

# Misleading and Deceptive Conduct under § 2

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# Deception in Standard Setting – Antitrust Implications of Violating FRAND Licensing Commitments

## *Basic Premises*

- Standard setting eliminates competition among alternative technologies - antitrust therefore has a stake in policing standard setting activity
- When a proprietary technology is made essential to an industry standard, the owner of that technology gains exclusionary power beyond that of the patent itself
- Assertion of non-disclosed patents after lock-in has been recognized as raising antitrust concerns
- Violations of other rules designed to constrain exploitation of lock-in raise the same competitive concerns

## *What is a FRAND Commitment?*

- The purpose of disclosure is to avoid hold-up
- One way is to include patents in the standard only where the patent holder agrees to license on *Fair, Reasonable, And Non Discriminatory* terms
- Obligation to disclose is ineffective if there is no recourse for violation of FRAND

# *What Problems Is FRAND Designed to Address?*

- Before = options
- After = no options
- Lock-in + significant sunk investment in standard-specific resources = potential for monopoly rents
  - Rewards for innovation, not “lock-in”
  - “Fair and reasonable” reflects the competitive environment *before* lock-in
- FRAND is also a commitment to a common enterprise
  - Mutual restraint: all patent owners agree to limit compensation to preserve efficiency of the standard
- FRAND is designed to create competitive markets for standard-compliant products

# *FRAND Is Enforceable Under the Antitrust Laws*

- The holder of a patent included in a standard gains monopoly power
  - The power to exclude from the standard
  - The power to control prices
- Agreeing to FRAND terms to gain inclusion, and then avoiding the FRAND constraint after adoption of the standard, is *willful acquisition* of monopoly power – it is not “competition on the merits”
  - The monopoly is not based on superior product, business acumen or historical accident
- Willful violation of a FRAND commitment is therefore monopolization in violation of the Sherman Act

# *Antitrust Courts Are Competent to Enforce FRAND Commitments*

- Some have argued that FRAND should be enforceable only under contract or tort law
- FRAND violations can be antitrust violations because of their effects on competition and consumers
- The public should have recourse under the antitrust laws even where it may not have standing to pursue a contract or tort claim
- Participants in the standard setting process may not have appropriate incentives to vindicate the public interest in competition
- If a court is capable of determining whether conduct violates FRAND in a contract or tort case, it can also do so in an antitrust case

# *Illustrations of FRAND Violations*

- Refusal to license
  - Outright refusals
  - Constructive refusals
  - Effects
  
- Discriminating against competitors in standard-compliant markets
  - Extending monopoly from technology to product markets
  - Hold up potential
    - Analogy: evasion of rate regulation through vertical integration
  - Effects on future innovation/competition
  - Discrimination is well known to antitrust courts



## *“Fair and Reasonable”*

- “Fair and Reasonable” royalty
  - Reflects the competitive environment *before* lock-in
  - Avoids rendering the standard inefficient
  
- Determining Fair and Reasonable royalty
  - Incremental value of technology relative to next best alternative
  - Possible adjustment to ensure overall royalty stack does not impede adoption of standard
  
- Antitrust courts routinely compare the “but for” competitive market to the observed market with the restraint

## *Proving “Fair and Reasonable” Royalties*

- Determining a “Fair and Reasonable” royalty is within the competence of courts and enforcement agencies
  - Consideration of alternatives in the standard setting process
  - Methods for calculating “reasonable royalties” in patent litigation
  - Industry benchmarks
  - Natural experiments
    - What rates are charged in a competitive environment?
  - Comparison to royalties charged for other standards
    - Royalties charged relative to contribution to standard
  - Comparison to royalty rate where there is no FRAND commitment

# Conclusion

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