SINGAPORE EVENT – THE ROLE OF ANTITRUST IN LICENSING DISPUTES IN ICT SECTOR

David Evans:

Hello everyone. My name is David Evans with Competition Policy International, at least for this session here. The topic today is 'Antitrust and IP' and we have a great group assembled here today, so let me introduce the panel. We have Doug Ginsburg, Senior Judge on the DC Circuit Court of Appeals and Professor of the - Professor Doug, should I say the Scalia School of law?

Douglas Ginsburg: On July 1st.

David Evans: So right now it's the George Mason Law School.

We have Dina Kallay, director of Competition & Intellectual Property at Ericsson, based in D.C; and up the road we have Christopher Yoo, professor of Law at the University of Pennsylvania. Thanks a lot for joining me today.

I'm going to serve mainly as the moderator today, but as I told a few of you I may chime in every now and then, though this is mainly for you.

We're going to be talking about antitrust and patents, not generally, but in information, communication and technology industries. We're going to get to standards, essential patents, FRAND and a lot of other fun stuff that people are talking about these days - It's going to be great.

Nowadays, in terms of ICT, mobile is really the biggest and fastest-growing part - there is actually a lot of Intellectual Property behind the mobile devices we carry around with us and the cell networks we all use in order to be online all the time. In fact, we really owe it to the standards adopted cooperatively by industry players like Ericsson and many other companies

and the intellectual property incorporated in those standards for the mobile revolution we are living through these days.

But, a question for you guys - This is all very interesting, ICT is great, patents are great - but in terms of Antitrust and IP: Why are we talking about that topic now? What are your concerns when it comes to that topic?

Doug, why don't we start with you…

DG: There was a long, dark, age that ended in 1981, prior to which (in the US and probably elsewhere), antitrust laws were used or administered in a way that reflected great hostility to a lot of practices involving patents. The assumption was by the Supreme Court that well, if you have a patent you must have market power. That was evidently not true, but at the time people's thinking until 1981 was that these practices, patent packs, patent pools and so on, all of which were regarded as having market power. That went away, and by 1995 the US competition agencies issued joint guidelines on Intellectual Property in which they basically said: Intellectual Property is like any other property for antitrust purposes, except in certain special circumstances that have to be shown - otherwise we should treat intellectual property just as we would real property or personal property. And my concern is that now, 20 years later, there's a little slippage: agencies are departing from that in ways that I find a bit alarming, and I think unjustified…

DE: Talking specifically of the US agencies or…?

DG: Yes, US agencies, but in a way they're doing so less than a few others that were never committed to practice symmetry. So the Chinese agencies were never committed to symmetry, they didn't exist at that time.

So now we're seeing things such as the Department of Justice antitrust division suggesting that it may be an antitrust violation for a patent holder who's subject to a FRAND commitment to seek an injunction against an alleged infringement, and that they might have to prove to exonerate itself that the counter party was an unwilling licensee. That it was unreasonable, breached an impasse, wouldn't sign a licensing agreement. And that really undermines to a great degree not just the bargaining position of a patentee but the value of the patent. And as you start to diminish the rewards from holding the patents the investment in development is going to diminish.

DE: Let's bring Christopher to the conversation. Christopher, your reaction to this?

Christopher Yoo: So if you want to know *why* we're talking about this right now, I mean the easiest way to say it is that 'The Chinese antitrust authorities dropped a billion dollar fine on Qualcomm'. And a billion dollar has a remarkable ability to focus the mind, it has a way of making everything very clear, but it's not just that. We have whole dimensions to this fight spanning out…

DE: But just on that point, Christopher. Would you agree that the NDRC was building on an awful lot of momentum that is being created by a lot of other agencies. It's not like they woke up one day and decided to do this. There was the European Commission and a lot of other things going on that kind of laid the foundation.

CY: Absolutely, and I would say that because the antimonopoly law agency in China knew (I'm

doing some comparative ways of looking at them) they very much take cues from what happens in other parts of the world. They're watching it very closely. And the fact that they see another agency, whether US or EU enforcement agency taking action they take that as license or courage to take similar actions. It's not just though the major cases. What we're seeing, particularly in this case, in some of the situations we're going to talk about- There's the Huawei vs. ETE case which is happening in the lower level Chinese courts. We're seeing Apple and Motorola literally fighting it in the EU. We're seeing a great deal of litigation across the entire world over these issues, and we saw an exclusion order put in by the US International Trade Commission that was overturned by the President of the United States. I mean, this is the highest levels of issues and we're finding new fronts coming out in the design patent wars, which is - we're not even talking about conventional utility patents. We're now having things that protect the way things look! We used to not care about that, said it's very easy to get but it doesn't matter it, it doesn't protect very much. If you look at the Apple-Samsung war, they're fighting over a patent dimension we've never had before.

You ask what are my concerns. I would say two major ones. One is: there are certain aspects of this fight that threaten to turn routine disagreements over price between two parties into Antitrust wars. I mean there's always someone who wants to pay more, there's someone who wishes they'd been paid more, someone who wishes they had paid less. Unfortunately the way things are unfolding is, we're now dressing these up in different fights and we're not going to get through seeing that reality that I'm worried about.

