Standing Committee on

Standards and Patents

2015

International Association for the Protection of Intellectual Property
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2015 Annual Report of Q222

Standards and Patents

Names and Functions of Committee Members

Chairman:	Michael Fröhlich	(Germany)
Co-Chairman:	Gertjan Kuipers	(The Netherlands)
Secretary:	Pauline Debré	(France)
Members:	Alma Sofia Alvarez	(Mexico)
	Calvin Park	(South Korea)
	Chris Scherer	(USA)
	Claudia Wallman	(Sweden)
	Jeffrey Gluck	(USA)
	Jesus Arribas	(Spain)
	John Brunner	(UK)
	Kiyoko Nakaoka	(Japan)
	Louis-Pierre Gravelle	(Canada)
	Lindsay Casey	(Ireland)
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	Marcio Merkl	(Brasil)
	Martin Fähndrich	(Germany)
	Masatsugu Suzuki	(Japan)
	Michaela Maggi	(Italy)
	Monica Barone	(USA)
	Paul Reeskamp	(The Netherlands)
	Peter Treloar	(Australia)
	Stéphane Tronchon	(France)
	Taliah Walklett	(UK)
Responsible Reporter:	John Osha	(USA)

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1. Summary

1.1. Current and future issues

Special Committee Q222 has the task to monitor, comment and advise AIPPI on policy, regulatory and legal frameworks relating to standards and patents, including developments in case law and regulations in various jurisdictions as well as in standard setting organizations. The Committee is working on identifying possible shortcomings, including the analysis of the role antitrust law plays in this context. Where appropriate, the Committee will formulate standpoints and opinions.

During the reporting period, the Committee had a physical meeting at the AIPPI ExCo in Toronto, and one meeting per teleconference.

The Committee has resumed the work on "Prior art documentation in Standard Development Organisations (SDOs) and access for Patent and Trademark Offices (PTOs) to such documents" (Workplan Item #7), it started the work on FRAND (Workplan Item #3) as well as on ADR (Workplan Item #8). The Committee has also resonded to a request for comments from AIPPI Japan to inform an opinion on a draft of the Japanese Federal Trade Commission's Guidelines for the Use of Intellectual Property under the Antimonopoly Act. Please refer to Section 2 for more details on these activities.

The Committee has also identified and discussed several important developments of relevance that have taken place in various jurisdictions over the last year (see below Section 3 for more details).

Finally, leadership of the Committee has been working on the organisation of the FRAND-workshop at the Annual Congress in Rio de Janeiro.

Priorities for the next reporting period are:

(1) Continue work on SDO/PTO cooperation, FRAND, and use of ADR for FRAND-disputes with a view of establishing a standpoint and producing appropriate deliverables;

(2) Monitoring and reporting relevant developments;

(3) Further increasing the Committee's visibility in AIPPI and the national groups, as well as outside of AIPPI.

1.2. Deadline for any action

At present no deadlines in the work of Q222 are open.

1.3. Action recommended

The Committee recommends that

- this Report be addressed in the ExCo meetings in Rio de Janeiro;
- the visibility of Annual Reports with substantial content of AIPPI's Standing Committees be further increased in and outside of AIPPI, *e.g.* through articles in magazines of media partners.

2. Report of Committee's activities

2.1 Membership

The Committee welcomed eight new members: Pauline Debré (France), Michaela Maggi (Italy), Jeffrey Gluck (USA), Monica Barone (USA), John Brunner (UK), Taliah Walklett (UK), Alma Sofia Alvarez (Mexico), and Paul Reeskamp (The Netherlands).

Valeria Falce retired from her responsibilities as member of the Committee.

The Committee has now 23 members coming from 16 different jurisdictions.

2.2 Secretary

Claudia Wallman stepped down from her function as Secretary for the Committee. She was warmly thanked for the time and expertise she has devoted to this work.

Pauline Debré has been appointed as new Secretary of the Committee.

2.3 Meetings

During the reporting period the Commitee had a physical meeting at the AIPPI ExCo in Toronto and one additional meeting by teleconference.

2.4 Activities

The Committee has resumed its work on "Prior art documentation in Standard Development Organisations (SDOs) and access for Patent and Trademark Offices (PTOs) to such documents" (Workplan Item #7). Documentation available in Standard Development Organisations can have some relevance during the granting process, as patents containing subject matter already put forward in an SDO may not meet the requirements of patentability. However, PTOs can only avoid granting patents that are not meeting these for if their examiners have access to the earliest publicly available drafts and working documents for a standard under development. Cooperation between SDOs and PTOs with a view of supplying corresponding documents from SDOs to PTOs can therefore be helpful in support of the PTO's striving to improve the quality of issued patents. In order to examine and analyze this topic, the Committee has finalized a questionnaire which is to be sent to the national groups of AIPPI, selected PTOs and a number of SDOs.

The Committee has also started the work on FRAND (Workplan Item #3). A number of courts in various jurisdictions have recently provided some guidance on how to determine fair reasonable and non-discriminatory (FRAND) terms and conditions either for specific patents-in-suit or an entire portfolio of patents. This question currently attracts a lot of attention and the Committee felt that it's the right moment to look into the topic. A list of relevant cases has been compiled and it has been decided to form a small working group which will do some preparatory on the topic.

The Committee has further decided to start work on the Use of ADR Mechanisms in the context of FRAND-Related disputes. Using ADR for FRAND-related disputes is not a novel concept and a number of SDOs even have ADR provisions in their rules and policies. These provisions have, however, rarely if ever been invoked. But the ADR topic has attracted a lot of attention over the last couple of months, mainly because it has been mentioned as a possibility in a number of recent cases, e.g. the U.S. Fed. Trade Comm'n in re Motorola, the European Commission in the Motorola case and the Samsung commitments, or Court for Justice of the European Union in Huawei v ZTE. The Committee decided to form a small working group which will do some preparatory on the topic. The Committee will also explore a liaison and possible cooperation on this topic with the Standing Committee on ADR (Q225).

Finally, the Committee responded to a request for comments from AIPPI to inform an opinion on a draft of the Japanese Federal Trade Commission Guidelines for the Use of Intellectual Property under the Antimonopoly Act. The Committee has sent to AIPPI Japan the Committee's report on the availability of injunctive relief for FRAND-committed standard essential patents for reference of discussion and has pointed to the Committee findings and recommendations with this regard.

