FRAND COMMITMENTS AND EC COMPETITION LAW: A REJOINDER

PHILIPPE CHAPPATTE*

In this issue of the *European Competition Journal*, Damien Geradin and Miguel Rato publish their reply to my article, "FRAND Commitments—The Case for Antitrust Intervention".[1] Given the somewhat strident terms of their piece, I have been given the right to a brief rejoinder. Although there are many points of fact, law and policy in the Geradin/Rato paper that I would take issue with, the key weaknesses of their paper are the following.

A. There Is A Problem

Geradin/Rato argue that there is no real risk of excessive royalties through hold-up and royalty stacking. Their views are not, however, shared by many in the telecoms industry, least of all the heavyweights of the industry who filed the original EU complaints in 2005 (Nokia, Ericsson, Broadcom, Texas Instruments, NEC and Panasonic) and other suits against Qualcomm. The Qualcomm problem is now compounded by an increasing number of companies who have bought a few patents they claim are essential to telecom standards and are pursuing not only equipment manufacturers but also operators of mobile networks through patent litigation—the current claims of IPCOM against Nokia are an example. Looking to the future, as I explained in my original article, the levels of patent royalty claimed by those companies who have declared patents essential to the next generation (4G) of mobile technology (LTE) are generally regarded as wholly excessive (and far exceed 20% of the wholesale value of a handset).

* Partner with Slaughter and May, London and Brussels. Although the views expressed in this article are my own, Slaughter and May was retained by Ericsson in relation to its complaint against the licensing practices of Qualcomm Inc that was filed with the European Commission's Competition Directorate.

1 P Chappatte, "FRAND Commitments—The Case for Antitrust Intervention" (2009) 5 *European Competition Journal* 319.

B. Contract Law Is Not The Solution

Geradin/Rato claim that a FRAND commitment is a contract. This approach, however, is flawed. They have not cited a single case where a court has enforced FRAND as a contractual commitment to charge a fair and reasonable rate. I am not aware of any case where a court has made such a determination.

There is real doubt whether any court will hold that a FRAND commitment is a contract, since the "price" of the licence may not be sufficiently determined for the purposes of contract law.

Moreover, Geradin/Rato's concept of contractual FRAND is a rather unusual one—and in any event it does not address the risk of hold-up or royalty stacking.

They argue that a court should not determine or enforce a FRAND rate. Rather, they argue that the court's role is merely to ensure that the rate offered is "within the range of reasonableness", which, in the absence of an agreement, is for the IP owner to decide. The burden of proof, they suggest, is on the infringer to establish that the rate offered by the IP owner is unreasonable. This seems to give the patent holder all the aces, in particular since he can also threaten an injunction. Their view of contractual FRAND does not seem to accord with generally accepted views of a contract, which generally signifies an agreement between two or more companies—their proposal is more in the nature of a one-sided dispute resolution mechanism.

C. *Ex Ante* Licensing/Declarations Are Not The Solution

Geradin/Rato argue that a system which involves the declaration of maximum royalty rates by patent owners prior to the adoption of a standard (*ex ante* declarations) can provide appropriate benchmarks, as can licensing agreements entered into prior to adoption of a standard. The system of *ex ante* declarations has been tested for 4G mobile technology and has failed to avoid excessive royalty claims. Prior to a mobile telecom standard being adopted, there is insufficient knowledge about the strength and depth of each owner's patent portfolio to make reliable valuations. Every declaration risks becoming in effect a wish list of what a company that has filed a patent application would like to obtain by way of royalties—the declaration is at most, therefore, a starting point in negotiations rather than a realistic estimate of a fair and reasonable rate.

As to Geradin/Rato's statement that licensing of essential patents takes place generally prior to a standard being adopted, this is generally not the case. Most licensing takes place several years after the first release of a standard because it is only then that the relevant patent claims can be properly assessed and granted.

D. Geradin/Rato Offer No Practical Solution To Valuing FRAND Patents

The problem that I tried to address in my article is how to value patents that are essential to a standard where the technology has been developed collectively in a standard setting organisation (SSO) and has resulted in over 60 companies declaring over 10,000 patents essential to the standard.

Geradin/Rato's proposal is that, where patents are in dispute, you leave it to the court to decide what the disputed patent is worth by applying a range of factors as set out in the *Georgia-Pacific* case. This is not a solution to the problem.

A new manufacturer of handsets which has no patents to cross-license needs to be able to estimate roughly, for the purposes of its business plan, what level of royalties will be payable to essential patent owners if it wants to manufacture a 3G handset. Without predictability and transparency, new entrants could be dissuaded from market entry. Geradin/Rato expect new entrants to engage in lengthy negotiations with each patent holder to determine, amongst other things, the costs incurred by each patent holder in innovation. Yet, how can this be done in a reasonable period of time with so many different patent owners across so many patents? In patent litigation, substantial resources are deployed to evaluate just a few patents.

So litigation does not give us a solution—it is in the interests of all SSO members that new entry be encouraged. There needs to be a transparent and predictable system to enable the new entrant to have an idea of what the total royalty stack will be and how that total should be allocated to the many patent holders. The objective of the FRAND commitment is to ensure that the new handset manufacturer in my example does not pay too much. Geradin/Rato do not give the new manufacturer any practical benchmarks it can use either to estimate its royalty costs when evaluating its plan for market entry or to determine what a FRAND rate should be for a given set of essential patents in bilateral negotiations with patent holders.

E. The Proposed Benchmarks Are Workable

Geradin/Rato state that the benchmarks that I have put forward are unworkable. This is clearly not the case since they are actually used extensively in bilateral negotiations. Moreover, these benchmarks are currently being used in litigation to determine the value of patents that are claimed to be essential to 3G technology. The benchmarks I have proposed enable specific calculations to be made on individual patent values and would also provide our new entrant in my example above with the predictability and transparency required.

F. Conclusion

Collectively established standards that spawn many patents owned by many companies give rise to particular problems for competition authorities, courts and SSOs. It cannot make sense to have a system where the owner of one amongst thousands of patents essential to a standard can threaten a handset manufacturer or an operator with an injunction that would bring its entire business to a standstill as a means of extorting large sums of money in the name of innovation. Courts will find it difficult to address these issues by applying patent law principles because they can only examine a few patents at any one time and are no better placed than competition authorities in achieving an outcome that is in the consumer's interest. Competition law has a role to play in addressing the problem. Through a combination of legal and economic principles, competition law can assist in defining what "fair and reasonable" means without threatening the future of innovation. The companies that have supported the notion that a FRAND commitment is a real constraint on royalties include Nokia and Ericsson, who have invested far more in the development of 3G technology than any other company.