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Different Policy Orientations Influence the Patent and Litigation Ecosystem

By Roberto Dini, Carter Eltzroth, He Jing, and Andrei Iancu

Abstract

During the LES USA & Canada 2023 Annual Meeting in Chicago in October 2023, a panel of senior experts addressed how different policy orientations influence the patent and litigation ecosystem. The background for the panel was the risks inherent to innovation taken on by the inventor: The technology of the invention may fail. The technology may not be commercially successful. It may be overtaken by a better innovation. In the face of these uncertainties, the inventor should be entitled to enjoy a stable legal environment. There should be little risk that the legal rights associated with the inventor's patent, its exploitation, and its enforcement are subject to frequent, abrupt change. The inventor should benefit from well-settled rules applied by neutral courts and by the patent office and other neutral expert government agencies.

The panel reviewed the current situation across China, the European Union, and the United States. It seems that patent stability is being lost: patent rules and policy are influenced by election returns and turnover at regulatory agencies. And these are further impacted by political concerns about national security, industrial policy, and national sovereignty.

The panelists brought to bear their expertise when addressing:

- *The problematic provisions of a proposed Regulation on Standard Essential Patents, now being considered by the institutions of the European Union;*
- *Developments in U.S. regulation and proposed legislation, demonstrating across eBay (and other Supreme Court decisions), PTAB and multi-agency guidance, the inconstancy of U.S. rules governing patents rights, and Congress's attempts to offer to innovators greater certainty as to the legal environment and to business outcomes;*
- *A new (and welcome) approach to anti-suit injunctions in China; and*
- *The extent to which standards development organizations have the tools to provide greater clarity on licensing patents essential to their standards.*

The panel consisted of Roberto Dini, Founder, Metroconsult, Turin; Carter Eltzroth, Legal Director, DVB Project, Geneva; He Jing, Managing Partner, GEN Law, Beijing; and Andrei Iancu, Partner, Sullivan & Cromwell, Washington.

1. The Proposed European Regulation on Standard Essential Patents

The European Commission's proposal for a Regulation on Standard Essential Patents¹ aims to enhance transparency and to reduce information imbalances in respect of standard essential patents (SEPs), particularly within IoT technology development. The European Commission spent years in gathering materials on perceived abuses stemming from SEP declarations and licensing practices.² But these materials do not demonstrate market failure in SEP licensing and do not support a regulatory intervention as sweeping as the proposed SEP Regulation.

Members of the panel highlighted several concerns relating to the proposed SEP Regulation:

- The proposal interferes with the right to access courts. Before asserting rights in judicial pro-

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1. European Commission, *Proposal for a regulation...on standard essential patents COM(2023)232* (27 Apr 2023).

2. The proposal is surprising in part because the proposal appears to run counter to the great weight of evidence presented by stakeholders in standards development and SEP licensing. The Commission's multi-year process for compiling evidence is outlined in *Standard Essential Patents—European Commission (europa.eu)*.

ceedings against an infringer, the proposed SEP Regulation calls for registration of SEPs and a conciliation process for a FRAND determination—lasting some nine months—before a newly formed “Competence Centre” managed by the EU Intellectual Property Office. This delay in vindicating patent rights would deprive SEP holders of court access and the ability to promptly address infringements; it would impugn fundamental rights protected under EU and international law.³

- The Competence Centre to be established under the proposed SEP Regulation is flawed for several reasons. Its management by the EUIPO is ill-conceived because that EU agency is focused on trademarks; it has little experience in patents and still less in SEPs. Its role as a registration body for SEPs is largely duplicative of the long-standing activity of standards bodies in calling for—and maintaining databases of—declarations of SEPs and assurances of FRAND licensing. The role of the Competence Centre in determining FRAND rates is problematic, in part because it undermines the market-based approach, functioning satisfactorily today, setting rates through arm’s-length commercial negotiation. In addition, the volume of activities to be undertaken by the Competence Centre—essentiality reviews, setting aggregate FRAND rates, etc.—raises doubt on whether there is an adequate number of qualified EU-based conciliators available with sufficient expertise (and who would not be subject to claims of conflict).
- An important underlying rationale for the proposal—support for SMEs, encouragement for innovation—is flawed. It may be argued that there is a benefit in providing to small- and medium-sized enterprises (SMEs) free information about SEPs. But the proposal misses the importance that SMEs can play in their own innovation protected by their own patents. An abusive market practice that can be usefully addressed is the hold-out tactics of large corporations, refusing to take licences of SEPs held by SMEs. Moreover, SMEs could suffer disproportionately from the additional costs and delays of the proposed Competence Centre.