The second problem is a much more fundamental one, which I think has an implication for the future. We always struggle in antitrust law with how to deal with dynamic efficiency. Static efficiency we get. We understand how can anything be exist within the existing practical possibility frontiers quite easily. The problem is that patents are the area where we actually focus on the Dynamic efficiency. The framing of these issues through FRAND and through ICT licensing has a way of accepting that focus on static efficiency at a time when we're seeing not only the developed countries understand the importance of innovation, but Chinese authorities in their latest five-year plan, just late last year, emphasized the importance of innovation. They see in their world that they can't compete on costs anymore, or they will rapidly reach that world where, as the Chinese economy keeps rising they're already facing low-cost competitors from cheaper labor sources like Indonesia and other sources. And they're starting to realize, as a lot of other countries have, that the way to maintain economic growth is by climbing up the ladder of value-added contributions- that means innovation and investing in better products as against cheaper products. And I think that the current FRAND limits really put a drag on that, and actually threatens to distract us from focusing on why there is an interaction between IP and antitrust, which is to drive forward innovation.

DE: Dina?

Dina Kallay: So, I think I'll take more of an industry view…

DE: Industry view, but also as a company you're seeing - Christopher was looking more at China, you're seeing the whole world…

DK: Right, I think but also specifically to a region.

I think that the technology that goes into these [devices] has become very, very valuable. And it's valuable not because it's in a standard, but because it adds a lot of value for the end consumers. For various reasons, the world's largest multinationals right now have an interest in devaluing that technology, each for their own specific reasons (and there are different flavors of that). For that reason, they have a well-coordinated and well-funded effort to devalue it. So this is why you're hearing about it: there's a lot of money that goes into advocacy (mostly towards antitrust agencies and elsewhere) to convince everybody that patents that are essential are somehow overpriced, and we need to deflate the price significantly. So that's the reason why we're hearing about it - simply strong advocacy from the strongest market players who are trying to use competition agencies to make that point and change the regulatory landscape in their favor.

In terms of what is my concern as a result of this blitz or attack on the FRAND ecosystem- the concern is that this encouraging wide-range infringement. Infringement is already a problem in many parts of the world without us harboring them and making infringement easier.

DE: Why does it make infringement easier?

DK: It's making it easier because it allows people to infringe long term strategically, and makes it more difficult to stop that infringement.

DG: If the Patentee can't go get an injunction against the infringement without risking an antitrust liability, they're going to have to pursue other relief for… years.

DE: And even if that hasn't been decided, what you're saying that because this is such a hot-button item with the antitrust authorities, there is a suspicion that if you infringe that the patent-holder may be reluctant to pursue you because of the antitrust risk?

DK: I would say that is correct.

DG: If they pursue it could take years…

DK: And just so they can fine you 10% of your worldwide turnover for attempting to protect your right! The concern is a slow-down of standard setting, and we are seeing some breakdown of standard-setting, and hopefully we'll get to that.

DE: So, the thing I find most confusing about this topic as an economist - really two things - One thing I find confusing is: A lot of the attacks on FRAND-related issues seem to suggest that there's a systemic problem in this industry. That doesn't seem to make sense, because if you look at the particular industry we're talking about: it has just an incredibly rapid rate of innovation. We have half of the adult people in the world now using mobile phones; their growth is extraordinary; we have this enormous mobile app ecosystem that surrounds the phones and which is then supporting companies such as Uber and so forth. You look at this ecosystem and, of all the things going on in the world it seems to be the thing that is working really really well. I could say 'anything is possible' and it would seem counterintuitive, that this is the industry around the world that is subject to a sort of systemic problem with a lot of friction. This is the problem that I find confusing.

DG: It's the industry that is the most patent-intensive and standard-intensive. It's probably the industry that has had the greatest year-over-year drop in cost for two decades. Capacity and performance increases at a greater rate than any other sector. But of course, the people who are fomenting these problems are saying "Just imagine how much better it would do if there weren't all of these anticompetitive measures out there."

DE: We're going to come back to this later, but right now I want to give Dina a challenge. I'm not sure that everyone who is going to be listening to this knows this topic as deeply as all of us do. So these acronyms - SEP's and SSO's and SDO's and FRAND and so forth - could you give us a one-minute or two-minute short course on the role of Standard Development Organizations (sometimes referred to as SSO's), tell us a little bit of what we're talking about when we're referring to FRAND agreements, just to help us put it in context.

DK: Sure. So, in the ICT industry, you have Standard Development Organizations that develop some very sophisticated standards- they're not like "the shapes of plugs on a wall", they're the type of things that allow you to stream a movie on your phone while on a train. And because these standards are sophisticated, it's useful for companies to get together and try to develop these together through synergies, and they do that through SDO's. Initially, to make sure that this collaborative technology is available (first of all to the founders who created it), the way to solve the problem has been to include commitments to give all the players access to this technology, and this is called a FRAND assurance or FRAND commitment. Initially it was not only for the future implementers of this standard, but also for the companies who created this together, to make sure there is no exclusion and that they can all access it.

