

Patents, Standards and Anti-Monopoly Law - Emerging issues arising out of standard-essential patents (SEPs) -

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Part 1: Recent Development (1)

Huawei v. ZTE (EU)

On July 14, 2015, the Court of Justice in EU decided in the case of *Huawei Technologies v. ZTE Corp.* that SEP owner who has declared a FRAND license shall not be abusive by bringing a court action for injunction as long as:

- 1 The SEP owner has alerted the alleged infringer specifying what patent was infringed in what way.;
- 2 After the alleged infringer has expressed its willingness to conclude a license agreement on FRAND terms, the SEP owner has offered in writing for a FRAND license with the amount of royalty and the method of royalty calculation.;
- 3 If the alleged infringer continues to use the patent in question. And,
- 4 If the alleged infringer has not diligently responded to that offer. Judgment in this case should be in accordance with common commercial practices in the field and in good faith. No delaying tactics be allowed.

Recent Development (2)

Amendment of the IP Guideline (Japan)

On July 8, 2015, the Japan Fair Trade Commission (JFTC) announced a draft of the partial amendment of the IP Guideline. The draft regards the act of a “willing licensor” as a violation of the anti-monopoly law so far as the willing licensor:

- 1 refuses the FRAND license to a willing licensee; or
- 2 claims injunction against a willing licensee for infringement of a standard-essential patent.

A willing licensee may be regarded continuingly as a willing licensee if it seeks the award for the FRAND license from the courts or arbitration tribunals.

Recent Development (3)

Business Review Letter (US)

On January 8, 2015, the Department of Justice (DOJ) issued a business review letter to answer the question raised by an American standard-setting organization, IEEE. DOJ answered that the proposed new patent policy would not violate anti-trust law even if it contains provisions to limit its members to:

1. Claim injunction of infringement,
2. Separate a value of SEP caused by standardization,
3. Admit a “Grant-Back” provision, and
4. Expand the FRAND license to cover all levels of production.

Part 2: Apple v. Samsung

- In April 2011, Apple sued Samsung in charge of infringement of its utility patents, design patents and trademarks in US. Samsung counter-sued Apple in charge of patent infringement.
- Two companies sued to each other in 10 countries (USA, Germany, France, UK, Netherland, Italy, Spain, Australia, Korea and Japan).
- In 2012
 - Apple lost a patent case in Japan.
 - Samsung lost a jury trial in California, USA.
 - Each party won and lost in Korea.
 - Apple lost a design patent case in UK.
- In 2013
 - Samsung lost a patent case in Japan.
 - Samsung withdrew injunction claims in EU nations.
 - Apple lost a Section 337 case (but the ITC decision was nullified by the presidential veto right).
- In 2014
 - Each party withdrew an appeal to another ITC decision in US.
 - Apple lost an appeal case in Japan.

<Galaxy and iPhone at issue>

(source: *google_image*)



<iPad and Samsung Tab at issue>

(Source: <http://www.reuters.com/article/2011/12/02/us-apple-samsung-secrecy-idUSTRE7B030420111202>)



<Market Shares in 2011/2012>

(Source : IDC)

Top Five Smartphone Vendors, Shipments, and Market Share, Q2 2012 (Units in Millions)

Vendor	2Q12 Unit Shipments	2Q12 Market Share	2Q11 Unit Shipments	2Q11 Market Share	Year-over-year Change
Samsung	50.2	32.6%	18.4	17.0%	172.8%
Apple	26.0	16.9%	20.4	18.8%	27.5%
Nokia	10.2	6.6%	16.7	15.4%	-38.9%
HTC	8.8	5.7%	11.6	10.7%	-24.1%
ZTE	8.0	5.2%	2.0	1.8%	300.0%
Others	50.7	32.9%	39.2	36.2%	29.3%
Total	153.9	100.0%	108.3	100.0%	42.1%

