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2nd IP & Antitrust: Hot Issues

#1 SEPs: Is There a Need to Review the Balance Between Intellectual Property and Antitrust Priorities?

Webinar - Tuesday 7 June 2022*

Keynote

> "Because there is no definition of what FRAND is, the SEP licensing process is essentially a naked exercise in rent sharing."

Pierre Régibeau
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Pierre Régibeau

Pierre Régibeau introduced the presentation by taking stock of the current situation in terms of standard-essential patents (SEPs). He underlines that from the 2000's, some progress has been made in trying to streamline the standard setting process especially in the field of mobile communication.

On the European Union side, the Huawei v. ZTE decision (C-170/13) indicates more precisely what can and cannot be done, at least up to a certain stage of the licensing process. There has also been some progress in patent pool management that has been able to not have "one size fits all" to attract a greater proportion of industry participants. Moreover, there seems to be more willingness from the courts to set FRAND royalties. To do this, they rely on various methods, including the bottom-up approach or the top-down approach. However, it is important to remember that there are hundreds of standardisations processes every day and most of them are going very well, without any litigation.

In terms of the standards settings, there is a kind of "bad student" in the field of mobile communication where the solution seems to be elusive, because of the parties that seem to be sitting on their position. On one hand, the SEPs owners want to get paid, and they sometimes need an injunction to secure payment, but they seem unwilling to commit to anything clear or more definitive than some vague notion of FRAND which Pierre described as useless because of its lack of flexibility. On the other hand, technology users are afraid of paying too much. In general, they rely on highly exaggerated, undocumented claims about the negative effect of the level of charges.

Because there is no definition of what FRAND is, the SEP licensing process is essentially a naked exercise in rent sharing. This is a zero-sum game, so it is not surprising that SEP-holders and implementers have opposite views.

A first step on the side of the SEPs owners would be to have a commitment to something more real for which we could agree what a reasonable order of magnitude is. This is no panacea though, as long as there is no

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meaningful competition between potential standards, so that implementers can compare such commitments.

DG GROW tries to bring clarity to this process, through five main points. First, they are facilitating the ex-post licensing process, by encouraging the development of an essentiality assessment. Then, they are trying to promote the creation of a database to improve transparency. Third, they are encouraging the formation of patent pools, although disappointing in some areas, like 3G/4G, patent pools are improving, notably by finding ways of rewarding more important patents more highly. Fourth, they are improving clarity on FRAND licensing terms. Finally, they are working on the enforcement process where the courts are taking responsibility and are willing to essentially set the FRAND royalty rate in a worldwide manner and determine the right royalty level.

Regarding the link with antitrust, there is no need to rebalance the priority. The tasks are well divided. IP rights determine the property rights. Contract law deals with commitments and procedures. Antitrust deals with the behavior of dominant firms, no matter if this dominance comes from patents or SEPs. According to Pierre, competition policy should have very little to do with SEPs problems. Competition policy should not be involved systematically in issues that deal with rent-sharing rather than inefficiencies in the market. On the other hand, there are things to be concerned about, such as the scrutiny of how standard setting organisations' rules are designed, how they operate, and if people follow these rules. One thing is sure, one of the roles of the DG COMP is to ensure that the rules set out in Huawei v. ZTE are followed.

As to the decision of the Munich Court, he explains that the Huawei v. ZTE interpretation, while very useful, is a unfortunately incomplete as it does not specify what happens if the parties still disagree after making "potentially FRAND" offers to each other. By contrast, the Advocate General's opinion in the case did specify that injunctions were off the table as long as the potential licensee agreed to have licensing conditions set by in Court. ■

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Panel Discussion

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Courts play a critical role in SEP licensing, and how they perceive the various regulatory initiatives and SEP policies is an important element of enforcement."

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Avantika Chowdhury opened up the discussion by underlining that there are plenty of regulatory initiatives in the EU and around the world regarding SEP and words such as "symmetry" and "balance" appear many times in these initiatives. From an economic perspective, this is consistent with the concerns around the imbalance of bargaining power or asymmetric bargaining power between patentees and potential licensees. DG GROW and the U.S Department of Justice both have open consultations, the first one on having a potential new framework for fair and balanced negotiations and the second one on their draft policy statement on SEP Licensing. Regulators are not the only actors. Indeed, courts play a critical role in SEP licensing, and how they perceive the various regulatory initiatives and SEP policies is an important element of enforcement. There has been a large number of court judgments over the years, with courts in Europe (and UK in particular) increasingly judging on key issues such as global licensing, role of injunctions, level of value chain where licence should be taken and methods of FRAND royalty determination.

