

Standard-setting and EU competition law

Damien Geradin

Intertic conference, Rome

24 May 2012

COVINGTON & BURLING LLP

BEIJING BRUSSELS LONDON NEW YORK SAN DIEGO SAN FRANCISCO SILICON VALLEY WASHINGTON

The growing importance of standardization

- In today's technology-driven world, industry standardization, device interoperability, and product compatibility have become critical to promoting innovation and competition.
- Standards are typically created by standard-setting organizations (SSOs) composed of participants from a given industry.
- SSOs have thus gained importance in technology-driven sectors.
- A wide variety of SSOs engaged in standardization efforts in an increasingly large number of industries.

Standardization and the FRAND regime

- Under traditional standards development procedures IPRs owners:
 - Disclose the patents they consider essential for a standard
 - Typically provide an assurance or commitment that, if their patents are included in a standard, they will license their IPRs on fair, reasonable and non-discriminatory (FRAND) terms, with or without monetary compensation
- Licensing terms are typically negotiated on a bilateral basis outside the SSOs

Different Business Models and Incentives

- Firms with different business models have different incentives when it comes to IP licensing:
 - Pure innovators (upstream only) - Royalties represent the life blood of these companies
 - Vertically-integrated firms (upstream and downstream) - Essentially interested in cross-licensing; low royalties or even a zero royalty may be acceptable
 - Pure manufacturers (downstream only) - Want to pay less in royalties as this reduces their costs
 - Buyers of equipment - Also tend to believe that lower royalties would be beneficial by reducing the price of equipment

Main criticisms of the FRAND regime

- **Patent hold-up:** Risk that once a standard has been adopted, essential patent holders will seek to exploit the additional market power allegedly conferred by standardization to charge “excessive” royalties in breach of their FRAND commitment
- **Abusive use of injunction:** Risk that essential patent holders will use this enforcement tool to coerce potential licensees to conclude a license at terms that are not FRAND

Past investigations

- *Qualcomm*: Commission investigated whether Qualcomm's licensing conduct with respect to 3G standard was exploitative
 - Case closed
- *Rambus*: Commission investigated whether Rambus engaged in patent ambush by failing to disclose essential patents during standard development
 - Article 9 commitment decision

Commission guidelines on horizontal agreements

- “Safe harbour”: SSOs whose policies meet certain conditions will be insulated from claims that agreements they operate under and/or adopt are anticompetitive
- Identify the risk of “hold up” and states that “An abuse of the market power gained by virtue of IPR being included in a standard constitutes an infringement of Article 102”
- Argues “in case of a dispute, the assessment of whether fees imposed for patents in the standard-setting context are unfair or unreasonable, will be based on whether the fees bear a reasonable relationship to the economic value of the patents”

Policy statements by VP Almunia

- “We must [...] ensure that, once they hold standard essential patents, companies give effective access on fair, reasonable and non-discriminatory terms. This is crucial if we want industries and businesses relying on such patents to develop freely to their utmost potential.”
- “By threatening to use injunctions, [holders of standard essential patents] can also make demands that their commercial partners would not accept under normal circumstances. For example, fearing exclusion from the market, companies might be forced to share valuable patented inventions with a competitor or pay excessive royalties which are then passed on to consumers.”

Google / Motorola Mobility merger decision

- The Commission considers that “[t]he seeking of injunctions on the basis of SEPs is ... not, of itself, anti-competitive” and adds that “[i]n particular, and depending on the circumstances, it may be legitimate for the holder of SEPs to seek an injunction against a potential licensee which is not willing to negotiate in good faith on FRAND terms.” (¶ 126, emphasis added)
- The decision, however, identifies three sets of circumstances in which “[an SEP holder] would be in a position to cause a significant impediment to effective competition, in particular by having recourse to injunctions against good faith licensees, with the aim of : (i) raising the royalty levels (both rate and base) ...; (ii) forcing potential licensees into cross-licences on terms which they would otherwise not have agreed to; and/or (iii) excluding competitors from the market.” (¶ 109).

Pending investigations

- *Samsung* (IP/12/89, 31 January 2012): Apple complained that Samsung used injunctions to coerce it to accept license at terms that are not FRAND
- *Motorola* (IP/12/345, 3 April 2012): Microsoft made similar allegations vis-à-vis Motorola's licensing conduct
- Other complaints?

Relevant considerations

- Good faith vs bad faith during licensing negotiations
- Genuine concern vs use of Commission process in the context of patent war
- Existence of a benchmark that helps determining whether license terms are FRAND
- Past behavior in standard-setting and licensing negotiations

Contacts

Prof. Damien Geradin

COVINGTON & BURLING LLP

Avenue des Arts, 44

B-1040 Brussels - Belgium

Tel: 32-2-5495275

dgeradin@cov.com / www.cov.com