So we're talking about patents that relied on a technology developed in a collaborative manner, and therefore companies choose voluntarily to give a commitment of accessing them on terms that are Fair, Reasonable and Non Discriminatory. But they don't have to, and I think that's something I wasn't quite clear about…

DE: But if they want to get their technology incorporated into the standard they usually do right?

DK: You usually have a form, and you can tick the box 'no' and sometimes your technology will still be taken. But typically yeah…

DG: Some standards organizations require it, and some do not. So maybe debated it and decided not to adopt a reasonable access…

DE: The role of the SDO's as institutions in this is something I want to touch on later, because I think that's a really interesting topic, but Doug- I want to hit you with a question:

Suppose I had a patent - maybe it's a Standard Essential Patent, maybe it isn't. I seek an injunction or an exclusion order against an alleged infringement. When if ever should that be an antitrust violation? Does the answer depend on whether it is an SEP? Does it matter that I entered into a FRAND agreement?

DG: There's a lot in there…

First of all let's distinguish between an injunction and an exclusion order. Someone goes into court seeking an injunction against the infringement of their patent, as opposed to an exclusion order, where you go to the International Trade Commission (at least in the US) and say 'this is an infringing product, it shouldn't be allowed to be imported.'

In each case, the decision maker (the court or the ITC) has certain criteria used to make a decision whether to grant an injunction or to grant an exclusion. To take the case of the injunction which is a little simpler: The courts want to consider, whether if you don't have the injunction you'd be irreparably harmed. (If you don't get the injunction, couldn't you just get damages later?) If you do get the injunction, will the other party be irreparably harmed? And so on. So where is the public interest in all of this?

Well, there are four criteria. Since the decision is going to be filtered through this process in which a court makes that analysis, it's ludicrous to think there should ever be an antitrust violation for going to court and asking… ever. It doesn't make any sense whatsoever. The ITC has a slightly different set of criteria, but they also have a public interest element in it, it's one their four also I think. So there's really no occasion except as with any other litigation where it's a sham - where you're using the process as your weapon, rather than looking for the outcome of the process.

DE: Christopher, your thoughts on this?

CY: I think that making the seeking of an injunction the basis of antitrust liability is going to put an enormous drag on innovation. Injunctions are extraordinary remedies. The traditional remedies at large is money - if you've got damages they make you whole with money. We've created some extraordinary remedies which only kick in if remedies at law are inadequate - that is just paying you additional money is not going to make you whole. If you've agreed to license to everybody on reasonable terms, the vast majority of the time all you're fighting about is money!

DE: Could I just ask you an empirical question? I would think that for the debate about antitrust and injunctions - regardless of whether it's ludicrous or not - I would think that an interesting empirical piece of information would be what fraction of the time do courts adopt an injunction as opposed to saying 'well, you can get damages later on.'? Are they common?

CY: In FRAND cases or infringement cases?

DE: Infringement cases

CY: They used to be quite generally granted, until a Supreme Court case called **E-bay vs. MercExchange,** which made clear that the conventional rules governing all injunctions applied to patents specifically. In fact, that created a bit of a sea-change in the behavior of lower courts. When we talk about actual FRAND, staying with essential patterns something with FRAND obligations, the injunctions almost never granted, for the simple reason that you already committed to licensing that money, you're only fighting over how many zeroes in the check and what the number is going to be, and remedies are more adequate.

DE: So you're saying that, with regards to FRAND patents a lot of this debate is over. Courts typically don't grant injunctions.

DG: Unless you've got an insolvent counter-party or someone who otherwise isn't going to be

able to pay for damages later on, there's no reason to do so. Now, let me just point out that what we've described is the US scenario, and that is true in many other places, but not everywhere. In Germany it's almost routine to get the injunction and then to have to get it lifted if they decide it has to. So the institutional setting makes a difference.

CY: Judge Posner, in one of the first big FRAND cases limiting at these judgments in the US essentially said "we should create a Bright-Line rule that you never get injunctions in these FRAND cases". On appeal the Federal Circuit said that's probably too strong for the reasons that Judge Ginsburg just said: If the infringer is judgment-proof - they have no money- then remedies of law are inadequate, that's a well-recognized basis for actually giving someone an injunction and the Federal Circuit takes the, in my opinion reasonable position, that we should apply the normal rules that we apply to all forms of injunction to antitrust. We don't need to re-make the law for so many things. The old law we developed for very similar cases holds up very well.

DG: Bear in mind that everybody here is in contractual relationships. The patentee, if there's an SEP with a FRAND commitment, has agreed - as Dina has said - to license to all comers on Fair and Reasonable and Non Discriminatory terms. Courts have decided that if that is a requirement in the SSO, participation in the SSO by-laws, then the implementer and the third-party beneficiaries of that - who's the player, who's the developer - that is a contractual relationship and there's nothing anti-competitive about that.