Overall, a less ambitious SEP Regulation could create a body whose functions would be limited to manag-

ing a voluntary SEP registration and essentiality-check process, coupled with collecting and organizing information to assist in establishing ranges of FRAND royalties. In contrast, the framework offered today in the proposed SEP Regulation is overly intrusive in matters relating to SEPs and FRAND licensing and challenges the autonomy of parties in their negotiations and the independence of courts (and other adjudicators) in resolving SEP disputes.

In its attempt to find a comprehensive regulatory approach to address purported market failures in SEP licensing, the Commission has underestimated the benefits of patent pools, which have proven effective in issues relating to transparency and commercial efficiency. Patent pools make available a streamlined “one-stop shop” solution for technology licensing, offering access to a portfolio of patents essential for standardized technologies owned by multiple patent holders. Patent pools offer transparency through comprehensive information sharing, essentiality evaluations for each jurisdiction, and cost-effective licensing. Indeed, they foster innovation by making participation in standards development more accessible, especially for SMEs, R&D centres, and universities, ensuring a fair return on their investments. Additionally, patent pools comply with antitrust regulations, mitigating risks and promoting competition. Despite the Commission’s previous recognition of the advantages of patent pools,⁴ the proposed SEP Regulation does not sufficiently encourage their use, missing an opportunity to enhance SEP licensing efficiency and fairness.

Former U.S. government representatives have already expressed similar concerns about the proposed SEP Regulation.⁵ The proposed SEP Regulation would have consequences on U.S. entities with patents granted in Europe. Moreover, if adopted in Europe, the initiative could have a contagion effect, encouraging an effort in the United States for legislation establishing a formal Article III court devoted to setting SEP royalties.⁶ Holders of U.S. patents and practitioners have echoed the concerns expressed in Europe: Why is any legislative initiative needed without evidence of pervasive abuse, distortion of markets by SEP holders, holders engaging

3. The restrictions run counter to the EU’s international commitments, for example WTO’s TRIPS agreement, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 Apr 1994 (as amended 23 Jan 2017), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), and the EU Directive on IPR Enforcement, *Directive 2004/48/EC...on the enforcement of intellectual property rights* (29 Apr 2004).

4. See, e.g., European Commission, Communication, *Guidelines on the application of Article 101 of the Treaty...to technology transfer agreements* (2014/C 89/03) (28 Mar 2014) at paras 244 ff.

5. The views on the proposed SEP Regulation of former senior U.S. government officials are set out in a *letter of comments addressed to the European Commission* (20 Apr 2023). LES Italy responded to the Commission’s call for feedback on the proposal. *LES ITALY position paper on the European Commission’s [proposed SEP Regulation]* (8 Aug 2023).

6. Draft text of a *Standard Essential Royalties Act (SERA)* (2022).

in hold-up, entities blocked from market entry when the holder obtains an injunction against entities willing to take a FRAND licence, or holders charging unfair and unreasonable rates? In the absence of any of this economic and legal evidence, why provoke a sea change in licensing practices and undercut practical, efficient licensing frameworks, such as patent pools?

2. Legislative, Regulatory Developments in the United States

Innovators are granted a patent covering their invention for a “limited term” and understandably they would look for a stable legal environment to exploit their invention. Instead, within the United States, the policy covering intellectual property and its exploitation, and the role of standards bodies, could be described as on a regulatory pendulum. In the United States, these shifts can be understood as consistent within a framework of democratic governance: the U.S. Constitution calls for periodic elections of the U.S. president and a change in president can bring with it changes in policy. But these changes can have unintended consequences, for example on standard essential patents. One administration finds in 2013 that a SEP-holder is generally not entitled to an injunction prohibiting infringement; the next issues in 2019 guidelines restoring injunctive remedies, finding that a SEP should be treated as any other patent. The current administration proposes in 2021, but then does not adopt, its own draft policy statement; instead it withdraws in 2022 the policy statement of the prior administration.⁷