Dr Chowdhury posed the question of whether there is likely to be a convergence or divergence between different regulators on this issue, and between regulators and courts, and also asked for panelists' views about the role of antitrust in FRAND licensing.

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Maureen Ohlhausen

Maureen Ohlhausen focused her presentation on the US perspective. She underlines that this subject was a hot topic when she was at the FTC. The Antitrust Guidelines for the Licensing of Intellectual Property were updated in 2017 on a bi-partisan basis and helped to clarify the balanced approach between Antitrust and IP. Under the Trump Administration, the DOJ took some action to reassert the importance of IP rights and recognize that opportunistic behavior can occur on either side of the licensing negotiation. Now, under the Biden Administration, there is some retrenchment on the FTC side. In particular, some in the FTC appear to be interested in expanding antitrust law by taking a more active role at the expense of IP law. The idea seems to be to circumvent court decisions on the issue of unfair methods of competition. For its part, the DOJ put out a request for comment on what it and the Patent and Trademark Office have missed in their draft SEP Policy Statement.

According to Maureen, separation of powers will become a key if the FTC tries to rewrite antitrust law. In the US system, Congress makes the laws, and the courts are the final interpreters of the law, which the agencies enforce. The courts will not react well to the FTC trying to take on a legislative role.sShe is skeptical as to whether the antitrust agencies should intervene in areas that do not fall within their expertise, such as labor or social issues. She suggests that the antitrust agencies focus on their area of expertise, which is antitrust. She is concerned about the FTC's interest in expanding the interpretation of unfair methods of competition to circumvent court interpretations it does not like.

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Jonathan Barnett

Jonathan Barnett highlighted that, historically, regulators' concerns have focused on patent hold-up risk. Since the Huawei v. ZTE case in 2015, EU regulators took that decision into account, recognizing at least the possibility of patent hold-out. This shift progressed further under Makan Delrahim's leadership of the DOJ Antitrust Division under the Trump Administration, when DOJ took the position that evidence for patent hold-up was weak, and the primary concern is patent hold-out. Since then, the Biden Administration asked the agencies to reconsider this position. The draft Policy Statement issued by the DOJ (but subsequently withdrawn) seems to be an attempt by a regulator to prevent SEP owners being able to secure an injunction in most circumstances. According to Jonathan, it also creates a divergence between EU and US regulators given that EU regulators have recognized the two problems of patent hold-up and hold-out. Courts in the EU, the UK, and the US have not been partial to the patent hold-up theory or related royalty-stacking theory when raised in litigation, tending to conclude that these theories lack sufficient supporting evidence.

Jonathan noted that in general there is a strong presumption against the use of antitrust law to interpret the content of the FRAND standard or mandate the level of licensing, which he considers as mostly being a matter of contract law or, in the case of damages calculations, patent law. He explains that markets generally know how to figure out what the efficient level of licensing is, what is efficient pricing, etc. Antitrust should not be used as a tool for courts to set prices. Both in EU and US law, competition law should be used as a tool for ensuring that markets operate under conditions under which they can set prices efficiently through competition.

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Michael Schloegl

Michael Schloegl focused his presentation on what can be achieved as a SEP owner with an injunction based on a recent case in front of the Munich Court: IP Bridge v. Ford Werke GmbH. IP Bridge has chosen one SEP that is most likely valid and essential in Germany to chase Ford-Werke GmbH and sue them. The Munich judge granted the injunction against Ford Werke GmbH although Ford tried to negotiate a bilateral license agreement with IP Bridge. However, IP Bridge, refused to grant such bilateral license but insisted on having Ford Motor Company, i.e. the entire Ford-group, take a license agreement from Avanci. Finally Ford took the Avanci license under injunction pressure, although this German IP Bridge patent would have been easy to design around if it were not a standard-essential patent. Based on this one single German patent, there is now a global license agreement with Ford Motor Company on one hand and the complete Avanci Pool on the other hand. All of

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Michael Schloegl

this is because of the threat of an injunction. Contrary to the basic idea of the FRAND undertaking, a single SEP is given an impact here that goes far beyond the impact of non-essential patents. Continental, like other suppliers in the car industry, has tens of thousands of non-essential patents that all protect technologies in much more important components of a car, and which are unjustifiably degraded by the pattern shown here. Michael deplores that SEPs, and the FRAND concept is abused in that kind of case in today's SEP ecosystem to extort huge inflated royalties. He sees antitrust constraints as a way to stop this type of behavior.

