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Moving beyond the FRAND Commitment

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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

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

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.