3. Recent developments relevant to the Committee's work

As per the previous years (see Annual Reports of 2011, 2012, 2013 and 2014; all available on AIPPI's website), the Committee has identified a number of important developments relevant to the Committee's work:

3.1. Court cases

3.1.1. Europe

3.1.1.1 Court of Justice of the European Union, Judgment 16 July 2015, C-170/13, *Huawei v ZTE*

On 16 July 2015, the Court of Justice of the European Union (CJEU) handed down its long awaited decision in the case between Huawei and ZTE on the availability of injunctive relief for FRAND-committed SEPs. This case has been followed very carefully all over Europe and beyond.

The core approach that has now been endorsed by the CJEU is that the SEP owner may seek and obtain injunctive relief, but only if the following conditions are met:

- prior to bringing the action, the SEP holder must alert the implementer of the alleged infringement and specify the way in which the SEP is alleged to be infringed; and
- prior to bringing the action, the SEP holder must make a specific written offer on FRAND terms; and
- the implementer does not react "*diligently… in accordance with recognised commercial practices in the field and in good faith*", which is a matter that must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

The background for the decision is a request for a preliminary ruling from the German Regional Court in Düsseldorf which has referred five questions to the CJEU owing to the divergent approaches being taken by German courts and the European Commission on the conditions under which a claim for injunctive relief for FRAND-committed SEPs can be sought and enforced without infringing EU competition law. In March 2013, this referring court stayed patent infringement proceedings between *Huawei* and *ZTE* and asked the CJEU under which circumstances the assertion of SEPs might constitute the abuse of a market dominant position in the meaning of Art. 102 TFEU. It is important to note that, at the time of the referral, the European Commission was also investigating a possible abuse by way of asserting SEPs in two parallel proceedings which in the first half of 2014 resulted in the Commission's decisions *Samsung* and *Motorola* (cases AT 39.939 and AT.39985).

In November 2014, the Advocate General issued his opinion in the CJEU proceedings and concluded that the SEP holder must alert the infringer to the infringement and is obliged make a licence offer on FRAND terms. The potential licensee must then provide a considered and serious response to that offer. If it does not accept the SEP holder's offer, it must promptly present the patentee with a reasonable counter-offer. Injunctions are available to the patentee against a potential licensee whose conduct during the negotiations is purely tactical and/or dilatory and/or not serious.

In its July 16th decision, the CJEU has rather closely followed the opinion of the Advocate-General, without however going into the same level of detail:

The court has explicitly tried to find a middle path, to *"strike a balance between maintaining free competition (…) and the requirement to safeguard that proprietor's intellectual-property rights and its right to effective judicial protection"*. In doing so, it has attempted to lay down guidelines of behaviour that provide a safe harbour to both implementers and SEP owners: by following them, implementers are immune from the threat of injunctions, while SEP owners need not to fear antitrust liability.

The CJEU held that an SEP-holder that has given a voluntary FRAND-commitment does not abuse its dominant position by bringing an action for injunctive relief prohibiting the infringement of its SEP or seeking the recall of products for the manufacture of which that SEP has been used, as long as:

- the SEP holder has, prior to bringing that action, alerted the alleged infringer of the infringement by designating the patent in question and specifying the way in which it has been infringed; and

- the SEP holder has presented to the alleged infringer, who has expressed its willingness to conclude a licensing agreement on FRAND terms, a specific, written offer for a FRAND licence, specifying, in particular, the royalty and the way in which it is to be calculated; and

- where the alleged infringer continues to use the SEP in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

The Court also held, *inter alia*, that an alleged infringer which has not accepted the offer made by the SEP holder may invoke the abusive nature of an action for an injunction or for the recall of products only if it has promptly and in writing submitted a specific counter-offer to the SEP holder that corresponds to FRAND terms. Furthermore, the Court ruled that from the point at which its counter-offer is rejected the alleged infringer has to provide appropriate security, in accordance with recognised commercial practices in the field, for example by providing a bank guarantee or by placing the amounts necessary on deposit. In addition, where no agreement is reached on the details of the FRAND terms following the counter-offer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.

As regards liability for past use the CJEU ruled that Article 102 TFEU does not prohibit an SEP holder bringing an action for infringement and seeking a rendering of accounts or an award of damages in relation to past acts of use of an SEP.

The ruling is final and cannot be appealed. It is binding on the European Commission and the courts and competition agencies of all EU member states.

The decision of the CJEU can be found here: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CJ0170&from=DE

The opinion from the Advocate-General can be accessed using this link: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CC0170&from=DE

3.1.1.2 Landgericht Düsseldorf, Judgment of 26 March 2015, Docket No. 4b O 140/13 – *France Brevets ./. HTC*

This case relates to an action for infringement of a patent allegedly essential to an ETSI standard relating to the implementation of Near Field Communication technology on a SIM-card. The decision is of particular interest, because it is the first decision of a German court where the court enters into an assessment of whether the SEP holder is actually dominant in the relevant market. Until then German courts implicitly proceeded on the assumption that an SEP confers market power and that an SEP holder is dominant.

The court now held that *"[…] it must be assessed on an individual basis whether the technical teaching which is accorded protection actually enjoys said relevant dominance on the market under anti-trust law"*. The Court further stated that it is *"of the opinion that […] an assumption [of dominance on the market] in the case of every standard-essential patent would constitute an error"*. In this context the Court noted that the party asserting the notion of a dominant position – in other words the defendant raising the FRAND-defence – must first present the circumstances justifying such an assertion. The reason for this is that significance of the standard in the market may be low because e.g. there may be competing standards, or there may also be functions included in the standard which are of lesser significance to the market.

Applying these findings on the case at hand, the Court found that the plaintiff is not dominant, because there are technical alternatives available to the protected NFC-implementation on the SIM-card, such as the implementation on a SD-card or a so-called „embedded Secure Element (eSE)", which the Court found particularly suited as a potential substitute technology.

The Court noted however, that *"a dominant position can also be assumed even if products are offered on the market in question […] which do not have the product configuration of the standard-essential patent"*. But the prerequisite for an assumption of a dominant position on the market in such a situation is that without access to the use of the patent in suit, a competitive offer is not possible. An indication in this regard can be how far the technology in question has already penetrated the market. The Court clarified however that this indication cannot be based merely on rigid percentage thresholds.

