

Haris Tsilikas

Antitrust Enforcement and Standard Essential Patents

Moving beyond the FRAND Commitment



Nomos

MIPLC

Munich
Intellectual
Property
Law Center

Augsburg
München
Washington DC



MAX-PLANCK-GESELLSCHAFT



Universität
Augsburg
University



TECHNISCHE
UNIVERSITÄT
MÜNCHEN

THE GEORGE
WASHINGTON
UNIVERSITY

WASHINGTON, DC

MIPLC Studies

Edited by

Prof. Dr. Christoph Ann, LL.M. (Duke University)
Technical University of Munich (TUM)

Prof. Robert Brauneis
The George Washington University Law School

Prof. Dr. Josef Drexl, LL.M. (Berkeley)
Max Planck Institute for Innovation and Competition

Prof. Dr. Michael Kort
University of Augsburg

Prof. Dr. Thomas M.J. Möllers
University of Augsburg

Prof. Dr. Dres. h.c. Joseph Straus
Max Planck Institute for Innovation and Competition

Volume 29

Haris Tsilikas

Antitrust Enforcement and Standard Essential Patents

Moving beyond the FRAND Commitment



Nomos

MIPLC

Munich
Intellectual
Property
Law Center

Augsburg
München
Washington DC

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Munich, Master Thesis Munich Intellectual Property Law Center, 2015

ISBN 978-3-8487-4217-2 (Print)
 978-3-8452-8519-1 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-4217-2 (Print)
 978-3-8452-8519-1 (ePDF)

Library of Congress Cataloging-in-Publication Data

Tsilikas, Haris
Antitrust Enforcement and Standard Essential Patents
Moving beyond the FRAND Commitment
Haris Tsilikas
78 p.

ISBN 978-3-8487-4217-2 (Print)
 978-3-8452-8519-1 (ePDF)

1. Edition 2017

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2017. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

Foreword

The present book is the result of the master thesis written in the summer of 2015 for the Munich Intellectual Property Law Center (MIPLC) LLM in IP and Competition. The subject of the thesis is the much debated issue of standard-essential patents, their enforcement and the implications for EU competition law. It is an attempt to deal with a problem not much discussed in the literature, namely the enforcement of SEPs for which the patent holder has not submitted a FRAND commitment to a standardisation body. In particular, the issue of transferability of SEPs and the emergence of new upstream business models by non-practicing entities (NPEs) may present a challenge to established standardisation patterns. I would like to express my deep gratitude to my thesis supervisor, Professor Dr. Josef Drexl for his valuable advice and support. I would also like to express my gratitude to my family and friends for supporting (and tolerating) me during this intensive year!

Munich, 8 May 2017

Haris Tsilikas

Table of Content

Abstract	9
Part I. Introduction	11
Part II. Standards-Setting and Competition Policy	15
A. The Standards-Setting Process	15
i. Economic Benefits of Formal Standardisation	15
ii. Formal Standardisation and its Superior Efficiency	18
iii. Anticompetitive Risks Prior-Adoption of a Standard	20
B. Theories of Post-Adoption Harm	22
C. Responses to Hold-Up – SSOs Self-Regulation and the Voluntary FRAND Commitment	25
D. Hold-Up or Hold-Out?	27
Part III. Standards-Setting and Antitrust Enforcement in the US	31
A. The Nature of the FRAND Commitment	31
B. Injunctive Relief Post-eBay	33
C. Exclusion Orders and the International Trade Commission	35
D. Antitrust Enforcement by the DOJ and the FTC	37
Part IV. Standards-Setting and EU Competition Law	41
A. Case-Law in Member States – The Orange Book Standard	41
B. Enforcement Action by the Commission	44
C. Huawei V. ZTE	46