DE: Let's turn to a different topic. One of the theories that is sometimes used in this area is 'excessive pricing'. We all know that some jurisdictions -not the US- but China, the EC, lots of other places - charging excessive prices could be a violation of the antitrust laws under some circumstances. Dina, let me start with you on this one. Are there circumstances where you think it would make sense to use these laws to force patent-holders to lower their prices?

DK: I'm afraid not. I think that competition law should focus on exclusionary conduct in the area of unilateral conduct. Even in Europe, where they technically have Excessive Pricing on the books, they're really quite reluctant to use it. I know it's technically on the books, but the focus is on exclusion. I think competition agencies are not well placed to decide when one price is acceptable, especially when their National Champions think any price above zero is accepted, so I think it's a very bad idea.

DE: Chris, you started to mention the NDRC case in China as an excessive pricing decision. Your view on this?

CY: I agree with Dina. You don't even need fancy modern FRAND and patent law to do this. Antitrust courts going back a century acknowledge that setting prices is just not a function to which they're well suited. It's not just US law that says that - national laws all over the place say this, it's very typical. Think about this in the patent case - If you're an innovator, what really are you entitled to? You're really entitled to the difference between the value of your invention and the next best alternative- that is what you contributed to society and you have to get into some return on that.

First, a court determining what's reasonable in this circumstance has to make that scientific assessment based on hypothetical businesses based on those two differences and how they would play out.

Second, the other part we talk about conventionally in terms of understanding where prices are set, is not just the difference in reservation prices but bargaining power, traditionally understood as 'who has more round delaying this or dragging out the negotiations'. So you have to look at the gap of the reservation price which determines the value, trying to figure out how within their hypothetical global bargain how you set those prices. And even if by some miracle you get that right today, you're going to get revisions requesting 'oh, my factory costs have changed, we have to revise it.' 'The structure of demand has changed.' 'The level of competition has changed.' And the idea that you would have a court in an ongoing basis monitoring this, would be problematic.

The other thing that's quite interesting is, I keep thinking back to for example US law: If there's recourse to another legal mechanism that can give you largely the same results, your ability to bring a monopolization case to the courts watching goes right down. And as Doug has pointed out very nicely, what we have here is mechanisms under which other conventional forms of law resolve disputes over price. What do we benefit by overlaying antitrust liability on top of that? The question to ask isn't should there be liability, but should there be antitrust liability in addition to relief from a system that is already set to granted? And if that's the case first you get trouble damages, you get all these other problems associated with it. My guess is that, the fact that you already have a loop through for some other ways, that are better suited - whether its through arbitration of prices or other things to get at factual prices in antitrust reports make that a much better option.

DE: Of course, this is interesting because these are countries that actually have excessive pricing laws, exploitative abuse laws, in their books. And what you're saying is 'well that's fine, just don't apply them'. And in the case of China - just to push back on your comments Christopher- the courts have difficulty doing this. In the case of NDRC you actually have an agency that is primarily a price-regulatory body, so there may be a question on whether they're well-suited to do this, but at least they've been in the business of trying to for a number years.

CY: What is fascinating is, when you talk to European regulators about their excessive pricing laws they always say 'Oh, don't worry. We never enforce that.' And this is where I think Europe has to take its obligation seriously as a new emerging leader, setting an example in antitrust. Other countries are looking towards Europe's model of law, not just at the application, and actually taking guidance from it. So I think that the wink-and-a-nod 'don't worry we won't ever do it' isn't entirely responsible.

When you talk about the NRDC is actually really something fascinating. We complain in the US that we have two antitrust enforcement agencies left. They have three. And the three agencies they have, have built into their DNA a legacy of different things. So the one specific topic was the industrial policy. And still is - it believes in its ability to do that. What will happen you talk to Chinese judges, they are at a complete loss. They're the front line in trying to tackle these disputes, they're saying 'I understand what they're trying to do and I understand how they're trying to disagree with the government', but they freely admit that they really don't have standards for delivery. They're trying to make them up as they go along.

DG: Everything that Chris said about the difficulties of litigation, whether its an agency or a court trying to set a fair price, is true. But even if the agencies weren't there, even if there's

no antitrust element, the same difficulties are encountered in a contract case. We have a FRAND contract, basically, we come to an impasse, somebody gets sued, and a court's going to have to make a decision. It's something nobody wants, basically. There are only two reported decisions in the US, which the court has set the rate - and so the patentee came in with this claim for a huge amount, billions of dollars, and came away with $14 million. But the opinion is 207 pages long, as the court struggled to calculate this. The other case is protected so I don't know how big it was, but that's it.

DK: Maybe I should mention the Ericsson case, where the court found that an offer of 50 cents per device was FRAND, the infringers claimed that it had to be fractions of a penny, but the court found that no, 50 cents is FRAND. And the infringer eventually failed to negotiate the reduction.