The decision in German language is available at: http://www.duesseldorfer-archiv.de/?q=node/6281

3.1.1.3 President of the District Court of The Hague, Decision of 24 October 2014, *ZTE v. Vringo*

As of September 2012, Vringo and ZTE have been engaged in licensing negotiations regarding Vringo's portfolio of SEPs, but to no avail. In April and May 2014, on the basis of the EU 608/213 Customs Enforcement Regulation, at Vringo's request, Dutch customs seized several shipments of ZTE's goods using UMTS technology. The goods allegedly infringed Vringo's EP 186 119 B2 ("EP 119"), that has been declared essential for UMTS. Subsequently, Vringo made ZTE a last licensing offer on 18 June 2014. ZTE did not respond to this offer and instead initiated preliminary proceedings before the (President of) District Court of The Hague to amongst others lift the customs seizure and prohibit Vringo from effectuating further seizures on the basis of any of its SEPs, including amongst others EP 119. A month in the proceedings, on 19 Augustus 2014, ZTE made a counteroffer to Vringo (the "ZTE Offer").

At the heart of the dispute before the President of the District Court in The Hague is whether ZTE is to be considered a willing licensee under FRAND terms and whether Vringo was, under the given circumstances, entitled to enforce its rights.

Referring to previous decisions, the court first establishes that the mere existence of an obligation to license at FRAND terms does not mean that a SEP holder is not entitled to enforce its rights. Save for exceptional circumstances, such action does not amount to an abuse of power or unlawful or unreasonable conduct of the patent holder. ZTE's assertion that it automatically obtained a license because of Vringo's FRAND obligation is also rejected on that basis.

The court further holds that the circumstances of the European Commission's decision *re Motorola* (the "Motorola decision"), on which ZTE's argumentation relies to a great extent, differ from those of the matter at hand. According to the court, the ZTE Offer substantially differs from the Second Orange Book Offer made by Apple in the Motorola decision which (finally) made Apple a willing licensee. The court holds that at the very least, it is doubtful whether the ZTE Offer made ZTE a willing licensee. In that respect, the court refers to parallel proceedings before the German court in Mannheim, in which a similar offer was not held sufficient to make ZTE a willing licensee. Because the court in preliminary relief proceedings finds that ZTE's "willing licensee defence" is not likely to succeed in main proceedings, the customs seizure is maintained and the claims of ZTE are denied (as the court considers that the infringement is sufficiently demonstrated and the invalidity of the patent is not sufficiently in doubt (the patent having been upheld in appeal in opposition proceedings).

Superfluously, the court considers that even if the initial licensing offer of Vringo of 28 March 2013 would have been contrary to FRAND terms, this would not have affected the outcome of the proceedings, because ZTE had failed to raise substantive objections thereto prior to the customs seizure. As a result it cannot be concluded that Vringo would not be willing to license on FRAND terms. Furthermore, according to the court, the customs seizure cannot be perceived as Vringo forcing its licensing terms on ZTE. In the matter at hand, the seizure was not so much a reaction to an unsatisfactory counteroffer by ZTE, but rather a reaction to the absence of any (counter)offer by ZTE whatsoever (apparently in view of the fact that ZTE considered EP 119 not to be infringed / invalid). In such case ZTE would have to accept the consequences of its actions.

3.1.1.4 Tribunal de Grande Instance de Paris, 3è ch. 2è sec., 17 April 2015, *Core Wireless Licensing v LG Electronics*, n° 14/14124

On 17 April 2015, the Tribunal de Grande Instance de Paris issued a decision in relation to SEPs and FRAND obligations.

Core Wireless and LG failed to find an agreement regarding the licensing of Core Wireless' portfolio of 1.261 SEPs relating to 2G, 3G and 4G ETSI standards. These patents had been filed by Nokia Corporation and then transferred to Core Wireless in 2012. Core Wireless asked the court to set a royalty a FRAND rate for the licensing of its SEPs to LG. LG replied that the patents were invalid or, at least, non-essential to the standards and that such a claim from Core Wireless was an abuse of a dominant position.

The court confirmed that the ETSI IPR Policy, including the FRAND commitments, was applicable, but ruled that Core Wireless had not demonstrated that any of the asserted patents was essential to any of the standards. In this context, there was no need for the Court to set a royalty rate. The decision is noteworthy because it is the first time that a French Court checked the question of essentiality in details.

Also, the court ruled that there was no abuse of a dominant position as long as Core Wireless did not try to prevent LG from using the patents: "*the only act of filing a complaint to have a court set a royalty rate, which could not be set trough negotiations, could not constitute an abuse of a dominant position without any other circumstances demonstrating notably the will to prevent LG from using the said patents in exchange of fair and proportionate royalties*"

3.1.1.4. In the High Court of Justice (England and Wales), Chancery Division, Patents Court on 21 July 2015 between Unwired Planet International Limited and Huawei Technologies, Samsung Electronics and others, with Telefonaktiebolaget L M Ericsson and others joined

On 21 July 2015, the UK High Court handed down an interim judgment in *Unwired Planet v Huawei & Samsung et al.*, with Ericsson also joined as a party to the proceedings, among others. This interim judgment is interesting for its consideration of issues surrounding the transfer of an ETSI FRAND obligation.

The interim judgment from Mr Justice Birss was handed down in on-going proceedings between Unwired Planet and Huawei and Samsung concerning alleged infringement of five SEPs, and one further patent which is not an SEP. The five SEPs were acquired from Ericsson by Unwired Planet in a master sale agreement (MSA) dated 10 January 2013. The interim judgment concerned principally an application by Ericsson in the on-going proceedings to strike out allegations of breaches of Article 101 TFEU. Samsung had contended that:

(i) in transferring patents to Unwired Planet, there was a failure to ensure the complete, proper and effective transfer of an enforceable FRAND obligation;
(ii) by dividing Ericsson's patent portfolio and transferring only part, a breach of competition law had taken place in that unfair higher royalties would be earned and competition would be restricted or distorted;
(iii) certain terms in the MSA were standalone infringements of Article 101 TFEU.

In the interim judgment, Mr Justice Birss declined to strike out allegations (ii) and (iii), and so these issues will be considered later at trial. However, he did strike out allegation (i) and in doing so considered a number of issues relating to the transfer of a FRAND obligation.