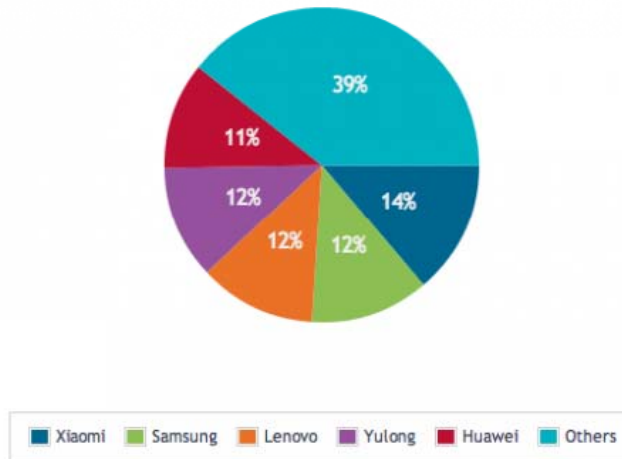
<Market Shares in 2013/2014>

(Source : [IDC](#))

Top Five Smartphone Vendors, Worldwide Shipments, and Market Share, Q1 2014 (Preliminary)

Vendor	1Q14 Shipment Volumes	1Q14 Market Share	1Q13 Shipment Volumes	1Q13 Market Share	Year-Over-Year Change
Samsung	85.0	30.2%	69.7	31.9%	22.0%
Apple	43.7	15.5%	37.4	17.1%	16.8%
Huawei	13.7	4.9%	9.3	4.3%	47.3%
Lenovo	12.9	4.6%	7.9	3.6%	63.3%
LG	12.3	4.4%	10.3	4.7%	19.4%
Others	113.9	40.5%	84.2	38.5%	35.2%
Total	281.5	100.0%	218.8	100.0%	28.6%

<Players in China>



@Canalys: Chinese s/p vendors make up 4 of the top 5 in China Q2. Xiaomi rose to No.1 aided by Samsung & Apple shrinking.

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Vendor	Units
Xiaomi	14,991,570
Samsung	13,228,430
Lenovo	13,025,780
Yulong	12,720,120
Huawei	11,860,210
Others	42,664,530

Aspects of IPRs

- Key Intellectual Property Rights for Apple

- Utility Patents

- US Patent 7,469,381 covers **scrolling behaviors** that align text and graphics to the top of the display automatically and bounces or "rubber-bands" the page when a user scrolls to the end of a document or list.
 - US Patent 7,479,949 covers **touch-screen heuristics** which can be viewed as one of the most important properties leveraged in *iOS*.
 - Patent portfolio: approximately 8,000 patents and patent applications. Among them, software-related patents are enormous.

- Trademarks

- Icon designs & Trade dress

- Design Patents

- Menu layout (e.g., D504, 889 & D593,087)

<Samsung>

- Standard Essential Patents (SEP)
 - US Patents 7,447,516 and 7,675,941 relating to a telecommunications standard (WCDMA).
- Non-standard Essential
 - US Patents 7,456,893; 7,577,460; and 7,698,711 relate to portable wireless terminals for telecommunications with the function of transmission and reception. But they are not SEPs.
- Patent Portfolio
 - Approx. 80,000 patents and patent applications

<Arguments>

<Apple>

- Based on design patents for the design of mobile terminals and graphic user interfaces (**GUIs**), Apple also asserts trademarks for **trade dress** and **icon layouts**.
- Based on utility patents on scrolling/unlocking mechanisms on the touch panel screen, Apple asserts **high-tech patents**. For its defense, Apple has purchased telecommunications patents from Nortel Network in Canada at US\$2.6 bill.

<Samsung>

- Based on patents relating to 3rd generation telecommunications format or WCDMA, Samsung asserts **infringement of SEPs** to telecommunications standards.
- Samsung asserts that marketing of standard-complied smartphones would unavoidably cause infringement of telecommunication standards.

<Strategic Features>

<Apple>

- Enforcement of IPRs with a combination of **utility patents, design patents and trademarks** relating to touch panels and GUI.
- IPR portfolio is not large, but they focus on **software-related** patents.
- They are **proprietary software**. No open license.