DG: So both these cases come out with a small fraction of what the claim had been. Which fuels the fire of people saying "You see, the patent holders are demanding excessive amounts".

DK: Well, Ericsson had the opposite, it was the infringers who said that it should be fractions of a penny and the court said no. So that is actually an example of hold-out.

CY: This is the irony here, which is- this sort of disputes we're familiar with in any number of contexts, whether it's labor negotiations when you have a new union contract. You get these people with adversarial interests, and what we usually see is some forms of institutional design, a mechanism designed to try to solve this. In fact, what is frustrating to many of us is that these standard-setting organizations who create these FRAND obligations have not really been that aggressive about creating these. They are trying to compete to become The standard-setting organization. They have been intentionally vague about what these standards and mechanisms mean.

DE: I think Dina wants to push back, but before she does let me see if I can push back a little bit on it. Is it one reason why the SDO's may not have put a lot of effort into dealing with this problem is because it's not a problem? That by and large the patent-holders and the licensees, under the framework they have do work it out, and therefore spending effort developing a governance regime for this particular problem isn't worth their effort and might cause unintended consequences?

CY: I think that's definitely true. What the problem is, is that if you look at the litigation, the names of the parties - The disputes tend to be highly concentrated in a small number of parties. There is a very - I don't know how much I want to out this, but there's a very well-known, very large company.

DE: Out it, go with it.

CY: Apple takes the position that it won't pay a penny to anybody. And if you systematically take that as a position, you are going to see - even in a world where most parties resolve disputes amicably, and because they understand that in order to keep playing the game they have to work things out somehow - they have things to design, they have real work to do. If a single company would like to take the position that Nothing is FRAND - that Zero is FRAND in all cases - you're going to get litigation. And notwithstanding the fact that you don't need a law for a good resolution in all cases, you're going to need it in those cases.

DG: But that's really an outlier. There's very little litigation. Except for the Smartphone Wars, because of Apple, there's very little litigation around the world. You said repeat players - cross-licensing is a very common resolution of this, because if each company has big portfolios, and the safe thing is to cross-license those portfolios and not get in a war or anything. This is a situation that we see with physical goods and real property all the time when someone is contemplating an asset-specific investment. In fact everyone in the room has encounters of, well - once you rent an apartment, you're going to move in and maybe make some improvements, and how do you know at the end of the year your landlord isn't going to triple the rent? Well there are reputational constraints for one thing; there are provisions you can put in your index. There are institutions that have been developed to prevent just that kind of opportunistic behavior, and it's no different from this in my view.

DK: I don't subscribe to the notion that SDO's have not been working on this or thinking about it. Since the 1990's N-theory has had an IT policy and IPR working group, and I've been active in the NC IPR working group after 2001-2002. There's a lot of thinking that goes into it.

What we see in the patent policies that are in place is the consensus position of all the parties, and there's a little bit of wiggle-room or leeway in there, because you need to leave flexibility. Every licensing deal is different. For example, there are terms and conditions, it's not just monetary, and the length changes. The variables are endless, so you cannot tightly define it, because it won't work. It needs to be flexible to fix everything.

DG: So people enter FRAND agreements without knowing what they're going to pay, because you just know it's arranged. You're going to have to work out later on the particulars.

DK: I think people in the industry know pretty well what they're going to pay. It's not that big, people have an idea of how much they would pay.

DG: Within a range.

DK: Yes, within a range of course.

DE: I've been spending some time studying Standard Setting Organizations recently because I've ultimately concluded they're multi-sided platforms, and that's something that I like to look at. But one of the things that has struck me in this area is that these are very sophisticated organizations. They develop complex governance structures; they're obviously solving very complicated collective action problems; they've spontaneously arisen; they solve very difficult economic problems and have developed institutions to do that. So I would think that if, hypothetically, FRAND negotiations was a problem and there were a lot of breakdowns, that they would come up with a solution for that. Maybe that would be independent arbitration, or maybe they would do something, if there was a big problem. Am I wrong about this?

DK: People sometimes don't understand that SDO's are just a collection of the companies acting in them, they don't exist as free-standing entities.

DG: Well they have bylaws, many of them even have buildings…

DK: The industry practice in Europe forever, in most cases, has been arbitration when there are disputes. That's what parties use, it's efficient and it solves these issues.

CY: But David, I think that you hit the point right on the head, which is that they solve

collective action problems, but only inasmuch as there is an underlying agreement among the people constituting the standard and participating in developing the standard actually have a basis for agreement. And sometimes you can agree not to agree, or agree to disagree, or agree to leave some things out. And I think that you don't always solve a dispute up front, you kick some things down the road, and especially I don't think that every planner is always worried about how to resolve this. I think some things get kicked down the road a little bit farther, and we're encountering them now, and now's the right time.

DE: Let's turn to a little elevated topic. We hear the terms 'Hold-up' and 'Hold-out' or the reverse patent hold-up quite a bit in this area. Doug, what is 'patent holdup'? Any real or imagined examples that come to mind?