Samsung had submitted that the MSA did not compel Unwired Planet to give a FRAND undertaking. It also argued that, even if the MSA did compel Unwired Planet to give a FRAND undertaking, that obligation was only enforceable by Ericsson and not by third parties on the basis that the MSA could have, but expressly did not, allow third parties to enforce its terms. Samsung emphasised that, what had to happen in order to satisfy Article 101 TFEU, was not merely that Unwired Planet had to be compelled to offer a FRAND undertaking to ETSI (which it did), but that Ericsson's own FRAND undertaking itself had to be transferred to Unwired Planet.

On the first point, Mr Justice Birss considered the suggestion that the arrangement between Ericsson and Unwired Planet failed to compel Unwired Planet to make a FRAND declaration was hopeless and should be struck out.

On the second point, Ericsson had submitted that once a party made a FRAND declaration to ETSI, that commitment to license on FRAND terms would be enforceable by a third party against the declarant. Samsung had disputed this, but Mr Justice Birss agreed with Ericsson in that anyone seeking a license under the patents would be entitled to require Unwired Planet to license on FRAND terms.

On the third point, Samsung had alleged that the splitting up the portfolio and transferring only a portion to Unwired Planet meant that Ericsson's FRAND obligation could not itself have been transferred, since the obligation was only in respect of the entire portfolio, and as a result Article 101 TFEU was breached on this point, irrespective of the fact that Unwired Planet had made its own FRAND commitment to ETSI for the patents which it acquired from Ericsson. Mr Justice Birss disagreed with Samsung, stating that the fact that the transferee's FRAND commitment was a fresh one, rather than a commitment based in some way on a consideration of the larger portfolio, had no real prospect of being shown to have as its object or effect a distortion or restriction of competition contrary to Article 101 TFEU.

In summary, the UK Court decided that the making of a fresh ETSI FRAND commitment by Unwired Planet, in addition to the terms of the MSA, meant that there was no contravention of Article 101 TFEU merely on the basis that the FRAND obligation itself had not been transferred.

The proceedings now continue to various trials in 2015 and 2016, with the patent trials commencing in October 2015, and the remaining competition law issues being considered in a trial scheduled for October 2016.

The interim judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Patents/2015/2097.rtf

3.1.2. United States

3.1.2.1. U.S. Court of Appeals for the Federal Circuit, *Ericsson Inc. v. D-Link Systems, Inc.*, Case 2013-1625, -1631, -1632, -1633 (Fed. Cir. Dec. 4, 2014).

The Federal Circuit's ruling in the *Ericsson v. D-Link Systems* appeal provides further guidance regarding the assessment of damages in patent infringement cases in the United States that involve SEPs. The U.S. District Court for the Eastern District of

Texas had found D-Link liable for infringement of Ericsson's SEPs related to IEEE 802.11 Standard-related technologies and had assessed damages at US$0.15 per infringing device. The Federal Circuit upheld the judgment of infringement but vacated the damages assessment and remanded the case back to the District Court for further proceedings. In so doing, the Federal Circuit noted a number of factors relating how damages should be assessed.

The Federal Circuit stressed that the "entire market value rule" (EMVR) should be applied and explained that the EMVR actually has two parts: a legal rule and an evidentiary principle. The legal rule is that damages should be assessed based on the incremental value of the patented idea to the actual product. The evidentiary principle relates to how the royalty base for assessing damages should be chosen. The court said that, "where the entire value of a machine as a marketable article is 'properly and legally attributable to the patented feature,' the damages…may be calculated by reference to that value," citing its prior decision in *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 41, 67, 68 (Fed. Cir. 2012). But where this is not the case, the royalty base may correspond to "often, the smallest salable unit and, at times, even less," citing its prior decision in *VirnetX, Inc. v. Cisco Systems, Inc.*, 767 F.3d 1308 (Fed. Cir. 2014). Furthermore, the Court stressed that damages should be based on the added value attributable to the use of the patented feature, and not on the value of the patent being part of the standard (i.e., an SEP).

The Court provided additional guidance regarding jury instructions and the assessment of damages in such cases, including:

- The existence of a RAND (FRAND) commitment is a factor that may be considered in assessing damages.

- The *Georgia-Pacific* factors (*see, e.g., Monsanto Co. v. McFarling*, 488 F.3d 973 (Fed. Cir. 2007) and *Georgia-Pacific Corp. v. U.S. Plywood Corp.,* 318 F.Supp. 1116 (S.D.N.Y. 1970)), normally applied in assessing damages in patent infringement cases, are not *per se* applicable to RAND cases, as many of these factors are not relevant, or may be misleading, if there is a RAND commitment, and the Court did not make any *per se* modification of the *Georgia-Pacific* factors, instead noting that applicability of any particular factor in a RAND-related case is based on the facts of the case.

- Other licenses relating to the SEPs in the case may be presented as royalties-related evidence in assessing damages, but they must be presented in their individual contexts. Most notably, licenses are not normally negotiated using the EMVR and are, rather, negotiated between the two parties who reach mutually acceptable terms.

- Royalty stacking and patent hold-up may be considered, but evidence of actual royalty-stacking or patent hold-up must be presented to establish this.

In summary, the Court emphasized that a jury should be instructed only on "factors relevant to the specific case at issue."

The Federal Circuit's ruling can be found here: http://www.cafc.uscourts.gov/images/stories/opinions-orders/13-1625.Opinion.12-2-2014.1.PDF

3.1.2.2. U.S. International Trade Commission, Initial determination on Remand, *In the Matter of Certain 3G Mobile Handsets and Components Thereof* (Inv. n° 337-TA-613)

By way of Initial Determination on Remand issued April, 27 2015, Administrative Law Judge (ALJ) Theodore R. Essex of the United States International Trade Commission (ITC) held that Nokia's 3G mobile handsets infringe the asserted claims of U.S. Patents Nos. 7,190,966 and 7,286,847 owned by InterDigital Communications Corp. (referred herein as InterDigital). As part of holding, ALJ Essex considered several FRAND-related issues.

To lay the procedural background leading to the Initial Determination on Remand by ALJ Essex, the ITC instituted an investigation in September 2007 based on a complaint filed by InterDigital. The respondents in this proceeding are Microsoft Oy and Nokia Inc. and Nokia, Inc. (collectively referred herein as Nokia/MMO). In August 2009, the ITC affirmed ALJ Luckern's Determination finding no violation of US Patent Nos. 7,190,966 and 7,286,847. The ITC affirmed the finding of no violation and terminated the investigation in October 2009. However, the affirmation was appealed to the US Court of Appeals for the Federal Circuit in 2012 which reversed the claim construction of several claim terms and returned jurisdiction back to the ITC on remand. Accordingly, in March 2014 the ITC ordered the remanding of certain issues to the ALJ. The remanded issues included considering evidence concerning public interest factors, briefing the issue of the standard-essential nature of the patents-in-suit, and whether a patent hold-up or reverse hold-up occurred.