To stop the shifts in policy caused by changes in presidency, one solution could be the adoption of a law by the U.S. Congress that would provide, simply, that no special rules would govern standard essential patents: these would be treated as any other patents. This would codify the crux of the 2019 guidelines. But this initiative, further discussed below, is unlikely to

be adopted. Legislative initiatives then, unless pursued to bicameral adoption by the U.S. Congress, will not solve issues related to SEPs; repeated guidance by U.S. agencies is transitory. The conclusion must be that the government should stay out of these complex issues. Until there is evidence of an absolute need, government help—whether in Europe, the U.S. or in China—is not needed to negotiate SEPs.

The perverse effects of government intervention in patent rights can also be found in the establishment and operation of the U.S. Patent Trial and Appeal Board (PTAB). The creation in the United States of *Inter Partes* Review (IPR) was intended to be an efficient alternative to judicial proceedings in U.S. District Court. Instead IPR has become an almost obligatory addition to litigation. This duplicative effort (and cost) was not intended in the 2011 legislation creating IPR. It was promoted as a measure to eliminate bad patents. But the courts have been (and are) available to fulfil this function. There is nothing else in the U.S. legal system that allows a litigant “two bites at the apple.” Moreover, the IPR rules set out a separate (and looser) test for challenging validity: Today, in the district court, a patent can be challenged as invalid based on “clear and convincing evidence,” a test that is justified by the decision taken by the USPTO to issue the patent and to vest rights in the patentee. However, in the PTAB, invalidity is assessed by a different standard, based on “preponderance of the evidence.” The different standards and the duplicative processes reduce predictability and depress investment in innovation. It is important to correct the burdens on patents and risks to cutting-edge innovation by putting an end to the duplicative PTAB process and the looser challenge to validity offered through IPR.

Proposed legislative action in the U.S. Congress

Apart from the dysfunction prompted by *Inter Partes* Review, and the risk that the winds of change from Europe may bring regulatory royalty-rate setting to the United States, there are bills pending in the U.S. Congress that could impact patent rights and the work of practitioners. If adopted, these initiatives could be beneficial to patent holders. The first, introduced by Senators Tillis and Coons, is intended to clarify patent eligibility rules in response to recent jurisprudence of the U.S. Supreme Court imposing constraints on eligibility, leading to uncertainty in innovation and unpredictable business outcomes. The bill, the “Patent Eligibility Restoration Act,”⁸ would codify exceptions to eligibility,

7. Policy during *Obama* administration: “U.S. Dep’t of Just & U.S. Pat & Trademark Off,” *Policy Statement on Remedies for [SEPs] subject to voluntary F/RAND Commitments* (8 Jan 2013); “Trump administration: U.S. Pat & Trademark Off, U.S. Dep’t of Just & U.S. Nat’l Inst of Stand and Tech,” *Policy Statement on Remedies for [SEPs] subject to voluntary F/RAND Commitments* (19 Dec 2019); *Biden* administration: “U.S. Pat & Trademark Off, U.S. Dep’t of Just & U.S. Nat’l Inst of Stand and Tech,” *Draft Policy Statement on Licensing Negotiations and Remedies for [SEPs] subject to Voluntary F/RAND Commitments* (Dec 2021); later in the *Biden* administration this draft Policy Statement was not taken forward; instead the 2019 Policy Statement was simply withdrawn: “U.S. Pat & Trademark Off, U.S. Dep’t of Just & U.S. Nat’l Inst of Stand and Tech,” *Withdrawal of 2019 Policy Statement on Remedies for [SEPs] subject to voluntary F/RAND Commitments* (8 Jun 2022) (but making clear that the withdrawal of the 2019 Policy Statement does not mean that the prior 2013 Policy Statement is reinstated).

8. The bill setting out a *Patent Eligibility Restoration Act* (S.2140, 118th Cong (2023-2024)) was introduced on 6 June 2023. See also Press Release, “*Senators Coons, Tillis introduce Patent Eligibility Restoration Act to revitalize American innovation*” (Washington, DC, 22 Jun 2023).

building on long-standing exceptions and replacing where necessary recent caselaw, offering a legislative framework that would crisply define eligibility exclusions. What doesn't fall within the list of exceptions would be patent subject matter. Once adopted, the legislation would end much of the debate on the scope of section 101 of the Patent Act.

