs is available through the declaration system upfront, the easier it will be for negotiating parties and courts to analyze the essentiality of a patent, the allegedly infringing products, the proposed royalty calculation, and the non-discrimination element of FRAND.

Furthermore, the Commission endorses alternative dispute resolution ("ADR") mechanisms, as they may offer swifter and less costly dispute resolution, and recommends that outcomes of ADRs should be included in SDOs' databases. The Commission notes that the Unified Patent Court, once it enters into operation, should be in a position to provide a dedicated arbitration and mediation center.

The Commission also acknowledges that portfolio licenses granted outside national territories are compliant with FRAND, provided that the portfolio is limited to the SEPs that the licensee needs to produce and market its product. Bundling of non-SEPs is also permitted, as long as implementers are not forced to accept a license for these other patents. In this respect it is regrettable that the Communication may be interpreted as suggesting a stricter approach than the Commission Guidelines on technology transfer agreements.[9]

Finally, in order to raise awareness of the FRAND licensing process and its implications, the Commission intends to collaborate with stakeholders, open source communities and SDOs to promote an effective relationship between standardization and open source. To that end, the Commission will

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9 The Communication states that " ... *SEP holders may offer more patents, including non-SEPs, but cannot require a licensee to accept a license for these other patents as well.*" In contrast, paragraph 264 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements provides that "*[i]n the assessment of technology pools comprising non-essential but complementary technologies, the Commission will in its overall assessment, inter alia, take account of the following factors: (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool, for example due to the costs of assessing whether all the technologies are essential in view of the high number of technologies ... .*"

fund studies to analyze complementarities, ways of interacting and differences between the two processes.

V. Concluding remarks

As noted in our review of the Commission's roadmap and draft Communication in October 2017, the Commission's recommendations to increase transparency on SEP exposure is a welcomed initiative. However, although the Commission is aware that reforms of the SDO system are costly, unfortunately, the final version of the Communication does not address head-on valid concerns that reforms would involve significant investments. These investments may create disincentives to participate in standard setting.

The Commission has made it clear that it will closely watch future developments in this area. While the reactions to the Communication range from mildly positive to agnostic, it remains to be seen how the Communication will permeate into daily licensing practices. It is commendable that the Commission has chosen not to disregard the feedback received from different stakeholders in the SEP licensing world. Especially with regard to FRAND licensing terms, the Commission has shown good judgment by refraining from establishing rigid regulatory guidelines which are at odds with industry practice. In doing so, the Commission has left responsibility to further delineate the meaning of FRAND with negotiating parties and courts deciding disputes.

Recent Committee Events

IP and High Tech Developments in Canada
February 26, 2018

On February 26, 2018, the Intellectual Property Committee of the ABA's Antitrust Section hosted a Brown Bag entitled "IP and High Tech Developments in Canada." Moderated by **Megan MacDonald** (Stikeman Elliott LLP), the panel featured speakers **Andy Baziliauskas** (Charles River Associates), **Paul Johnson** (Canadian Competition Bureau), and **Elisa Kearney** (Davies Ward Phillips & Vineberg LLP).

The discussion focused on the priorities and objectives set out in the Canadian Competition Bureau's 2017-18 Annual Plan: Competition is Key, in which the Bureau committed to continue its work to foster the conditions for innovation in Canada, particularly in the digital economy. The panel also discussed the Bureau's ongoing enforcement actions in the digital economy and its completed investigations into Google, Apple, and Amazon, as well as the Bureau's September 2017 white paper titled Big Data and Innovation and the Bureau's final report on technology-led innovation in the Canadian financial services sector.

Recordings of ABA programs are available on the Section website:
http://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio.html

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For upcoming events visit http://ambar.org/atevents.

Visit the IP committee Connect page at: http://connect.abaantitrust.org/committees1/viewcommunities/groupdetails/?CommunityKey=cefbd05f-6dd2-45d2-845a-2ce480dc3ba4

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