Regarding public interest factors, ALJ Essex reasoned there was no detriment to public health if an exclusion order issued as a result of this proceeding. ALJ Essex reasoned that there is no evidence that the mobile phone and operating system at issue provides any public health and safety benefit that other smart phones cannot provide. Furthermore, ALJ Essex determined United States consumers would not be impacted by an exclusion order because there was no evidence to support the contention that Nokia phone users would be dissatisfied by another brand.

ALJ Essex also examined the issue of whether the patents-in-suit are essential to a standard. In the proceeding, the respondent Nokia/MMO argued that its products did not infringe the patents-in-suit. In arguing this, ALJ Essex opined that Nokia/MMO, in arguing non-infringment, is also arguing that the patents-in-suit are not SEPs. He further concludes that if the patents in question are not SEPs, InterDigital has no duty to offer a license under FRAND terms.

ALJ Essex notes that InterDigital FRAND-licensing declaration to the European Telecomm Standards Institute (ETSI) does not say that the patents are assumed standard essential, rather the declaration states "…IPR(s) disclosed … may be or may become ESSENTIAL in relation to at least the ETSI Work Item(s)...". ALJ Essex reasoned that the Declaration does not prove the patents declared before ETSI are actually SEPs, and the Declaration "do[es] not create a duty that any patent so declared must be licensed on FRAND terms, but rather the agreement is one that has multiple contingencies." ALJ Essex also equated SEPs to the ETSI term "essential IPR". In the present proceeding and at the time of the Initial Determination on Remand, no court had declared the patents-in-suit to be SEPs, and the Declaration is not proof that the patents-in-suit are standard essential. ALJ Essex reasoned:

> "if the patents are valid and infringed, but not SEPs, the respondents would have no rights regarding licensing under the ETSI agreement, the duty to license under FRAND terms is only triggered if the IPRs are or become and remain essential to the standard. The duty to license on FRAND terms, if there is one, is a springing duty."

Alternatively, ALJ Essex considered another possible outcome:

> "the patents[-in-suit] could be valid, not essential to the Standard, and yet still be infringed, so the carrying of the burden of proof that these patents are standard essential is an issue that must be considered by the ALJ."

In the present proceeding, Nokia/MMO did not present any evidence that the patents-in-suit are standard essential, and therefore, Nokia/MMO was not entitled to claim the rights available under ETSI FRAND policy. Further, the burden of proof remains with the proponent of the factual proposition (19 CFR 210.37) and nothing has shifted that burden of proof in the proceeding.

ALJ Essex also examined whether InterDigital acted in bad faith if the patents-in-suit are indeed standard essential. Under the previous ruling before ALJs of the ITC, the agreement created by ETSI does not reach the level of a contract. ALJ Essex restated critical considerations when examining whether a contract was formed in good faith. First, it is noted that parties giving a FRAND commitment to ETSI and thereby signing a licensing agreement for IPR at ETSI do not know what the FRAND rate is because absent an agreement and determination by a court, the FRAND rate is not known. Further,

> "to prove a violation of FRAND, as it is defined in ETSI, there must be voluntary agreement or a trial in a district court, and only after the court determines a rate, could we look retrospectively at the negotiations and determine if the offers were within the FRAND range."

Next, ALJ Essex examined evidence of hold-up or hold-out. In regards to hold-up, ALJ Essex restated the decision from Ericsson, Inc. v. D-link Sys., Inc.:

> "In deciding whether to instruct the jury on patent hold-up and royalty stacking, again, we emphasize that the district court must consider the evidence on the record before it. The district court need not instruct the jury on hold-up or stacking unless the accused infringer presents actual evidence of hold-up or stacking. Certainly

> something more than a general argument that these phenomena are possibilities is necessary." (Ericsson, Inc. v. D-link Sys., Inc., 773 F.3d 1201 (Fed. Cir. 2014).

Ericsson also places the burden of proof for a violation of FRAND on the respondent. In this proceeding before ALJ Essex, Nokia/MMO failed to carry the burden and no evidence presented indicates that InterDigital attempted to negotiate in bad faith, and there was no evidence of a hold-up.

Similarly, ALJ Essex analyzed patent hold-out. During the timeframe from August 2009 until the decision by the Federal Circuit in 2012, there was no evidence of bad faith by either party during licensing negotiations, and therefore, no hold-out by Nokia/MMO.

However, once the Federal Circuit rendered a decision in 2012, Nokia/MMO was on notice that they infringed the patents-in-suit and should have been aware and they may have to take a license. Due to the new decision and remand issues, ALJ Essex stated that "where a respondent uses a technology covered by a patent, and refuses to take a license to the technology or refuses to negotiate in a meaningful way there is reverse hold[-]up," and therefore, there is evidence of reverse hold-up on the part of Nokia/MMO. A "reverse hold-up" describes the situation in which a manufacturer that is using standard-essential patent technology refuses to enter into a license agreement with the patent owner or otherwise to pay compensation".

The ITC issued a Notice of Commission Decision to Review in Part a Final Initial Determination on Remand 25 June 25, 2015. In the Notice, the ITC requests several responses to ETSI IPR and FRAND related questions. The ITC invited comments from the parties and interested persons to be filed by July 10, 2015, and for reply submissions by July 20, 2015. As of July 24, 2015, no further determinations have been made.

The Initial determination on Remand is available at: http://www.usitc.gov/press_room/documents/337_613r_id.pdf

The Notice of Commission Decision can be found here: http://www.usitc.gov/secretary/fed_reg_notices/337/337_613_notice06252015sgl.pdf

3.2 Activities by antitrust enforcement agencies

3.2.1. *National Development and Reform Commission* of the Government of the People's Republic of *China* (NDRC), Decision of 10 February 2015, *re Qualcomm*

China's National Development and Reform Commission announced its investigation decision re Qualcomm on 10 February 2015. In the decision, the NDRC defined two relevant markets, i.e. (i) the license market of SEPs for wireless communication technology, which is a collection of each independent license market constituted by each SEP held by Qualcomm, and (ii) baseband chip market, including CDMA baseband chip market, WCDMA baseband chip market, and LTE baseband chip market.