Table of Content

Part V. Patent Assertion Entities and Privateers: Moving Beyond the FRAND Commitment	49
A. Patent Assertion Entities and Privateering: Costs and Efficiencies	49
i. The PAE and Privateer or Hybrid-PAE Business Model	49
ii. Implications of PAE Activities for Social Welfare and Efficiency	53
B. PAEs and Privateers in the Context of Cooperative Standards-Setting	55
C. PAEs and Opportunistic Assertion of SEPs: A Competition Law Problem?	58
D. Enforcing EU Competition Law against PAEs and Privateers: Moving Beyond the FRAND Commitment	62
i. Legal Formalism in the Enforcement of EU Competition Law in the Context of Coordinated Standards-Setting	62
ii. An Effects-Based Approach to Opportunism with SEPs: Anticompetitive Foreclosure and Article 102 TFEU	65
iii. Privateering Arrangements and Article 101 TFEU	68
Part VI. Conclusion	71
Bibliography	73

Abstract

The present thesis discusses the implications of the enforcement of standard-essential patents (SEPs) for competition law. Formal cooperative standards-setting is an efficient and inclusive form of standardisation. As opposed to alternative forms of achieving interoperability between independent devices in network markets, such as *de facto* standardisation, formal standards-setting has the potential to result in near-optimal investment in research and development and at the same time in rapid implementation of innovative standards.

At the core of formal standardisation is an intricate balance of interests and incentives. On the one hand, contributors to the process are rewarded by the licensing of their patents that read on the technical specifications of standards and are essential to their implementation (SEPs); on the other hand, contributed technology is available to implementers of standards on fair, reasonable and non-discriminatory (FRAND) terms that allow for profitable investment in the production of standard-compliant products.

Although the standards-setting process yields significant benefits for competition and consumers, it is not itself without anticompetitive risks. Such risks may emerge at both prior- and post-adoption levels. Of particular concern for the antitrust agencies in major jurisdictions is the abuse of the market power conferred to holders of SEPs, for which there are no substitutes. Opportunistic SEP holders, it is feared, might take advantage of the industry lock-in a particular standard and extract excessive royalty rates reflecting not the economic value of the patent but rather its 'hold-up' value.

Enforcement of SEPs and in particular requests for injunctive relief is vital for the realisation of the hold-up scenario. Absent a credible threat of exclusion from the downstream market for standard-compliant products, implementers would not give in demands for excessive royalty rates. Thus the availability of injunctive relief to holders of SEPs raises the most troubling questions for competition policy and the enforcement of competition laws.

From patent litigation outcomes and antitrust enforcement of the recent years a common pattern has emerged in all major jurisdictions witnessing SEP disputes; injunctive relief should be unavailable to SEP holders in

Abstract

cases where the alleged infringer is willing to agree on a licence on FRAND terms. The above convergence notwithstanding, the role of competition law in addressing the anticompetitive effects of opportunistic SEP assertion varies from jurisdiction to jurisdiction, depending on the operation of alternative legal frameworks, such as patent law and contract law.

However, antitrust analysis of abusive assertion of SEPs is characterised so far by a formalistic approach, focusing too narrowly on the voluntary FRAND commitment, rather than on the anticompetitive effects of non-FRAND licensing terms. This over-reliance on FRAND commitments leaves open a potentially harmful to competition loophole.

Two practical scenarios illustrate the shortcomings of relying too much on the FRAND commitment. While patent assertion entities (PAEs) and a particular sub-group among them, namely privateers, have recently took hold of numerous SEPs, they are at the same time not bound by any voluntary commitment to offer FRAND licensing terms. Those commitments bound previous owners of transferred SEPs, but not their current holders, PAEs and privateers.

Although patent law and contract law could provide valuable remedies against anticompetitive abuses in the enforcement of SEPs, antitrust authorities are in a unique position to decisively deter such conduct, in that they can impose positive financial harm on wrongdoers in the form of fines. However, for competition law to play an even more meaningful role in the future, antitrust analysis should move beyond the voluntary FRAND commitment and adopt a more encompassing effects-based approach.