

Misleading and Deceptive Conduct under § 2

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Deception in Standard Setting – Antitrust Implications of Violating FRAND Licensing Commitments

Basic Premises

- Standard setting eliminates competition among alternative technologies - antitrust therefore has a stake in policing standard setting activity
- When a proprietary technology is made essential to an industry standard, the owner of that technology gains exclusionary power beyond that of the patent itself
- Assertion of non-disclosed patents after lock-in has been recognized as raising antitrust concerns
- Violations of other rules designed to constrain exploitation of lock-in raise the same competitive concerns

What is a FRAND Commitment?

- The purpose of disclosure is to avoid hold-up
- One way is to include patents in the standard only where the patent holder agrees to license on *Fair, Reasonable, And Non Discriminatory* terms
- Obligation to disclose is ineffective if there is no recourse for violation of FRAND

What Problems Is FRAND Designed to Address?

- Before = options
- After = no options
- Lock-in + significant sunk investment in standard-specific resources = potential for monopoly rents
 - Rewards for innovation, not “lock-in”
 - “Fair and reasonable” reflects the competitive environment *before* lock-in
- FRAND is also a commitment to a common enterprise
 - Mutual restraint: all patent owners agree to limit compensation to preserve efficiency of the standard
- FRAND is designed to create competitive markets for standard-compliant products

FRAND Is Enforceable Under the Antitrust Laws

- The holder of a patent included in a standard gains monopoly power
 - The power to exclude from the standard
 - The power to control prices
- Agreeing to FRAND terms to gain inclusion, and then avoiding the FRAND constraint after adoption of the standard, is *willful acquisition* of monopoly power – it is not “competition on the merits”
 - The monopoly is not based on superior product, business acumen or historical accident
- Willful violation of a FRAND commitment is therefore monopolization in violation of the Sherman Act

Antitrust Courts Are Competent to Enforce FRAND Commitments

- Some have argued that FRAND should be enforceable only under contract or tort law
- FRAND violations can be antitrust violations because of their effects on competition and consumers
- The public should have recourse under the antitrust laws even where it may not have standing to pursue a contract or tort claim
- Participants in the standard setting process may not have appropriate incentives to vindicate the public interest in competition
- If a court is capable of determining whether conduct violates FRAND in a contract or tort case, it can also do so in an antitrust case

Illustrations of FRAND Violations

- Refusal to license
 - Outright refusals
 - Constructive refusals
 - Effects

- Discriminating against competitors in standard-compliant markets
 - Extending monopoly from technology to product markets
 - Hold up potential
 - Analogy: evasion of rate regulation through vertical integration
 - Effects on future innovation/competition
 - Discrimination is well known to antitrust courts

“Fair and Reasonable”

- “Fair and Reasonable” royalty
 - Reflects the competitive environment *before* lock-in
 - Avoids rendering the standard inefficient

- Determining Fair and Reasonable royalty
 - Incremental value of technology relative to next best alternative
 - Possible adjustment to ensure overall royalty stack does not impede adoption of standard

- Antitrust courts routinely compare the “but for” competitive market to the observed market with the restraint

Proving “Fair and Reasonable” Royalties

- Determining a “Fair and Reasonable” royalty is within the competence of courts and enforcement agencies
 - Consideration of alternatives in the standard setting process
 - Methods for calculating “reasonable royalties” in patent litigation
 - Industry benchmarks
 - Natural experiments
 - What rates are charged in a competitive environment?
 - Comparison to royalties charged for other standards
 - Royalties charged relative to contribution to standard
 - Comparison to royalty rate where there is no FRAND commitment

Conclusion

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