The NDRC found that Qualcomm had dominance in each of the two markets. In determining Qualcomm's dominant position in each of the relevant markets, the NDRC mainly focused on factors including market share, Qualcomm's control over the relevant market, downstream customers' reliance on Qualcomm's technology/products and market entry barriers.

NDRC also found that Qualcomm engaged in three types of anticompetitive conducts, *i.e.* charging unfairly high royalties, tying SEPs with non-SEPs and imposing unfair conditions on the sale of baseband chips.

Based on these findings, NDRC determined that Qualcomm violated the Chinese Anti-Monopoly Law, eliminated and restricted market competition, hindered and repressed technology innovation and development, and harmed consumer interests.

NDRC required Qualcomm to (i) cease the anticompetitive conduct, (ii) pay a fine of RMB6.088 billion; and (iii) implement rectification measures agreed upon by Qualcomm and NDRC. The rectification measures mainly include (i) lowering royalty base; (ii) no charge for expired patents; (iii) no cross-license of non-SEPs against licensees' will and no cross-license without fair compensation; (iv) eliminating tying of SEPs and non-SEPs without justification; and (v) modifying sales terms for baseband chips.

3.2.2 China's State Administration for Industry and Commerce ("SAIC"), Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights

On 13 April 2015, the State Administration for Industry and Commerce released the Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights (the " Regulation"). The regulation is dated 7 April, and will enter into force on 1 August 2015.

The SAIC IPR Abuse Regulation implements the high-level principle in the Anti-Monopoly Law ("AML") that the law does not apply to the lawful exercise of intellectual property rights, but does apply to anti-competitive IPR abuses. In this context, the Regulation confirms that the ownership of an IPR does not necessarily confer market dominance, but that an IPR's nature as a legally authorized "monopoly" over a technology or product is an important factor in determining dominance.

Some provisions worth mention are:

The Regulation introduces a compulsory licensing requirement on essential facilities, *i.e.* requiring patent owners with market dominance to license their IP rights mandatorily under reasonable conditions when the intellectual property is an essential facility. In this context, Article 7 of the Regulation specifies the factors that determine what an essential facility is: First, the IPR must be indispensable for the licensee to compete in the market. Second, refusal to license could have a negative impact on competition or innovation, and impair consumer welfare and public interest. Third, the compulsory license must not cause unreasonable harm to the licensor.

Article 10 lists a number of types of licensing conditions that dominant licensors cannot insert in agreements absent valid reasons – for example, exclusive grant-backs to improved technology, no-challenge clauses, non-compete clauses, etc.

Article 13 of the Regulation is addressing standard essential patents and attempts to regulate setting of standards as well as their implementation. The article describes first the general principle that IPRs shall not be used to prohibit or restrict competition during the setting and the implementation of standards. It then deals in more detail with two specific prohibitions: (i.) The assertion of an SEPs after having deliberately failed in violation of the rules of the standards-setting organisation to disclose the essentiality of the patent in question during the standard setting process; and (ii.) the IPR holder's refusal to license SEPs under FRAND terms.

The Chinese text of the regulation can be found here: http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201504/t20150413_155103.html

3.2.3 Korean Fair Trade Commission, Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights

KFTC's Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights ("the Guidelines"), enacted in 2000, are internal guidelines for KFTC officials' interpretation and enforcement of MRFTA with respect to exercise of IPRs. Although they do not constitute law, the Guidelines are significant as they show KFTC's current policy and views regarding enforcement of MRFTA related to exercise of IPRs.

KFTC amended the Guidelines in December 2014, and the key amendments include: (i) new provisions for non-practicing entities ("NPEs"); (ii) changes to provisions for SEPs; and (iii) changes to review principles, as elaborated below.

First, the amended Guidelines include new provisions for NPEs, including definition of NPEs and description of their primary business. The Guidelines explain that NPEs are more likely to abuse patent rights than patentees in general, and provide examples of acts that are likely to be found as restricting competition, including imposing a markedly unreasonable level of royalties in light of normal trading practices. Although this provision of the amendment attempts to define NPEs and their activities to be regulated, the general view from the practitioners is that the both the definition of NPE and the activities to be regulated are ambiguous.

Second, changes were made to provisions for SEPs to include additional types of conducts that are likely to be found unreasonable, such as unreasonably avoiding or circumventing the granting of a license on FRAND terms, imposing discriminatory conditions when licensing SEPs, and restricting the licensee's exercise related patents. These provisions may be in conflict with SSO IPR policies. It is generally accepted view that the SSO IPR policies are intended to ensure "access" to SEPs for implementers, and they are not intended to set adequate royalty rates or the way licensing discussions are carried out by the parties.

Third, other noteworthy new provisions include unreasonable royalty calculation (by including in the royalty calculation the portion of the licensed product in which the licensed technology is not used), unreasonable conditions against patent exhaustion doctrine, unreasonable tying or bundling, and unreasonable restraints on competition for innovation (with new definition on "Innovation Market").

Although the Guidelines are not legal authority to be relied, the recent amendments to the Guidelines have caused some concerns among the IP practitioners in Korea, as amended Guidelines leave ambiguities in defining the certain terms such as "NPE" and "Innovation Market" as well as the activities to be regulated, and also as the amendments show the regulatory agency's willingness to step in to regulate activities of the members of the SSO relating to SEPs.

An English translation of the Guidelines is available under this link: http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Unfair%20Exercise%20of%20Intellectual%20Property%20Rights_mar%2014%202012.pdf

3.2.4 Japan Fair Trade Commission (JFTC), Draft Partial Amendment of "Guidelines for the Use of Intellectual Property under the Antimonopoly Act"

The JFTC's Guidelines for the Use of Intellectual Property under the Antimonopoly Act (the *"Guidelines"*) provide a comprehensive overview of the types of arrangements or agreements involving IP rights that are permissible or impermissible under the Antimonopoly Act.

Based on a result of a survey on "Issues related to Essential Patents", the JFTC released on 8 July 2015 a draft for a partial amendment of the Guidelines, which introduces provisions on SEPs and FRAND licensing in the Guidelines

According to the draft Guidelines a refusal to license an SEP for which a FRAND commitment has been given or claiming an injunction for such a patent against a party who is willing to take a license on FRAND terms can constitute unlawful Private Monopolization or Unfair Trade Practices.

