Smartphone Patent War:

Antitrust & IP Perspectives (Law 490)

George Mason University School of Law / Spring 2015

GENERAL BACKGROUND TO THE CLASS

I. Antitrust Law

A. US antitrust law

1. Overview of US antitrust Laws
   a) Sherman Act
   b) Clayton Act
   c) FTC Act, § 5

2. Key institutions
   a) The DoJ
   b) The FTC
   c) The federal courts

Reading:


B. EU competition law

1. Overview of EU competition rules
   a) The Treaty provisions
   b) Regulation 1/2003

2. Key institutions
   a) The European Commission
   b) The EU courts

Reading:

II. Intellectual property law (with focus on patents)

A. US law

1. Granting of patents
   a) United States Patent and Trademark Office: Examination of application submitted by inventor(s).
      (1) Types of patents: utility (apparatus, composition, and method), design, and plant.
      (2) Patent term: utility, generally 20 years from filing.
   b) Criticism of U.S. patent system
      (1) USPTO lacks appropriate resources for handling the increasing number of patent applications and the complexity of the applications submitted.
      (2) Readings:
         (a) Jonathan Masur, Patent Inflation, (2011) 121 Yale L.J. 470
         (c) USPTO dashboard: see backlog, number of examiners, pendency to first office action, and total pendency.
      (1) Goal of AIA is to harmonize the U.S. patent system with international systems (i.e., transition from “first to invent” to “first to file”) and strengthen the current patent system (e.g., post-grant review mechanism, gives PTO fee-setting authority to alleviate the funding issues; new joinder rule attempts to limit NPEs from suing multiple disparate defendants in one action.)
         (a) Read the Wikipedia entry: http://en.wikipedia.org/wiki/Leahy-Smith_America_Invents_Act

2. Patent enforcement
   a) Federal district court cases
   b) International Trade Commission (ITC)
   c) Federal district court cases vs. investigations before the ITC
      (1) Chart comparing the two jurisdictions in process
      (2) Procedural differences; schedule.
(3) Standing / domestic industry.
(4) Type of relief available – ITC only injunctive relief:
   (a) Limited Exclusion Orders
   (b) General Exclusion Orders
       (i) All infringing products (even if manufactured by non-named respondents.)
       (ii) Must show widespread pattern of importation of infringing items and it is difficult to identify the exact source. 19 U.S.C. § 1337(d)(2).

d) Infringement defenses (§§ 101, 102, 103)
e) Damages analysis overview

B. EU law

1. Granting of patents
   a) European route: http://www.epo.org/applying/european.html
   b) International route: http://www.epo.org/applying/international.html
   c) National route: http://www.epo.org/applying/national.html

2. Patent enforcement
   a) National patent courts
   b) Differences of procedure in the Member States

3. Creation of a Unitary Patent and a Unified Patent Court

III. The tumultuous relationship between antitrust and IP

A. Both antitrust and IP laws seek to promote dynamic competition
   1. The difficulty is that competition law also seeks to protect other forms of efficiencies (allocative and productive)
B. **Tensions between the two legal regimes**
   1. Competition rules can be used to place limits on the exercise of intellectual property rights
      a) Example: Compulsory licensing in EU Microsoft case
   2. Competition rules may be used to “correct” (actual or perceived) deficiencies in IP law

**Readings:**


**IV. Intense Rivalry between Tech Giants**

A. The tech industry is dominated by a few giant corporations

B. Trends in high tech
   1. The Internet
         (1) Online advertising is critical
         (2) Data is critical to online advertising
      b) Search dominated by Google
         (1) Horizontal search
         (2) Vertical search
   2. Hardware/software/content
a) Mobile outgrows PCs
   (1) Smartphones
   (2) Tablets
   (3) Phablets
b) Apple’s business model of integrating hardware, software and content has become the prevailing model in IT industry
c) Competition between platforms and ecosystems
d) Things are moving to the cloud

3. Intellectual property
a) Patents have become mission critical
b) New business models
c) Patent assertion entities (PAEs)
d) Privateerings

Readings:
- Battle between tech giants:
  o The Economist, Another game of thrones - Google, Apple, Facebook and Amazon are at each other’s throats in all sorts of ways, Dec 1, 2012, http://www.economist.com/news/21567361-google-apple-facebook-and-amazon-are-each-others-throats-all-sorts-ways-another-game
- Eco-system competition:


- End of PC era:

- Patent war:
  o Patent acquisitions:
  o Patent trolls:
THE PATENT WAR

I. Background

A. Standard-setting Organizations and IPRs

1. Standards
   a) Objectives and Benefits of Standardization
   b) Various forms of standards
   c) Strategic battles in SSOs
   d) The traditional IPR policies adopted by SSOs

   - Readings:


2. Licensing under FRAND commitments
   a) The traditional model of bilateral negotiations between potential licensors and licensees
   b) Rationale behind FRAND Commitments
   c) Meaning(s) of FRAND
      (1) Fairness and reasonableness
      (2) Non-discrimination
      (3) What is a FRAND royalty?
         (a) Can it be determined in the abstract?
         (b) Various methods proposed to calculate FRAND royalties
      (4) FRAND and injunctive relief
   d) What is the legal nature of FRAND?
   e) Is FRAND enforceable?
   f) Does FRAND work?

