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Fair, Reasonable and Non-Discriminatory (FRAND) Licensing Terms

Research Analysis of a Controversial Concept
Standards and innovation

• Open standards
  • Interoperability and level playing field
  • Drive major technology upgrades in ICT

• Collaborative innovation
  • Some SSO members bear the cost and risk of proposing (patented) technologies
  • Specifications are adopted by consensus => standard essential patents (SEP)

• SEP licensing has two conflicting objectives
  • Maintain incentives to invest in standard setting
  • Make the standard available to all for public use

• SSO IPR policies aim to set the right balance
  • Fair, Reasonable and Non-discriminatory (FRAND) licensing principles
Origins of the FRAND controversy

• More essential patents, from more contributors

• Evolving licensing practices
  • Cross-licensing, bilateral licensing, pooling, PAEs

• Litigation in the smartphone area
  • SEP account for 11% of litigated U.S. patents (Gupta & Snyder, 2014)

• Influence of economic arguments
  • IP fragmentation => “Royalty stacking”
  • Ex post licensing => “Patent hold-up” and “patent hold-out”
  • The notion of “hold-up” especially is pivotal, with antitrust implications
Towards a FRAND clarification

• Two remarks
  • Standardization has been a huge success until now!
  • FRAND is about sharing value and reducing negotiation costs

• A FRAND framework, not a FRAND formula
  • Unclear framework => transaction costs, litigation and controversy
  • “Hold-up” versus “hold-out”: where is the bargaining power?

• Conditions for injunction
  • “Unwilling” to what?

• Royalty determination
  • Apportionment: “Incremental value” versus “Georgia Pacific factors”
  • Royalty base: another problem?
Beyond FRAND

• Market transparency
  • To reduce negotiation and litigation costs
  • Lack of empirical evidence on alleged market failures
  • Study actual price formation mechanisms, including litigation

• Patent density and patent quality
  • Low quality patents increase the cost of the system
  • Enhance cooperation between SSOs and patent offices

• SSO governance and innovation
  • Challenged by the growing number and variety of participants
  • Study the R&D part of standard setting