Avantika Chowdhury then opened the discussion on whether there are alternative options to making the system more efficient and what could be a constructive way forward. For example, mediation and alternative dispute resolution more broadly has been discussed as a useful element. The Commission and other regulators are considering new frameworks and associated guidelines. While guidelines could help, Avantika highlighted the challenges of any guidelines from regulators given relevant assessments (whether of fairness of a rate in a case or what should be the level of licensing) depend so much on the context of a specific licensing scenario and specific market. What is efficient in mobile handset market is not necessarily efficient for automotive, both of which may be different to what works for a specific IoT product. The role of ETSI is also critical and any initiative in this area is likely to involve standards bodies such as ETSI, for example to carefully review the declarations.

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Giovanni Napolitano

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Giovanni Napolitano focused on the different alternatives and options that address the question of balance. It could help to have some procompetitive solutions to focus on serious matters. One of them is the mediation processes that is offered by the WIPO. They are very successful because more than 70% of the cases did not go to Court. In parallel, the WIPO has started a dialogue with more than 300 IP judges representing 90 countries. What emerges from this dialogue is that regulations should be implemented in a similar way or even the same way worldwide to avoid affecting international companies with court decisions made at the national or regional level. Those decisions could create some tensions between IP and antitrust communities. The private sector seems to be very interested in the WIPO to play a bigger role in all meditation and arbitration cases concerning SEPs. One of the reasons is that WIPO is seen as an independent and reliable body that prevents disputes from becoming antitrust cases.

Giovanni stated that the WIPO supports guidelines in general even if they are usually the result of a long process. If they are binding, the process will need to be up-to-date, and it can be complicated for the business community. Giovanni emphasizes the importance of transparency in the patent system and the standardisation system. The issue is that sometimes, there is a transfer of IP ownership. This information must be transferred to the standard-development organization databases to reduce the risk of litigation.

Michael added that sometimes suppliers are refused the possibility to take the license. For the case IP Bridge v. Ford Werke GmbH, this meant Avanci's members would insist only on the Avanci solution and would not engage in bilateral negotiations. Avanci is not FRAND. There are not fair negotiations, but it instead seems that terms are dictated by the SEP owners and if the implementer is not willing to sign the license agreement with such dictated terms, the implementer is faced with an infringement case with injunction pressure and surrenders under the threat of injunction. Therefore, Continental has developed a fair negotiation safe harbor concept that is based on Huawei v. ZTE case. This framework involves opening a period for fair negotiation in which both parties can engage in negotiation without any injunction pressure and where the implementer can open a rate-setting procedure if the contract has not been signed. It is only after the set period is over that the risk of injunctions opens up. Michael indicated that he does not want to use competition law to come to a FRAND rate. However, standardization and patent pools are horizontal cooperation between competitors that need to be carefully scrutinized by antitrust authorities.

On the question of patent pools, Jonathan noted that in the late 1990s, the US antitrust agencies played an important role in facilitating the formation of patent pools through the issuance of business review letters. Thanks to this, the consumer electronics markets has been able to use patents to achieve interoperability through licensing structures that were assembled and administered largely by independent third parties. The early pools established in the late 1990s, and "cleared" by the antitrust agencies, created a template that achieved a balance between the efficiency gains from "one-stop" licensing but with safeguards and precautions so the pool cannot be used for collusive purposes. More broadly, in Jonathan's view, one way that the SEP licensing system can be made more efficient (where there would be much less litigation, or at least shorter litigation) is to move to a regime in which injunctions are a credible outcome when the SEP owner has successfully shown validity and infringement. This will disincentivize hold out and incentivize parties to negotiate and come to an agreement faster. ■

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