3. Perceived problems with the FRAND regime
   a) Patent Ambush
   b) Patent hold-up
   c) Royalty-stacking

   - Readings:


B. Policy Statement by antitrust authorities

1. US
   a) FTC
      (1) Official statements
         (2) Speeches
   b) DoJ
      (1) Official statements
(2) Speeches

(i) Owners of SEPs are able to extract higher royalty rates in spite of FRAND obligations.
(ii) “If the licensee has already invested in a product and faces costs to designing around the patent, the licensor can extract some of the licensee’s investment, not just the value of his IP.”
(iii) “All truly essential patents for a successful standard inherently have market power. We believe declared SEPs can be a powerful weapon, perhaps enhanced by over declaration, and can be used to harm competition through holdup.”

2. EU
a) Speeches and articles

3. US and EU
C. The smartphone war


II. Gaining leverage in licensing negotiations: Injunctions

A. Injunctions are an essential part of patent infringement litigation

   1. An injunction should not be automatically issued based on a finding of patent infringement, but also that an injunction should not be denied simply on the basis that the plaintiff does not practice the patented invention. Instead, a federal court must still weigh what the Court described as the four-factor test traditionally used to determine if an injunction should issue.

C. FRAND commitment and reliance on injunctions
   1. US case-law
      a) Apple v. Motorola, Northern District of Illinois, 1:11-cv-08540
      See http://allthingsd.com/20120622/judge-dismisses-apple-v-motorola/
   2. ITC case law
      a) In the Matter of Certain Mobile Electronic Devices (Samsung v. Apple; investigation no. 337-TA-794, complaint filed on 06/28/11)
         (1) On June 4, 2013, the ITC found that Apple infringed a Samsung patent and imposed a limited exclusion order. See
b) In the Matter of Certain Electronic Digital Media Devices and Components Thereof (Apple v. Samsung; investigation no. 337-TA-796, complaint filed on 07/05/11)
      (a) For comments on the decision, see Florian Mueller, ITC orders import ban against Samsung over two Apple patents -- how good are the workarounds?, August 9, 2013, available at http://www.fosspatents.com/2013/08/itc-orders-import-ban-against-samsung.html

3. FTC Google consent decree
   b) In the Matter of Motorola Mobility LLC, a limited liability company, and Google Inc., a corporation - FTC File No. 121 0120

c) Comments on the Consent Decree

4. European Commission cases

a) Samsung Commitments Decision (2014)

b) Motorola Infringement decision (2014)

Reading:

On the European Commission’s approach to SEP, see Damien Geradin, Ten Years of DG Competition Effort to Provide Guidance on the
III. The determination of FRAND rates

A. Bilateral negotiations

1. The terms of a license are typically negotiated bilaterally between SEP holders and standard implementers


B. Court decisions

1. Judge Robart’s determination in Microsoft v. Motorola
   (a) Implementer of standards is a direct third party beneficiary who has standing to enforce contractual obligations of the patent holder.
   (b) Patent holder does not have to start the negotiations on RAND terms, but rather the parties negotiate toward a license agreement on FRAND terms.
   b) October 10, 2012 opinion (2012 WL 4827743 at *10, see http://www.wiwd.uscourts.gov/opinions/pdfs/11-C-178-C-10-29-12.PDF) decided that there will be a trial to decide the RAND royalty terms: “[a]ccordingly, the court declines to adopt Motorola’s proposal that the November 13 trial consist of Microsoft’s breach of contract claim. Instead, the November 13 trial will resolve two discrete issues: (1) a RAND royalty range for Motorola’s standard essential patents; and (2) a RAND royalty point for Motorola’s standard essential patents. Adjudication of both of these issues is necessary to resolve disputes in this litigation, and
Motorola agrees that these issues are within the authority of this court to decide. Determination of a RAND royalty range will provide the jury guidance in deciding whether Motorola’s October 21 and 29 Letters breached Motorola’s duty to make offers for its standard essential patents in good faith. Additionally, determination of a RAND royalty range will provide the court guidance in determining a precise RAND royalty (a specific request contained in Microsoft's complaint), which necessarily must fall within that range…. Based on the foregoing, the court DENIES Motorola's motion for partial summary judgment dismissing Microsoft's claim that the court create a license agreement for Motorola's standard essential patent.”

c) April 2013, Judge Robart set a both FRAND rate and range per unit for the Motorola’s video coding and wireless networking patents, for the purpose of helping the jury to determine whether Motorola had breached its FRAND commitment, 854 F. Supp. 2d 993 (W.D. Wash. 2012), available at http://www.scribd.com/doc/138032128/13-04-25-Microsoft-Motorola-FRAND-Rate-Determination


2. Judge Holderman’s determination in Innovatio LLC

C. The determination of fair and reasonable royalties


D. Non-discriminatory terms


E. FRAND arbitration