DG: You've got the patentee and the implementer and they negotiate a royalty. If the patentee is insisting - It's a derogatory term. Your request is a Hold-up, or your refusal to pay is a Hold-out. It's just a disagreement about where we come out.

DE: So in terms of 'Hold-up' in the derogatory sense - in terms of being a problem that policy should deal with - your view is that this is simply…

DG: It's a hypothetical negotiation which does not originate from patent licensing, it originates with contracts in general and the institutions that we've discussed that have grown up around sovereign contract laws. There's nothing special about this.

CY: I agree. There's a temptation any time people have a disagreement on price to talk about hold-up. That simply is not a hold-up. Doug alluded to it earlier - Hold-up is a form of opportunism. If you're locked into a particular person then, ex-ante to the decision you had total latitude to do whatever you wanted, but there's some change in position you have after the fact that makes you locked-in, and it has to be a change in policy by another person that you didn't know about when you made that decision up front. Those are the only times where we're really talking about a hold-up. It's used loosely to talk about any time when somebody has a patent.

If a patent actually gives you value because you created an invention that is superior to what you had before, that is not hold-up. That's just negotiation over the real value of your gun. Now what is fascinating is that the kind of opportunism we're talking about is usually reciprocal, and that's where we talk of reversal - it's the Apple problem. It's not only one side saying 'You have to pay me 'way too much'. The other side is in a position, because it's usually a bilateral situation, where they can actually hold-out the other way. And without understanding the frequency with which it has happened and the relative parity it gives you on both sides, I don't see how people can make a general claim that one is inherently a bigger problem than the other, particularly in a repeat-play game where things get settled. What's fascinating to me is the recent announcement between Microsoft and Google to actually shelve all the patent litigation. And to me that's a sign that they understand that in the long-term they'll win some, lose some (spend a lot of money on lawyers), but it's going to be a wash anyway, so why play that game? Because the only people you'll make rich are the economists and lawyers.

DE: I want to go to Dina next and then to Doug, but before I do that I'm going to give the opportunity to people on the floor to ask questions, particularly if you have contrary views to

this panel, just so we can get a little bit of contrariness going on.

DK: I want to draw a distinction between **'Hold-out'** and 'Reverse Hold-out'. There is a narrow distinction and people are not always aware of that.

A Hold-out is unilateral, generally. It's a party that tries to unnecessarily and unduly delay negotiations, including refusing to enter into a mechanism that will solve the dispute, that's unilateral. Reverse Hold-out I think more correctly refers to a collusive effort, and we see a lot of that too, where a group of technology users or infringers get together and collaborate in a kind of cartel or group, not to take a license. And you see that in several associations in the world at large.

DE: Any Questions?

Q1: Just now Judge Ginsburg mentioned that injunctions should not lead to any antitrust liability because everything is governed by FRAND contracts, which is it's own network of contracts. But what if they transfer the CPR of this network of FRAND contracts, there's this cool term I've heard coming up, 'FRAND wandering' - So you transfer it to an entity that's not bound by FRAND commitments, and then you use a minimum payment term that basically sets out a rate that is higher than what you would have in both the charge and the original FRAND commitment. Would this not be of concern in competition law?

DG: The principal reason why giving an injunction should not be considered even potentially an antitrust violation, is that you're asking the appropriate forum to give you an injunction and it's just seeking redress from a branch of government, and you're not necessarily going to get it. If there's no merit to it you won't get it.

Now you've raised a 'sham' type of a problem, where somebody is avoiding a FRAND sham by transferring the obligations, and I think there's been a case like that… They did not get away with it.

CY: The Volcomm vs. Qualcomm case to some extent is also similar. But you've actually identified a good example: That is hold-up. You have a situation where you made a representation that other people get access to this technology in FRAND. You then do something after that commitment has been made so that you don't have to honor that commitment anymore. Now that is an example of, well, fraudulent behavior. But you could also make the claim for hold-up as well.

DK: Right, but I think there's a growing consensus today that when you transfer FRANDs the commitments should transfer with it. In fact, ETSI has updated its policy to make it clear that it transfers with the FRAND. So I think that issue is taken care of, because there is a broader understanding today, that it could make an impact.

DG: If a corporation has got assets and liabilities and sells all the assets and leaves the liabilities, you don't really think they're going to get away with it.

DE: That's another FRAND issue. Dina, does the FRAND access commitment dictate the level of licensing in the value chain? In other words, whether a license should be granted to component makers for example, chip-makers in the case of mobile phones vs. final-piece makers, vs other levels? And before you answer that maybe just highlight why this turns out to be an important issue in this area.

DK: Sure. So, as part of this effort to devalue this technology there is some argument that there is a sort of 'compulsory license' where you Must license to component makers. Now of course components typically cost less, they're something small. The idea is that, psychologically, people will think "the technology can't be worth very much when the whole thing costs 10 cents" or even closer to zero. So that's where the argument comes from, and it's been made around the world.

