

Getting Past the SEP RAND Obsession: Some Thoughts on the Economic Implications of Unilateral Commitments and the Complexities of Patent Licensing

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The Commercial Function of Patents in Today's Innovation Economy

September 13, 2013

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The Research Question

- Are FRAND Commitments Limited to SSOs?
 - Many SSOs require firms to make patents that are essential to implement a standard available to implementers on FRAND terms
 - FRAND terms encourage investment in standards by reducing risk of holdup
- But Commitments Are Made Outside of SSOs too
 - FRAND commitments outside of SSO context are designed to encourage investment in standards without risk of holdup
 - Where firms rely on such FRAND commitments, the patent holder may obtain market power
- How to define FRAND depends on SEPs role in the industry

Patents Outside of SSO Operations

- How an industry coordinates to achieve necessary interoperability is a strategic choice
 - De facto standards, SSO standards, forum and consortia, etc. all possibilities
- De facto standards:
 - Led by individual firms, defined by market competition, typically where network effects matter
 - Examples: Microsoft's Windows, Adobe's PDF, Java, HP's PCL
- Interaction #1:
 - If SSO rules become too onerous, innovative firms will choose not to participate in cooperative standard setting
 - Theoretical models on participation constraints (e.g., Layne-Farrar & Llobet, 2013)
 - Real world: Ericsson, Nokia, Qualcomm stated they will reduce participation in SSOs

FRAND Commitments Outside of SSO Context

- FRAND licensing and de facto standards
 - Interaction #1 covers technology that is accepted “standard” whether in SSO or not
 - Outside of SSOs, technology owners don’t have to make FRAND commitments
 - But in some cases, to gain industry acceptance, owners of IPRs may need to make voluntary licensing commitments so their technology becomes a de facto standard
 - Examples: Sun’s pledge for OpenSolaris; MS pledge of reasonable licensing for essential (non-differentiating) protocol patents
- Rationale behind SSO FRAND is the same as for de facto stds
- Both types of FRAND commitments should be binding
 - To serve their purpose, they need to be enforced

Does it Matter that Commitment was Made to SSO?

- True that SSOs are Consortia of Competitors
 - So important to have procedural rules governing disclosure and participation
 - But that is not the rationale for FRAND commitments (incentivise investment)
 - And that is not the reason for punishing breaches of FRAND (hold up)
- The Identical Harm Can Arise Outside of SSO context
 - Voluntary FRAND commitment incentivises investment and adoption of standard
 - Breach of commitment results in hold up
- Breach of FRAND Outside of SSO Context May Even be Worse
 - No SSO exists to punish the firm that breached commitment
 - e.g. revocation or review of standard
 - Proprietary standard may obtain market power as a result of breach

Reducing Value of SEPs will Increase Value of Low Value Design and Software Patents

- FRAND applies to Patents Essential to Implement Standard
 - Some patents cover features and aspects that are not essential to a standard
 - Potential examples: a broad reading on rectangular shape with rounded corners; touch screen glass
 - These patents are usually not limited by FRAND encumbrances
- Interaction #2:
 - If FRAND rules are overly rigid, non-SEPs may be used to holdup SEP owners
 - Party with non-SEPs can seek injunction, accuse SEP holder of breach of FRAND, all to force below-FRAND rates
 - This may push firms out of SSOs, shift investment decisions

SEPs with Additional Rate Commitments

- Only one SSO (VITA) Mandates Licensing Rate Disclosure
- ...but 9 Firms Voluntarily Disclosed Maximum Rates for LTE Standard in 2009
 - Nortel, Alcatel-Lucent, Ericsson, Huawei, Nokia, Nokia-Siemens Networks, Motorola, Qualcomm, and ZTE all announced specific maximum royalty rates for single-mode handsets
- Leaving such commitments outside of SSO FRAND definitions provides flexibility
 - Firms Should be Held to their Maximum Rate Promises
 - Just like FRAND promises to SSOs and for de facto standard essential patents, voluntary specificity may spur investment in new generation
 - But leave room for firms to make or not make commitments as required by the circumstances

SEPs with No-Injunction Pledges

- While no SSO's IPR Policy states that FRAND means no injunctions, some firms have “volunteered” limitations on their ability to seek injunctive relief
 - Apple in relation to Nortel and Novell patent acquisitions
 - Microsoft in relation to Nortel acquisition
 - Google in 2013 FTC investigation
- Interaction #3:
 - SEP restrictions promised to conclude patent portfolio acquisition deals or to stave off investigations

Concluding Remarks

- Public licensing commitments of all sorts play key role
 - Encourage industry reliance on proprietary technologies; spurring investments
- To achieve this purpose, all licensing commitments should be binding
 - Not just FRAND for SEPs
- IPRs of all sorts are interrelated
 - FRAND obligations to SSOs cannot be considered in isolation
- Balance is the key message
 - Commitments should bind, but interpretations of commitments should be made in context of industry dealings

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