<Samsung>

- To defend with **a wide variety of relevant patents** covering radio communications and image processing
- Patent portfolio is large.
- To seek **open license** policy to get a cross-licensing among alliance companies.
- Traditional defense of its own products under its own patents

<Operating System: OS>

<Google v. Apple>

- Google is a leader of companies who have jointly developed an open source software “*Android*” for the 3rd generation mobile. Samsung adapts the Android for its *Galaxy*-series products.
- Apple has developed its own operating software called “*iOS*.” Such a self-made software is called the proprietary software.
- Open source software (OSS) and a proprietary software are competitive in the telecommunications technology.
- The IPR battle between Apple and Samsung is often described as a war between Apple and Google. Samsung is a player on behalf of Google.
- A party who has controlled the sovereignty of the operating system will be the real winner.

<Other Actions>

- Motorola v. Microsoft
 - Motorola sued Microsoft in US and Germany in charge of 3G patents.
 - Microsoft claimed a violation of competition law in EU by Motorola.
- Motorola v. Apple
 - Motorola sued Apple in US and Germany in charge of 3G patents.
 - Apple sued Motorola in charge of European competition law.
- Google purchased Motorola
 - In 2012, Google purchased business and patent portfolio from Motorola at the price of US\$12.5 billion. In 2014, Google agreed to sell Motorola's business to Lenovo, China at US\$1.41 billion. Patents left in the hand of Google.

Part 3: Competition Law

<A Case in EU>

The case between Apple v. Samsung illustrates features of issues to be caused by the intersection of patent, standard and competition law.

- In 1998, Samsung declared that its patents are essential to a mobile standard (SEP) of an European standard-setting organization (ETSI), and that they are licensable under the Fair, Reasonable and Non-Discriminatory terms (**FRAND**).

- Samsung sued Apple for **infringement** of its SEPs **by iPhones**. In return, Apple requested the Commission to make an investigation for a violation of the Competition Law in EU by Samsung's demand of a high license fee.

- In February 2012, the Commission announced that the authority would start the requested investigation.

- In December 2013, Samsung withdrew its claims for injunction of *iPhones* in the EU nations.

<Cases in US>

<Other cases heard in US>

- Microsoft v. Motorola (W.D. Wash., US)
- Apple v. Motorola (N.D. Illinois/W.D. Wis., US)
- Apple v. Motorola (S.D. Cal., US)
- Apple v. Samsung (N.D. Cal., US)
- Huawei v. InterDigital (Del. Chancery Ct., US)

<A Case in Japan>

In 2014, the IP High Court of Japan heard the arguments on the following issues in the case of *Apple v. Samsung*.

- 1) Whether Samsung's SEP is infringed.
- 2) Whether indirect infringement is found.
- 3) Whether the SEP can be invalidated under Section 104, Para.3(1) of the Patent Law.
- 4) Whether the SEP has been exhausted.
- 5) Whether a license agreement has been constituted.
- 6) Whether damages claim is abusive. And, if not,
- 7) Amount of damages.

<FRAND issue>

- The term “FRAND” stands for “**F**air, **R**easonable **A**nd **N**on-**D**iscriminatory.”
 - The SEP owner is required to be subject to the commitment of its own FRAND declaration and to license its SEP on the FRAND terms.
 - Each company has a right to conclude a contract independently and voluntarily.
 - A question arises when the SEP owner demands a higher patent royalty than the norms of industrial society.

Guidelines

<Japan>

“Guidelines for the Use of Intellectual Property under the Antimonopoly Act” (September 28, 2007)

<USA>

“Policy Statement on Remedies for Standards-Essential Patents subject to voluntary F/RAND Commitments” (U.S. Department of Justice and U.S. Patent & Trademark Office, 1.8.2013)

“Federal Trade Commission Report” (US Federal Trade Commission, 2007)

<EU>

“Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements” (2014/C 89/03)

Thank you!

Any questions or comments are welcome.

Feel free to send to the following:

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