However, first of all you pointed out correctly that the FRAND commitment is committed to grant access to this patent. If you look at DG Comp or the US agencies documents, they always speak about assuring FRAND access. Access and License are not the same thing - a lot of antitrust people don't know that because they don't engage with licensing - but when you license something, after you license it, it gets exhausted. You can only license it once. So you have to decide where you license it, after that you're done - you don't double-dip.

There has been an attempt to argue that you must exhaust it at a certain level. Now of course it depends on the language of the specific SDO you're in, how it defines FRAND. Until recently, no SDO in the world had set a compulsory license on a specific level. In fact the ETSI language makes it quite clear that it has to be fully compliant devices, end devices. In the Aerosil litigation in Texas there was an attempt to argue that you must license at a specific level, and the court rejected it. So no, I think that there are no Antitrust implications and there is no obligation under most SDO patent policies to do so. There certainly have been several well-funded attempts to argue that, but the fact that in Europe or in the US it went nowhere is good testament that there is no basis for it.

DG: Business practice on this varies, and there are good reasons why, more often than not, the end-user device is the metric that's used. It's administratively easier, easier to monitor, and simply the path of choice for parties - there's an exhaustion problem if they do it by components. So practice varies, but I think Dina is quite correct that it's rarely required. You hear these arguments for, was it SSPU they called it? Special payment…

DK: There is one kind of outlier SDO which has changed its policy recently to require it. And in that specific one we're seeing a breakdown.

DG: Is that EEE? I think I got some information on that today. There are 9 organizations now that, in light of the new policy, are not going forward - either explicitly stating that they will not make commitments under the new policy or simply declining to comment on whether they will. And who are the ones who specifically said they will not do it? Qualcomm, Ericsson, InterDigital, Nokia… four of the biggest patent portfolios in the world.

DE: So there is competition between SSO's, which is interesting…

DG: Well, I don't know whether that means there's competition or not. Each one has an area of coverage.

DE: But there's ability of the organizations to pull on other members.

DG: Well, and the others who have refused to say - Blackberry, Microsoft, HP, Texas A&M and Universities are major patent check-writers, major patent holders.

Q2: Two Questions- one quickly: Some discussion on global patenting, someone mentioned, it

seems that would deal with a lot of these issues. I think it played the role David suggested, some controversy.

I generally tend to agree with what Dina was saying and what Chris was saying, about repeatable games solving a lot of these issues, in that you have to go back to the Standards table with the same entities again. If you're unreasonable once, then you're going to have less room at the negotiating table the next time around. But what about players who aren't susceptible to repeatable game scenario? That ambiguity of FRANDS could then create a problem. One would be where you transfer -and you already mentioned these- to a non-committed entity, which then It transfers, but then you still have the ambiguity of FRAND commitments.

And the second would be say, software companies that don't have, in the style of Apple, -if you write individual software patents that don't necessarily have to meet on standards, you're not part of the standards bodies, but hardware companies have to keep stepping up to the plate with antitrust as a possibility.

DE: Who wants to take that?

DG: The simple one, the Noerr-Pennington one, as I alluded without getting into the case, I said 'You're just seeking redress from your government', where you seek an injunction. It's a 1st Amendment right. It's your right to write a petition. So it was pretty clear that making that into an antitrust violation would run into a Noerr-Pennington defense that would probably succeed in the US.

DK: There was the District of Wisconsin case, which said that they were immune from antitrust liability.

Q2: So you think the FTC Settlement then would have been susceptible for that court? Or what about the Motorola Settlement?

CY: The unfortunate thing about the Motorola Settlement is - The press release announcement to me speaks volumes. It's the same announcement that settled the Google Search case by the FTC. And it's unfortunately… the suggestion is that in the FTC's mind these two issues are tied together, and we see this with antitrust enforcement agencies and merger courts or other national agencies, where they'll use the fact that they've got a party in front of them that needs something in order to extract something of value from them. And you'll see many conditions acceded to that do not pertain to the merger- they're not merger specific - and in fact those enforcers, are often cashed and presented as voluntary commitments, which is - The government didn't order you to do that, but during the negotiation process the party says 'we'll do x' or 'We'll do y' and they accept those as being in the public interest but let them stand.

Not only is this potentially abusive of the fact that you have a person there who needs something from you - to take advantage of this to get them to do things you couldn't do directly through a regular process. The fact that these are often characterized as voluntary commitments immunizes them from judicial review, because they are not full-on agency actions, they're voluntary actions by one of the parties. So this has been a longstanding problem, and I actually find that the FTC settlement telling Motorola mobility NOT to seek injunctive relief as a remedy, I find it incredibly problematic and I do think that it's something

that China and other enforcement agencies are taking as guidance from us. 'Well if the EU is doing it and the US is doing it then this must be the accepted practice.'

DG: On the 20th of April, the European Commission cleared under its Merger Control rules the acquisition of Equenz and Paysquare by Worldline, subject to amongst others, a commitment to license technology interested in FRAND conditions.

It's exactly what Christopher was describing. These people are trying to do a merger, and they're being 'Held up' by the commission.