The Guidelines note with this regard that whether a party is not a "willing licensee" has to be assessed on the circumstances of each case. The Guidelines however explain that:

(i) a party is deemed to be "willing" if it shows its intention to have the FRAND license conditions determined by a court or through arbitration procedures in case that the parties do not reach an agreement on the license conditions even after a certain period of negotiations.

(ii) challenges to the validity, essentiality or possible infringement of the SEP, doesn't make a party which intends to be licensed on FRAND terms "unwilling".

The public commenting period on the draft is open until 6 August 2015.

An English translation of the Guidelines is available here: http://www.jftc.go.jp/en/pressreleases/yearly-2015/July/150708.files/Attachment1.pdf

An English translation of the survey can be found here: http://www.jftc.go.jp/en/pressreleases/yearly-2015/July/150708.files/Attachment2.pdf

3.2.5 Canadian Competition Bureau, Draft Intellectual Property Enforcement Guidelines

The Competition Bureau's ("Bureau") *Intellectual Property Enforcement Guidelines* (the "*IPEG*") describe how the Bureau approaches the interface between competition policy and IP rights, and describe the circumstances in which the Bureau, under the general provisions of section 32 of the *Competition Act*, would seek to restrain anti-competitive conduct associated with the exercise of IP rights, to maintain competitive markets.

On 9 June 2015, the Bureau released a Phase II draft update of the *Guidelines*, concentrating on the Bureau's enforcement approach in the areas of SEPs, Patented Medicines (Notice of Compliance) (PMNOC), patent litigation settlements and patent assertion entities (PAEs).

Regarding SEPs and FRAND licensing, the Bureau recognizes that the development of such standards, whether through formal SDO or other means, can have pro-competitive benefits, including ensuring product interoperability, lowering production costs, increasing efficiency and consumer choice, and fostering innovation. However, the Bureau also recognizes that standard development can pose competition concerns, such as reducing price competition, foreclosing innovative technologies and restricting firms' ability to compete by denying access to the standard or providing access on discriminatory terms. Another important concern is that of patent "hold-up", which occurs when patented technologies are incorporated into a standard. An example of patent hold-up is when the owner of a patented technology deliberately fails to disclose its patent to an SDO, and then later asserts that patent when access to its patented technology is required to implement the standard, leading to patent ambush.

To reduce the potential for patent ambush, many SDOs adopt an IP policy requiring members to disclose their patents that may draw upon the standard that the SDO selects. In the Phase II draft Guidelines, the Bureau considers patent ambush a potential "abuse of dominance" under section 79 of the Competition Act, in the scope of determining whether the conduct may result in a prevention or lessening of competition, in which case the Commissioner of Competition may seek a remedial order from the Tribunal.

The draft Guidelines set out a similar approach with respect to a patent holder reneging on commitments (i.e. with regard to licensing terms and royalties) made in the course of a standard-setting process, or seeking injunctions against firms that are “locked-in” to a standard and face prohibitive costs to switch to alternative technologies. In this latter regard, the Bureau states that it may be appropriate for a firm that has made a FRAND licensing commitment to seek an injunction against an infringing party when the potential licensee is unwilling to enter into negotiations or to pay a “FRAND rate” determined by a court or arbitrator.

The Bureau’s approach to reviewing policies of SDOs with regard to disclosure of IP rights, licensing commitments and conduct of members in relation to joint negotiation or discussion of licensing terms is also discussed in the phase II draft of the Guidelines. For instance, Example 14 of the Guidelines describes an SDO that adopts a disclosure policy requiring members to disclose all existing or pending patent rights relating to the possible standard, and to agree to license such rights on FRAND terms to all prospective licensees, with additional encouragement on the part of the SDO for members to specify the most restrictive licensing terms and conditions (including the maximum royalty) that they would require to license their patented technology. Recognizing that its members would include entities that compete with one another, the SDO’s policy also prohibits the joint negotiation or discussion of licensing terms among members. In such a scenario, the Guidelines state that:

> […] if the Bureau determined the SDO arrangement was only to set a standard for […] interoperability [of the subject products] and there were no joint discussions of licensing terms and conditions, it would likely conclude that the SDO was not an agreement that constituted a ‘naked restraint’ on competition”.

This would result with the Bureau reviewing the arrangement under section 90.1 of the Competition Act, according to the framework outlined in the Bureau’s Competitor Collaboration Guidelines ("CCGs").

Regarding PAEs, who acquire patents from innovating companies and then demand licensing fees from companies that are allegedly infringing their patents, the draft Guidelines indicate that the Bureau may take action against PAEs under the civil or criminal misleading advertising provisions of the Act, including sections 74.011 and 52.01 of the Act, which prohibit sending false or misleading electronic messages or emails, new provisions introduced following the adoption of Canada’s anti-spam legislation (CASL).

Example 10 of the draft Guidelines refers to a PAE sending thousands of notices to businesses demanding licensing fees and alleging it has poof of infringement. The Bureau says it would review such conduct to determine whether the PAE has, in fact, proof of infringement or is rather sending notices indiscriminately. In addition, the Bureau would have to be able to convince a court or the Competition Tribunal that these notices are representations “made to the public” within the meaning of sections 52 or 74.01(1)(a) of the Competition Act. In cases where the reviewable matters prohibitions against misleading advertising have been found by the court to have been contravened, the court can order the business not to further engage in the conduct, to pay an administrative monetary penalty, to pay restitution to consumers, and to publish a corrective notice.

The IPEG are available here: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03935.html

3.2.6 Brazilian Administrative Council for Economic Defense (CADE), Decision 6 July 2015, Preparatory Proceeding no. 08700.008409/2014-00, *TCT Mobile Telefones Ltda. v. Telefonaktiebolaget L.M. Ericsson*

In a landmark decision (*Despacho* SG Nº 760/2015, dated 6 July 2015) the Brazilian Administrative Council for Economic Defense (CADE), which is the main Brazilian governmental agency in the field of antitrust and competition regulation, denied an Administrative Appeal filed by TCT against the agency's prior decision of dismissal of the Preparatory Proceeding *(Nota Técnica* nº 11/2015, dated 1 June 2015).

