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
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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