[pause]

The key question is - is this relief they could have gotten in court? And the answer is usually no. Because it's outside the margins of the merger. There was no intention (at least in the ones I'm familiar with) no contention that the merger was going to create an antitrust problem.

DE: As much as I'd love to continue with a conversation on competition authorities engaging in extortion, let's move on to something else. Let's finish up with a follow up question, and let me say a few things as part of the 'editorial'.

How do trade law issues touch upon competition law issues in this area? If you think about the dynamics of these cases in different countries going forward, you expect that some of these issues are going to move out of the mundane world of antitrust authorities and get kind of 'booted-up' higher, on to the White House in the US, or to the higher, executive level in other countries.

DK: I'm not sure if the world of antitrust is mundane. These issues are obviously fertile ground for National Champions to convince their governments and competition agencies to act and take protectionist measures to help them in ways that have nothing to do with competition analysis, although you can dress it up as competition analysis. So I think this is a classic subject matter for trade issues. So we're talking about intellectual property…

DE: But as a practical matter, are you seeing these issues being debated and addressed at higher levels of government?

DK: I don't know, I don't work at a higher level of government. We're dealing with Intellectual property and with Standards. There are two big treaties that govern this area. There's the WTO TRIPS agreement, which sets minimum standards for protection of patents and other intellectual property right; and then there's the standards treaty, the TBT (Technical Barriers to Trade), which sets certain rules that govern standards. I do know that in the context of the new EEE policy, there are some valid arguments about it taking place in a manner inconsistent with TRIPS or TBT obligations, and I'm not sure if all the governments involved were fully compliant with these obligations, so I think we were seeing this argued in the context of re-accreditation of a group in ENIC, so I do think we're going to keep seeing these issues permeating in, and I think it's time for competition agencies to understand that these issues are involved, because it's really an intersection…

CY: Dina points to GATT and the major multilateral treaties as developing in favor for trade. A lot of people say that 'GATT is dead', it's been taken over -TPP and TTIP is being taken over by regionalism, and in fact what we're seeing is, in addition to the questions being dealt with at

the multilateral level, we have not only regional agreements but also bilaterals, and there's a wonderful set of problems you run into very quickly which is: If you want relief where do you seek the relief? Who do you seek it against? And what trade mechanism or regime are you going to invoke as a basis for doing that? In fact, what you're going to see is a lot of flexibility. The other problem you start to see is essentially how remedies imposed in one country can have implications elsewhere. If you argue that there's a FRAND obligation within your national borders for one actor that will have multilateral tendential effects. Because if you then charge the same two entities a different price in another jurisdiction, you have to ask yourself what is the extra-territorial factor once that have been bound by that. And the risk is that - we usually think about the commonest way of working this out, you can end up with a situation where the least-common-denominator enforcer ends up de facto making laws for other countries. And they are really struggling with ways to try to figure out how to handle that, and that is an example of the old-world principles of problem resolution stratagems.

DG: You say the least stringent regulator?

CY: The Most stringent, the least-common-denominator.

DE: Let me ask you all a final question, to get you guys to make a prediction.

Here are some of the things you've said over the last hour: That the whole debate really should be tamped down. That antitrust really shouldn't be involved in a lot of these issues. If we actually think about the dynamics and what's going to happen in the next few years - Is your view that in, let's say three to five years time we will be sitting here Not talking about this topic because it will have been put to rest, or do we think that competition authorities are going to be becoming increasingly more aggressive in this area?

DG: I think in the US at least, it's going to peter out. It's going to end back where we remember. There's going to be a few court cases, and right now we have the agencies occasionally sending something that suggests that there might be an antitrust problem, so they'll stop doing that.

DE: Dina, how about the rest of the world?

DK: I think younger agencies might see this as an easy opportunity to use their excessive pricing laws in ways that will not be pro-competitive. More generally, I think we will see a chilling of Standard Setting - the standards will be less robust because there's a lot of pressure not to invest so much on these open standards. And that's too bad, because it will be detrimental to competition.

CY: A few years ago, the FTC initiated a study called a 'Section 6B Study' which got a lot of attention. They're in the process of starting FRAND and other antitrust contents - In the process of getting close to a resolution, it's generating much less interest than I think people thought, just because the issue seems to, not quite have run its course, but the idea of using antitrust laws to get at this doesn't seem to hold much traction. And probably it's also informed some of the informal conversations being held in Silicon Valley. Apparently a bunch of Silicon Valley firms actually hired some attorneys to actually study whether antitrust laws would be applied here, and their conclusion was No. So I don't think the industry is convinced that it's going to be that generative, and they think that that's not going to be the case. Hopefully, I would like to think three or five years ago we won't be having this conversation,

but those kind of predictions which we make at our own hazard- I've made them before and we're still talking about some of those things.

DE: Good rule as an Economist is - Never make a prediction that can be tested within your own lifetime. I think we're going to bring this to a close. We apologize if in our enthusiasm to make this interesting we have insulted any countries, competition authority or anyone in the antitrust world. But thank you all for a wonderful conversation.

END