A second proposal, the PREVAIL Act,⁹ addresses the concerns arising out of *Inter Partes* Review before the PTAB, removing the duplication it offers today with the normal judicial process. A petitioner would have a choice of forums between the PTAB and the district court but cannot choose both. In addition, the PREVAIL Act would eliminate multiple challenges from the same party (and its privies) against the same patent and establish petitioner's burden of proof as "clear and convincing evidence," in line with the showing required in District Court. The bill contains other beneficial provisions addressing, for example, transparency and standing in the PTAB. If adopted, these two bills would go a long way to fix recent concerns in the U.S. patent system.

A further area that should be addressed is confirmation of the availability of injunctive relief against patent infringers. Injunctive relief to enforce the exclusive rights of patentees was undermined by the *eBay* decision of the U.S. Supreme Court.¹⁰ But no bill has been introduced to overrule *eBay*. Congress in 2020 adopted legislation making clear that in respect of *trademarks* there was a rebuttable presumption of irreparable harm for infringement (and thus injunctive relief could be more readily available for the trademark holder).¹¹ This could be a model for creating a comparable presumption in favour of a patentee for the grant of injunctive remedies against infringement. But the politics of *patents* is different, so a speedy legislative resolution of the question remains elusive.

3. Chinese Anti-suit Injunctions: Courts Through a Cycle of Reacting and Learning?

Back in 2019-2021, Chinese courts granted anti-suit injunctions (ASIs) in quite a few cases, attracting significant attention from the international legal

community. Such cases include *Huawei v. Conversant* (in Nanjing), *ZTE v. Conversant* and *OPPO v. Sharp* (both in Shenzhen), and *Xiaomi v. InterDigital* and *Samsung v. Ericsson* (both in Wuhan).¹²

The anti-suit injunction—compelling a party in a litigation not to pursue a case in another jurisdiction covering the same matter—is not an invention by Chinese courts! Indeed, the first ASI that involved a Chinese company was *Huawei v. Unwired Planet*, where UP sought in 2017 an ASI from the London court to order Huawei to refrain from enforcing injunctions granted by the Shenzhen Intermediate Court. This case was significant, as it marked the first time a Chinese company was directly involved in an ASI dispute. Another significant ASI is in the *Huawei v. Samsung* dispute, brought by Samsung in U.S. Federal court in Northern California, which likely contributed to the final settlement of the parties. These two early cases probably set a precedent, giving the idea to Chinese litigants and courts that ASIs were a useful stratagem in their toolbox to resolve SEP disputes.

Interestingly, after the rush of Chinese cases listed above, we have not seen any new ASIs since then. It appears that Chinese courts had a shift in the attitude, or simply that abruptly companies decided not to go to the Chinese courts to secure ASIs. The shift confirms the way Chinese courts deal with complex cross-border disputes—*reacting mode* and *learning mode*.

"Reacting mode" in response to decisions outside China

The *reacting mode* means that Chinese courts would consider themselves obligated to issue decisions to protect Chinese entities where they are convinced China's national interest is at risk or otherwise disadvantaged. For years there has been a strong voice that Chinese implementers, who are said to run on very thin profit margins, should watch out for "excessive" royalty rates charged by foreign patent owners. When UK courts issued royalty decisions on a global scale, as in the *Unwired Planet v. Huawei* case, it hit the nerves of Chinese courts.¹³ In the Supreme Court IP Court decision in *Huawei v. Conversant*, the court held that the German court decision, in which the royalty rate found by the German court is about 18 times higher than the

9. The bill setting out the *Promoting and Respecting Economically Vital American Innovation Leadership Act (the PREVAIL Act)* (S.2220, 118th Cong, 1st Session) was introduced in the U.S. Senate on 11 Jul 2023. A companion bill has been introduced in the U.S. House of Representatives (*H.R.4370, 118th Cong (2023-2024)*).

10. *eBay Inc v MercExchange, LLC*, 547 U.S. 368 (2006).

