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

Research Analysis of a Controversial Concept

- 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

- 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

- 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?

- 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