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Matt Tabas

Antitrust and Intellectual Property: A Global Overview

The issue of industry standards continues to be an important focus at the intersection of antitrust and intellectual property law. Competition authorities recognize that such standards frequently create efficiencies but remain concerned about potential risks. In particular, there has been a focus on standard-essential patents (SEPs) and "patent hold-up" (*i.e.*, the prospect of an SEP holder successfully demanding higher royalty rates or other more favorable terms after a standard is adopted than it could have demanded credibly before a standard is adopted). Standard-setting organisations (SSOs) routinely attempt to mitigate such risks by requiring that SEP holders agree to license those patents on fair, reasonable, and non-discriminatory (FRAND) terms. Failure to meet that obligation has sometimes been deemed a violation of antitrust laws. Courts and antitrust authorities have also expressed concern that those FRAND commitments may create a risk of "patent hold-out" (*i.e.*, where licensees refuse to pay reasonable rates for an SEP, forcing a patent holder to accept less than market value for patents and denying the patent holder fair compensation for the effort and investment made to develop the technology). How and who is entitled to define FRAND, how to assess whether particular licensing terms comply with a FRAND obligation, whether and in what circumstances a FRAND violation may be an antitrust violation, as well as the risks generally associated with SEP licensing, remain the focus of competition authorities and courts around the world.

United States

The US antitrust authorities in the Biden administration already have staked out different positions from their most recent predecessors on the role of antitrust law in enforcing FRAND licensing commitments made by SEP holders to SSOs.

Under the Trump administration's US Department of Justice's Antitrust Division (DOJ), Assistant Attorney General (AAG) Makan Delrahim attempted to "achieve a greater degree of symmetry between the dueling concerns of "hold up" by patent holders and "hold out" by patent implementers", and to advance the view that antitrust law should not be used to enforce FRAND licensing commitments made by SEP holders to SSOs, "even if a patent holder is alleged to have misled or deceived [an SSO] with respect to its licensing intentions".

For example, one of the last actions of the DOJ in the Trump administration was to take the "extraordinary step" to issue a supplement and update to the 2 February 2015 Business Review Letter to the Institute of Electrical and Electronics Engineers, Incorporated (IEEE). The 2015 IEEE Business Review Letter approved a prohibition against SEP holders seeking injunctions against willing licensees and recommended that FRAND licensing rates utilize a smallest saleable patent practicing unit (SSPPU) method. In its 10 September 2020 supplement, the DOJ addressed "concerns raised publicly by industry, lawmakers, and former department and other federal government officials that the 2015 letter has been misinterpreted, and cited frequently and incorrectly, as an endorsement of the IEEE's Patent Policy". Notably, the 2020 supplement acknowledged a SEP holder's right to seek injunctive relief "to obtain the appropriate value for its invention." Further, the 2020 supplement rejected the requirement that a FRAND rate be based on the SSPPU and instead notes that "there is no single correct way to calculate a reasonable royalty in the FRAND context." The supplement also noted the DOJ's views on the danger of "hold out" by patent implementers.

Shortly after taking over, however, the Biden administration's DOJ leadership moved the 2020 supplement from the business review letter section of the DOJ's website to a section reserved for comments and advocacy to states and other organizations. This move indicates that the DOJ leadership does not view the 2020 supplement as formal guidance. At the time, Acting AAG Richard Powers referred to the move as "a return to previous practice that

is consistent with existing [DOJ] regulations" and suggested that observers should not be surprised to see "some changes from" the DOJ in the near future.

The first of these changes came in September 2021, when DOJ Economics Director of Enforcement Dr Jeffrey Wilder delivered a speech in which he explicitly stated that "antitrust can and should play a role when the standards-setting process is used to thwart competition and harm consumers". The DOJ plans to investigate and "bring enforcement actions when anticompetitive conduct—by SEP holders or any other participants in the standards development process—harms competition"; however, Dr Wilder also noted that the agency intends to provide guidance for parties on SEP licensing negotiations and "will strive to be transparent" about its enforcement priorities and policies so that both licensors and licensees are aware of what conduct is viewed as an antitrust violation under the current administration.

On 8 June 2022, the DOJ, along with the United States Patent and Trademark Office and the National Institute of Standards and Technology, withdrew a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments issued jointly by the agencies on 19 December 2019. The withdrawal followed the request by President Biden in a 9 July 2021 Executive Order to, among other things, "consider whether to revise [the agencies'] position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the [Policy Statement]" to reduce "the potential for anticompetitive extension of market power beyond the scope of granted patents, and to protect standard-setting processes from abuse". Although the agencies considered whether to replace the 2019 Policy Statement, they ultimately withdrew the statement noting instead, that "[i]n exercising its law enforcement role, DOJ will review conduct by SEP holders or standards implementers on a case-by-case basis to determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition."