11. Trademark Modernization Act of 2020 s 226 (codified at 15 USC s 1116 (a)).

12. See, Wang Jiaqi, LEVELING THE PLAYING FIELD: CHINESE COURTS' PRACTICE OF ANTI-SUIT INJUNCTION IN STANDARD ESSENTIAL PATENT AREA, *Tsinghua China Law Review*, Vol. 13:381, *Microsoft Word—7 CLU_Anti-suit Injunction (tsinghua.edu.cn)*.

13. See the research report issued by Guangdong Higher People's Court, "Determination that the abuse of a dominant position by a SEP owner constitutes a monopoly" (2013).

rate issued by the Nanjing court, would interfere with the enforceability of the Chinese court decision, thus serving as the basis for the IP Court's issuance of the anti-suit injunction/anti-enforceability injunction.

The reacting mode likely continued through the time when the EU Commission filed, in February 2022, its WTO case against China on the anti-suit injunctions,¹⁴ which might explain the “discontinuation” of ASIs in China during the last two years.

“Learning mode,” sharing lessons with other jurisdictions

The *learning mode* is evident from the way Chinese courts now deal with FRAND rates in SEP cases. After the UK court took the unprecedented step of setting a global FRAND rate in *Unwired Planet*, Chinese courts issued SEP guidelines in April 2018 to show the willingness to adjudicate global FRAND rates.¹⁵ Next, the Supreme Court IP Court finally confirmed the power of Chinese courts to handle global FRAND rates in reviewing *Opvo v. Sharp* in August 2021.¹⁶

This led to a wave of cases where implementers went to Chinese courts to ask for adjudication of a global FRAND rate, including in the *Opvo v. Nokia* case now before the Chongqing court.

Knowledgeable practitioners have found, based on handling SEP cases in China, that Chinese judges have a great deal of experience in using both comparable license and top-down approaches in working towards a FRAND rate. They are also open to using protective orders and other practices to resolve concerns over confidentiality. Foreign-trained experts are allowed to testify.

Now the test would be how this Chongqing court is going to handle such a high-stakes decision. If the theory of learning mode is correct, it could be expected that the Chinese court will learn from the way the UK court handled royalty calculations in the *Optis v. Apple* and *InterDigital v. Lenovo* cases.

The final outcome of this *Opvo v. Nokia* case, if not resolved through settlement, will be a new measure of reality here.¹⁷

14. See *WTO | dispute settlement—the disputes—DS611: China—Enforcement of intellectual property rights*.

15. See the court procedures adopted by Guangdong Higher People's Court on adjudicating SEP disputes, as published by the South China Institute for International Intellectual Property, “Guangdong High People's Court issued the Guidelines on the Trial of Standard Essential Patent Dispute Cases (for Trial Implementation) (Full Text)” (4 Dec 2019).

16. See *FOSS Patents: China's top court affirms jurisdiction over global FRAND rates in OPPO v. Sharp, finding overwhelmingly strong Chinese connection* (6 Sept 2021).

Does it mean that ASIs may be a thing of the past in China? Not necessarily. ASIs are just one instrument in the judicial toolbox. Their use or disuse may be contingent on the need to maintain control over complex cross-border disputes.

4. Standards Bodies Setting Economic Terms for Licensing?

In the United States, broad policy pronouncements and guidelines can have a pernicious effect on the enforcement of patent rights. The regulator can also turn its focus to a single entity and influence an entire sector. The U.S. government actions on the recent changes in the IPR policy of the IEEE are emblematic: in communications from the U.S. Department of Justice, the changes to that IPR policy found initial regulatory acquiescence (2015); followed by regulatory questioning of that acquiescence (2020); followed by regulatory withdrawal of the questioning of the acquiescence by reclassifying the 2020 letter from formal guidance to advocacy (2022).¹⁸ An observer could say the changes in policy kept pace with the changes in leadership in the U.S. Department of Justice (and changes in U.S. president).

Intrusive *regulatory* intervention in SEP disputes is then problematic. Should we turn to *standards bodies* to solve issues relating to SEP licensing and compliance with FRAND obligations? This is far from clear. A standards body comprising engineers with the mandate of finding the best technical solution for a technical problem is ill-suited to provide detailed rules on licensing.

