Practical implications of the Dutch FRAND-approach

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 Enforcement of standard-essential patents discussed by District Court The Hague in a number of relatively recent decisions;
   Philips/SK Kassetten dated 17 March 2010
   LG Electronics/Sony dated 10 March 2011
   Samsung/Apple dated 14 March 2012
   Samsung/Apple dated 14 October 2011

 Practical implications:
  ➢ 3 different scenario’s
### Scenario I: Enforcement against alleged infringer who does not ask for, or refuses to negotiate and take a license

- **Situation is clear:**
  - Following *Philips / SK Kassetten*:
    - *entitlement* to a FRAND license alone is insufficient to deny an injunction
    - It is the responsibility of the third party to obtain a license
    - If he fails to take his responsibility (e.g. by doing nothing): patentee may enforce its essential patent and injunctive relief is granted if patent is valid and infringed

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### Under these circumstances, there is no reason to treat the holder of an essential patent differently from the holder of any other patent: FRAND-obligation exists, but is not triggered by third party;

- Usually situation is more complex: parties are negotiating, but a license is not (yet) concluded.
Scenario II: Enforcement following *unsuccessful* negotiations

- Patentee may start proceedings and in principle remains entitled to injunctive relief (*Philips/SK Kassetten*).
  - See also Pres. District Court The Hague in *Samsung/Apple*:
    "The route towards a FRAND-license starts with a request thereto from Apple followed by a FRAND-offer from Samsung. In case the parties would not be able to come to an agreement thereafter, Samsung is still free to claim injunctive relief."
  - Unless *exceptional circumstances* apply (*Philips / SK Kassetten*):
    - Decisive in assessing whether such exceptional circumstances apply: did patentee comply with its FRAND-obligation (*Samsung/Apple*).

N.B. Court will assess whether offer or counter-offer was FRAND.

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Scenario III: Enforcement *while* negotiations are still pending

- As long as good faith negotiations about a FRAND license are still pending, taking enforcement measures entails a serious risk for the patentee of being accused of misuse of right by filing proceedings alone (*LGE/Sony* and *Samsung/Apple*);
  - This may be different (i) if FRAND-offer is reasonable and alleged infringer refuses to accept this offer, or (ii) the alleged infringer does not negotiate in good faith, **BUT**
ESSENTIAL PATENTS IN PRACTICE

SCENARIO III

- Under current case-law, high likelihood that patentee who “jumped the gun” will be held to have misused its rights. In LGE/Sony and Samsung/Apple misuse assumed:
  
  (i) without discussion by the court whether or not offer(s) of patentee complied with FRAND, and
  
  (ii) without determining whether the counter-offers of alleged infringer were FRAND or were closer to FRAND than offer(s) patentee:

  "The District Court explicitly leaves open whether the counter-offer of Apple can be regarded as a FRAND-royalty, i.e. a license-rate that complies with the requirements in the FRAND-declarations. It can also be left open whether the counter-offer by Apple is closer to a FRAND-royalty than the opening-offer by Samsung."

ESSENTIAL PATENTS IN PRACTICE

- Hence, from current case-law it appears to follow:
  
  - Enforcement in the absence of a license: YES, unless misuse of right/special circumstances/extraordinary or unreasonable desires by patentee;
  
  - Enforcement pending negotiations: NO, unless lack of good faith or misuse of right by alleged infringer;
Each case to be assessed on its own facts with reasonableness as driving force:

* A patentee’s FRAND obligation should protect a third party that is genuinely interested in obtaining a license against being coerced into unreasonable conditions;

* A patentee’s FRAND obligation is not eternal: after having reasonably attempted to come to an agreement, the patentee should be able to invoke its patents and terminate further infringement;

Thank you for your attention...