Meanwhile, the US Federal Trade Commission (FTC) has not issued formal guidance on its approach to antitrust enforcement and FRAND licensing commitments, but several of the Commission members have recently articulated their views. In May 2022, FTC Chair Lina Khan and Commissioner Rebecca Kelly Slaughter submitted a written statement to the US International Trade Commission in *In the Matter of Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same*. The statement expressed the Commissioners' concerns with patent "hold up" and noted that "where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other market participants without providing commensurate benefits." In a June 2022 speech, FTC Commissioner Christine Wilson, however, critiqued this approach and noted that "prohibiting injunctions if a court has simply been *asked* to resolve FRAND terms will, in the long run, disincentivize innovation." (emphasis in original) Instead, she advocated for a balanced approach, such as the standard adopted by the European Court of Justice in its July 2015 decision in *Huawei Technologies Co Ltd v ZTE Corp and ZTE Deutschland GmbH*, which laid out criteria for when a SEP holder is entitled to seek an injunction against a potential licensee (without violating competition laws).

European Union and the United Kingdom

In recent years, several actions have focused on the interpretation of *Huawei v ZTE*. Notably, the German Federal Court of Justice and the UK Supreme Court issued decisions in 2020 interpreting the *Huawei* case.

On 5 May 2020, the German Federal Court of Justice issued a decision in *Sisvel International SA v Haier Deutschland GmbH,* overturning a lower court's determination that Sisvel's failure to offer Haier comparable licensing terms to Hisense for its communication SEPs violated Sisvel's FRAND obligations, and that Sisvel's patent infringement action for injunctive relief constituted an abuse of dominance. Instead, the Federal Court of Justice found that Haier's failure to engage in good-faith negotiations did not qualify it as a willing licensee under *Huawei v ZTE*. The court also held that that a SEP holder can make different FRAND offers to different licensees without violating its FRAND commitment (but noted that the SEP holder must provide an objective reason for the differing treatment).

On 26 August 2020, the Supreme Court of the United Kingdom ruled in *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* and *Huawei Technologies Co Ltd v Conversant Wireless Licensing*

SARL that a SEP holder may seek an injunction without abusing its dominance as long as it demonstrates that it is a willing licensor on FRAND terms, even in cases where the SEP holder only agrees to be bound by FRAND terms set by a court (rather than offer FRAND terms itself in the first instance). *Huawei v ZTE* did not set out a mandatory set of steps or protocols that must be followed prior to seeking an injunction but held that whether or not a FRAND offer is reasonable will depend on the facts of the case. Further, the non-discriminatory prong of that FRAND offer does not need to be a single "most favoured" rate for all licensees. Finally, the court held that English courts have both the power to enjoin an SEP implementer (unless it enters into global FRAND licence of a portfolio that includes foreign patents) and to determine royalty rates and terms of such a licence.

China

In recent years, courts in China have issued SEP decisions affecting worldwide licensing to protect both Chinese intellectual property rights and Chinese licensees in China and abroad. Following that trend, China's Intellectual Property Tribunal of the Supreme People's Court issued a decision on 19 August 2021 setting global FRAND licensing rates for SEPs from China and other jurisdictions, including the United States, Germany, and Japan. In *Sharp Corporation v OPPO et al*, the Supreme People's Court held that Chinese courts can set global FRAND licensing rates when the parties' negotiations indicate they are willing to enter into a worldwide licence and there is a close nexus to China. Here, Sharp and Oppo engaged in negotiations for a worldwide licence to Sharp's 3G, 4G, WiFi, and HEVC SEPs prior to Sharp filing patent infringement actions against Oppo in several jurisdictions. On 25 March 2020, Oppo filed suit in China asserting that Sharp violated its FRAND obligation and that the Chinese court should set the global royalty rate for the SEPs. The Supreme People's Court considered the scope of the parties' licensing negotiations, the ratio of SEPs from China, the country of implementation, the location of negotiations, and the location of the implementors' assets available for enforcement by the parties. In each instance, the Court held that these factors favor a Chinese court determining the global licensing rate.

Conclusion

The issues found at the intersection of antitrust law and intellectual property rights continue to be actively debated by competition authorities and courts worldwide. Therefore, it bears watching how they will continue to evolve.

Matt Tabas is a Partner in the Antitrust/Competition group of Arnold & Porter Kaye Scholer LLP's Washington, DC office. His practice focuses on all aspects of antitrust law, including mergers & acquisitions, civil antitrust litigation, and government investigations.