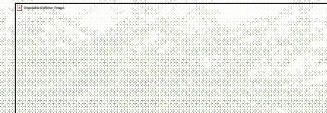




Framing patent hold-up within European laws

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Starting points for the analysis

- Standardization has become strategic for firms and society
 - Influences industry structure and innovation path
 - Alternatives: single technology (proprietary or open), battle of solutions
 - Path dependency
- Best outcome from social perspective
 - Standard meets user requirements (adoption)
 - Standard is successful (widely diffused)
 - Incentives are preserved for the future (even if at short-term cost)
 - Cost of establishing and administering standard is minimized



Patent disputes

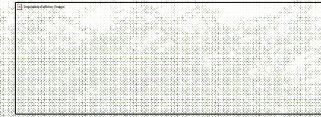
- For SEPs encumbered by FRAND commitments
 - SEPs, *qua* patents, are probabilistic
 - Large numbers of SEPs involved → portfolio licenses
 - Tough negotiations given the stakes
- Implementer
 - Outside option: challenge validity or infringement (same effect) → move out of probabilistic state
- SEP holder
 - Outside option: seek injunction → implementer will defend → move out of probabilistic state



Patent disputes

- Scenarios
 - *Negotiation*: parties negotiate, going to arbitration/courts if necessary → **no need for intervention**
 - *Hold-up* (properly understood): SEP holder wants to extract exorbitant royalties from implementer → **exploitative abuse?**
 - *Runaway* (reverse hold-up): implementer wants to practice standard without SEP license → **intervention under IP law?**
 - *Exclusion* (with vertically integrated parties): SEP holder wants to exclude implementer from market → **exclusionary abuse**





Framing patent disputes into European laws

- First port of call: IP law and remedies
 - Injunction as equitable relief: not that simple in Europe...
 - Directive 2004/48 on enforcement of IP rights
 - Background and context
 - Article 9 on interlocutory injunctions
 - Article 11 on final injunctions
 - Diverging implementations in the Member States



Framing patent disputes in European Laws

- How do we come to EU competition law?
 - Germany: implementation of Directive 2004/48 particularly favourable to patent holder
 - Competition law used to offer a forum to consider the conduct of the parties
 - Commission disagrees with German case-law (*Orange Book*) and endeavours to create its own precedents under EU competition law
 - Harmonization via EU competition law



Framing patent disputes in European laws

- *Orange Book* (to the extent applicable)
 - Assumes *Runaway* as starting point
- *Samsung and Motorola*
 - Assume *Holdup/Exclusion* as starting point
 - Use of 'exceptional circumstances' case-law: (i) SEP and (ii) FRAND commitment
 - Insistence that implementer keeps right to challenge (outside option): perverse effect on royalty price?



Framing patent disputes in European laws

- *Huawei v. ZTE*
 - Follows reasoning of Commission
 - Exclusion or exploitation? Missing a theory of harm...
 - Steps:
 - Prior notice
 - Specific written offer by SEP holder
 - Lack of diligent response by implementer
 - Implementer may reserve the right to challenge validity/infringement



Conclusion

- Patent disputes occur against a complex legal backdrop in the EU
- Competition law as “white knight”?
 - Theory of harm not well articulated
 - Assumptions and empirical evidence
 - Belief in “right price”, ignorance of probabilistic context
 - Interference from public policy misgivings regarding patent quality