17. Just before the submission of this article for publication, the Chongqing Court released its decision in *Opvo v. Nokia*. The FRAND rate awarded by the court is about 20 percent of the royalty rate that Nokia asked for. See the article written by Prof John Gong, who testified for Opvo in this case. *Ruling in Opvo vs Nokia addresses patent royalties row*,—*Chinadaily.com.cn* (8 Jan 2024). Soon after the judgment Nokia and Opvo reached settlement. See Press release, Nokia, “*Inside Information: Nokia signs 5G patent cross-license agreement with OPPO*” (24 Jan 2024). While there are debates about the merits of the Chongqing court decision, it is apparent that the Chinese court raced to issue the decision before the court in India issued its FRAND decision between Nokia and Opvo.

18. Initial regulatory acquiescence: *Letter of Renata Hesse, Acting Ass't Att'y Gen'l, U.S. Dep't of Just., dated 2 Feb 2015, addressed to Michael Lindsay [counsel to IEEE]; regulatory questioning of that acquiescence, Letter of Makan Delrahim, Ass't Att'y Gen'l, U.S. Dep't of Just., dated 10 Sept 2020, addressed to Sophia Muirhead, Gen'l Counsel of [IEEE]; regulatory withdrawal of the questioning of the acquiescence by reclassifying the 2020 letter (now included in the Department's webpage “Comments to States and other Organizations”). The current status of the IEEE's IPR policy is set out in IEEE, “*IEEE announces Decision on the Standards-related Patent Policy*” (Press release 30 Sept 2022). See note 7 *supra* and accompanying text for a discussion of varied U.S. agency actions on SEPs generally.*

The IPR policy of a standards body approaches these questions with a broad brush: imposing a FRAND obligation on patents essential to its standards and calling for a work-around when it becomes known that a patent otherwise essential will not be available for licensing. Otherwise, the standards body leaves the details of licensing to negotiations between the parties (and when required to the courts). The efforts by IEEE to set the parameters for licensing and for SEP enforcement did not find broad market consensus. A standards body can help in providing greater certainty in the patent landscape and in the overall royalty by requiring arbitration of SEP licensing disputes and fostering the formation of patent pools.¹⁹ Each is a platform, outside the standards body, for discovery of the FRAND rate and limiting friction in negotiation.

Other models for the handling of SEPs have been adopted by standards bodies. The first is the commonplace requirement that an SDO participant declares its potentially essential patent and provides the assurance that that SEP is available for licensing on FRAND terms. This approach is adopted by ETSI and indeed favoured by regulatory authorities.²⁰ While this approach is appealing in the name of transparency, it raises its own issues of timing of declaration, the value of “blanket” declarations, updating, the risk of over-declaration, and the burden for an SDO in maintaining a database and encouraging compliance.

Another model for handling SEPs—royalty-free (RF) licensing with universal reciprocity—was recently reviewed in a preliminary investigation by DG Competition of the European Commission. That investigation was closed in May 2023 when the SDO with the RF policy issued an important clarification of that policy.²¹ The underlying IPR policy of the SDO called for a SEP licence from SDO participants to implementers on a RF basis, subject to the implementer’s reciprocal RF licence back to the SDO participant. In the case examined by the European Commission, the SDO’s licensing policy required “universal reciprocity.” In other

words, in order to benefit from the RF licence, the initial licensee agrees to grant an RF licence (a) back to its licensor, and (b) to any of that initial licensee’s licensees and (c) to require such further licensee to include the same terms in its licence of its own SEPs. Universal reciprocity is one of the options in the W3C Royalty-free (RF) Licensing Requirements, and it is included in the Alliance for Open Media (AOM) Patent License 1.0.²²

Royalty-free licensing with reciprocity has long been a characteristic of the open-source software movement. In other sectors where SDOs have adopted FRAND policies (this is, allowing FRAND-based royalties), universal reciprocity has encountered much opposition. The Alliance for Open Media has developed the AV1 standard in a technology—video codecs—where the SDOs traditionally authoring such standards have adopted FRAND policies. For an implementer (a non-AOM participant) that also has a portfolio of AV1-essential patents, its concern with the AOM policy is clear: the price it pays for the purportedly RF patents to be licensed by the AOM participant is the foregone royalties it would have otherwise received not only from the AOM participant but also from any other AV1 implementer. This concern gave rise to the opening of the preliminary investigation before DG Competition.