The Preparatory Proceeding started on 7 October 2014 at the request of TCT for the evaluation by the agency of the need to institute an administrative investigation proceeding of violation to the economic order due to alleged (*i*) abusive exercise of industrial property rights; (*ii*) coercive negotiation, and (*iii*) sham litigation. The administrative case involves the Brazilian Patents PI 9811615-0 and PI 9405405-3 that have been declared as being essential to ETSI standards and for which a FRAND commitment has been made by Ericsson. TCT alleged in the Request, in summary, that Ericsson started baseless patent infringement lawsuits, which are discriminatory and exclusionary, and are being used as a way to impose against TCT the execution of patent license agreement under duress. TCT argued that the patent infringement lawsuit would be baseless because Ericsson has committed to "assign" the patents to an international technological standard, and by doing so, it would be bound to the rules of the standard [body], being eligible only to reasonable and fair royalties (*i.e.*: not to injunctions preventing the sale of infringing products). Furthermore, TCT alleged that its use of the patented technology would be indirect since the patents-in-suit are related to the *chipset* of the mobile phone, which is supplied by third parties under sublicenses from Ericsson. Finally, TCT alleged that the patent infringement lawsuit is based in factual grounds that were distorted by Ericsson, while the actual aim of the lawsuit would be impose licensing under terms imposed solely by Ericsson, characterizing therefore sham litigation.

Ericsson replied the Request alleging that the lawsuits do not constitute sham litigation, because they were based in adequate legal grounds, without distortion of the factual grounds, being such analysis a non-permissible review of court decisions. In addition, Ericsson alleged that the lawsuits were started due to the holdout strategy applied by TCT.

Lawsuits listed in the Preparatory Proceedings according to Ericsson's Reply Brief:

a) 19 August 2012, *Ericsson v. TCT*, Rio de Janeiro State Court, #0373121-63.2012.8.19.0001, Patent Infringement Suit (Civil Suit) Patent No. PI9811615-0;

b) 29 November 2012, *Ericsson v. TCT*, Rio de Janeiro State Court, #0489343.17.2012.8.19.0001, Patent Infringement Suit (Civil Suit) Patent No. PI9405405-3;

c) 9 June 2014, *Ericsson v. TCT*, Rio de Janeiro State Court, #0197160-40.2014.8.19.0001, Patent Infringement Suit (Civil Suit) Patent No. PI9811615-0; Counterclaim by TCT on 11 March 2015 raising in summary a FRAND defense and unavailability of inunctions under the circumstances;

d) 19 December 2014, *TCT v. Ericsson*, Rio de Janeiro Federal Court, #0006532-93.2015.4.02.5101, Declaratory Civil Action seeking a declaratory judgement of unavailability of inunctions under the circumstances and limitation of relief to monetary damages.

The final Decision (*Despacho* SG Nº 760/2015, dated 06.Jul.2015) denied the Administrative Appeal and affirmed the prior Decision *(Nota Técnica* nº 11/2015, published 20 May 2015) that dismissed the Preparatory Proceeding stating in summary that:

a) Ericsson showed during the evidentiary procedures of the Preparatory Proceedings that the licensing negotiations (regarding Patents PI9811615-0 and P19405405-3) lasted for a very long period and are still being held under an arbitration proceeding instituted between the parties;

b) TCT failed to show that the royalties proposed by Ericsson are abusive and inconsistent with FRAND;

c) It would not be economically reasonable for Ericsson to seek [definitive] exclusion of TCT from the mobile phone market, because such exclusion would deprive Ericsson from collecting any royalties from TCT sales, especially considering that Ericsson is currently not within the market of mobile phone sales (product sales) but rather in the market of supplying technology to the manufacturers of mobile phones;

d) TCT did not bring any new facts or additional indicia that could motivate a new analysis of the issues already assessed in the prior decision that dismissed the Preparatory Proceeding.

The decision in Portuguese is available here: http://www.migalhas.com.br/arquivos/2015/7/art20150708-05.pdf

3.3 Other

3.3.1 Public Consultation of the European Commission, DG Growth, on Patents and Standards – A modern framework for standardisation involving intellectual property rights.

In October 2014, the Commission launched a consultation on patents and standards. In its consultation, DG-GROWTH requested input on eight key topics arising in the context of standardisation involving patents, *i.e.*:

- Standardisation involving patents is common in the telecommunication industry and in the consumer electronics industry. Which other fields of standardisation comprise patent-protected technologies or are likely to do so in the future?

- A variety of rules and practices govern standardisation involving patents. Which elements of these rules and practices are working well and should be kept and/or expanded? Which elements on the other hand can be improved?
- Patent transparency seems particularly important to achieve efficient licensing and to prevent abusive behaviour. How can patent transparency in standardization be maintained/increased? What specific changes to the patent declaration systems of standard setting organizations would improve transparency regarding standard essential patents at a reasonable cost?
- Patents on technologies that are comprised in a standard are sometimes transferred to new owners. What problems arise due to these transfers? What can be done to prevent that such transfers undermine the effectiveness of the rules and practices that govern standardisation involving patents?
- Patent pools combine the complementary patents of several patent holders for licensing out under a combined licence. Where and how can patent pools play a positive role in ensuring transparency and an efficient licensing of patents on technologies comprised in standards? What can public authorities and standard setting organizations do to facilitate this role?
- Many standard setting organizations require that patents on technologies included in their standards are licensed on "fair", "reasonable" and "non-discriminatory" (FRAND) terms, without however defining these concepts in detail. What principles and methods do you find useful in order to apply these terms in practice?
- In some fields standard essential patents have spurred disputes and litigation. What are the causes and consequences of such disputes? What dispute resolution mechanisms could be used to resolve these patent disputes efficiently?
- How can holders of standard essential patents effectively protect themselves against implementers who refuse to pay royalties or unreasonably delay such payment? How can it be ensured that injunctions based on standard essential patents are not used to (a) either exclude companies from implementing a standard or (b) to extract unreasonable, unfair or discriminatory royalties?

The Commission asked detailed questions to each of these eight topics and is keen to learn more about the practicalities involved in complying with the current set of rules and practices on standardisation involving patents as well as in the quantitative impacts of possible changes.

The consultation was open from 14 October 2014 to 15 February 2015. The Commission received a large number of contributions, which can be accessed here http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_type=252&lang=en&item_id=7833.

4. Recommendations

The Committee recommends that

- this Report be addressed in the ExCo meetings in Rio de Janeiro;

- the visibility of Annual Reports with substantial content of AIPPI's Standing Committees be further increased in and outside of AIPPI, *e.g.* through articles in magazines of media partners.

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