At the time the Commission closed its preliminary investigation in May 2023, AOM issued a clarification of its IPR policy.²³ The clarification stated that while the AOM participant has a duty “to make available” a RF licence of its AV1-essential patents, subject to universal reciprocity, it also “has the freedom...to offer...different FRAND terms.” This alternative licence, to which both the AOM participant and its licensee may agree, may have royalty-bearing (but FRAND) terms.²⁴ The AOM clarification is an important development especially in Europe where courts have defined a process of licensing negotiations including the exchange of different FRAND offers.²⁵ It could well shape our understanding of the flexibility of the IPR policies of similar royalty-free standards bodies.

19. This has been the experience of the DVB Project. Eltzroth, *IPR Policy of the DVB Project*, Int’l J IT Standards & Standardization Res (2008, 2009).

20. European Telecommunications Standards Institute, Rules of Procedure (29-30 Nov 2022), *Annex 6: ETSI Intellectual Property Rights Policy*. European Commission, *Communication, Guidelines on the applicability of Article 101 of the Treaty...to horizontal co-operation agreements* (2023/C, 259/01) (21 Jul 2023) paras 456-462. On the other hand, DVB has since the mid-1990s successfully adopted a policy of “negative disclosure.” DVB Project, *Memorandum of Understanding* (2014), art 14.1, 14.3, an approach acknowledged by the Commission (and to which the safe harbour applies). Horizontal Guidelines at para 489.

21. Foo Yun Chee, *Tech group AOM’s video licensing policy no longer in EU antitrust crosshair* (Reuters, 23 May 2023).

22. *W3C Patent Policy* (2004) sect 5(4). The W3C Patent Policy has been amended since 2004, but it is that version on which the AOM IPR policy is based. *Alliance for Open Media Patent License 1.0* (“AOMPL1.0”) sect 1.2.1.

23. Alliance for Open Media, *AOM Statements* (23 May 2023). See notably Paragraph 1, “The possibility to engage in bilateral negotiations.”

24. The clarification extends beyond the licensing practices of AOM members: it can be understood to allow a licensee, already bound by an AOMPL1.0 and its universal reciprocity provision, also to offer an alternative (non-RF) FRAND licence.

25. *Huawei Technologies Co Ltd v ZTE Corp*, Case C-170/13 (16 July 2015), and progeny.

Conclusion

Regulatory uncertainty, indeed politicization, shapes the commercial environment in which companies bring their innovations to market and enforce the rights they think they should enjoy to protect themselves against those slavishly copying their inventions. This in-constant regulatory environment takes different forms across territories: in the European Union, the proposal for a SEP Regulation would displace market-based practices for SEP licensing negotiations and SEP enforcement, duplicating the patent pool framework already offering transparency and efficiency. The proposed SEP Regulation will impact not only European companies, but also any company holding SEPs issued in Europe.

In the United States, the policies governing SEPs, and the rights enjoyed by SEP holders, can shift with changes in the political party governing the U.S. presidency. At the same time, initiatives in the U.S. Congress can ameliorate (or worsen) the rights of patent holders, recently undermined by U.S. court decisions on injunctive relief and patentability.

Chinese courts appear to be adopting a more measured approach, as evidenced by the changing rules for issuing antisuit injunctions. The use of this litigation tool in China seems to be drawing closer to international best practices.

Across territories, standards developers have adopted differing IPR policies, each geared generally to as-

sure implementers that standard-essential patents will be available for licensing on FRAND terms. A recent case shows that when pressed, a standards body with royalty-free SEP licensing coupled with “universal reciprocity” will confirm that ultimately FRAND terms are settled by negotiation between the SEP holder and implementer. For SEP holders, these developments, some disconcerting, some positive, should in the end lead to rules consistent with the maxim of a reward based on “the fuel of interest added to the fire of genius, in the discovery and production of new and useful things.”

This article is based on the Workshop “How the Different Policy Orientations Influence the Patent and Litigation Eco-System” held on October 17, 2023, as part of the LES USA & Canada 2023 Annual Meeting in Chicago. The members of the panel were:

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