



Federal appeals court sees potential antitrust violation in standardization skullduggery

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..... Just after Labor Day, the US court of appeals in Philadelphia held that standardization skullduggery can properly be held monopolistic conduct in violation of the federal antitrust laws. It ruled that intentional deception of a private standard-setting organization, when used to acquire or maintain monopoly power, can be an illegal monopolistic practice. The appellate court reversed a trial court decision that had dismissed the case on grounds that such conduct did not violate the antitrust laws. (For an earlier Micro Law story on the same controversy, see "Standardization Skullduggery Update: UMTS Standard," *IEEE Micro*, vol. 26, no. 4, July/August 2005, pp. 73-76.)

Background

Two principal standards are in use for cell phones: code division multiple access (CDMA) and global system for mobile communications (GSM). In the United States, Verizon Wireless and Sprint have adopted CDMA technology, whereas Cingular (now AT&T) and T-Mobile have adopted GSM. The two technologies are not interoperable, so that different equipment must be used for each one. Therefore, each technology has its own standards. Current-generation GSM networks use the third-generation standard known as the Universal Mobile Telecommunications System (UMTS) standard, which this lawsuit involves.

The European Telecommunications Standards Institute (ETSI) and its counterparts in other countries, after a lengthy evaluation of available alternative equipment and technologies, created the UMTS standard. Qualcomm, a US chipset manufacturer, supplies some of the essential technology that ETSI ultimately included in the UMTS standard, and holds patents on its technology. It is ETSI's policy to require a commitment from vendors whose technologies are included in its standards to license their technologies to standards users on fair, reasonable, and non-discriminatory (FRAND) terms. As is usual in standard-setting organizations, nobody has made a specific definition of FRAND.

Qualcomm participated in the standard-setting process for UMTS and committed to the FRAND policy. According to Broadcom's complaint, ETSI embodied Qualcomm's patented technology—known as wideband CDMA—in the UMTS standard only after, and in reliance on, Qualcomm's FRAND commitment. Qualcomm's technology is said to be essential to compliance with the UMTS standard. According to Broadcom, Qualcomm violated its FRAND commitment once the ETSI standard was fixed: It demanded discriminatory high royalties from chipset-manufacturer competitors and from cell-phone manufacturers using non-Qualcomm chipsets. As a result of its conduct, Qualcomm

has a 90 percent market share of wideband CDMA or UMTS chipsets. Also, Broadcom charges, Qualcomm has coerced many cell-phone manufacturers to deal exclusively with Qualcomm for UMTS chipsets.

Trial court ruling

In August 2006, the trial court (the US district court in New Jersey) dismissed the case on grounds that Qualcomm, as a patent owner, had the right to set the terms on which it would license its patents. The court opined that inclusion of Qualcomm's patented technology in the UMTS standard was of no competitive significance because an absence of competition was the inevitable result of any standard-setting process. By the same token, any alleged deception was of no moment because no matter what technology was embodied in the standard it would have eliminated competition from the technologies not chosen. The court said: "It is the standard-development organization's decision to set a standard for wideband CDMA technology, not Qualcomm's 'inducement,' that results in the absence of competing wideband CDMA technologies." Furthermore, according to the court, the standard-setting process and the existence of patent rights made the existence of a monopoly inevitable, so that no monopoly would be unlawful.

Appellate court ruling

The appellate court began by noting that prior cases had involved companies that deceived standard-setting organizations by misleading them about the existence of patents, which was not alleged here. Nonetheless, the cases were instructive because they “reflect a growing awareness of the risks associated with deceptive conduct in the private standard-setting process.” In the present case, the court had to decide whether Qualcomm had violated the antitrust laws if it were true that “Qualcomm deceived relevant standard-setting organizations into adopting the UMTS standard by committing to license its wideband CDMA technology on FRAND terms and, later, after lock-in occurred, demanding non-FRAND royalties.” Finding an antitrust violation here would be an extension of the prior cases’ treatment of deceptive conduct.

The court pointed out that the FRAND commitment was important in the standard-setting process. It cited a brief from the IEEE that said that under present IEEE by-laws, “the absence of irrevocable FRAND assurances will preclude approval of standards known to incorporate essential, proprietary technologies.” Thus, the court said, a FRAND commitment is “an important factor” in evaluating which of alternative technologies to adopt for a standard. Also, a FRAND commitment is important in determining competitive costs. The market value of a patent “becomes significantly enhanced after the patent is incorporated in a standard.” The reason is that “firms may become locked in to a standard requiring the use of a competitor’s patented technology.” The patent might then permit the patent owner to demand what the court termed “supracompetitive” royalties. “It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power.”

Accordingly, the court ruled, FRAND-related deception gives rise to an anti-

trust violation when the following conditions are met:

1. the environment is consensus-oriented private standard setting;
2. the patent holder makes an intentionally false promise to license essential proprietary technology on FRAND terms;
3. the standard-setting organization relies on the FRAND promise when it includes the technology in a standard; and
4. the patent holder subsequently breaches the FRAND promise.

This holding, the court explained, “represents the emerging view of enforcement authorities and commentators, alike.” The court stated the rationale behind it as:

Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder.

The extension from the prior standardization skulduggery cases is proper because “deceptive FRAND commitments, no less than deceptive nondisclosure of patent rights, may result in anticompetitive harm.”

The court then briefly addressed several peripheral points. First, it brushed aside the argument that it is impossible to put content into an undertaking to charge “reasonable” royalties. The court pointed to many decisions on reasonableness of royalty rates in the context of patent infringement damages awards. Then the court discussed the recently developed doctrine that a patent should not automatically be considered to confer market power and therefore to define a relevant market. The court acknowledged this principle, which the Supreme Court has

recently stated (in the *Independent Ink* case), but argued that Qualcomm’s attempt to invoke it missed the point: “It is the incorporation of a patent into a standard—not the mere issuance of a patent—that makes the scope of the relevant market congruent with that of the patent.” Finally, the appellate court acknowledged the principle that a firm is generally under no obligation to deal with all comers or to cooperate with its competitors. This is especially true of patent owners, who enjoy a statutory monopoly over the patented subject matter. The no-obligation principle is attenuated here, however, because Qualcomm voluntarily entered into a FRAND commitment with the standard-setting organization. The appellate court also criticized the lower court for assuming that monopoly was inevitable in a standard-setting process. That conclusion “ignores the possibility of a standard comprised of nonproprietary technologies.”

Comment

The most noteworthy point is the court’s extension of prior case law condemning the use of deception from the original standardization skulduggery context of concealing the existence of rights. This decision extends the law to deceptive abuse of promises about how patent rights will be exercised. Since the trial court had dismissed the case without any trial, there was no real discussion of what behavior should be condemned as un-FRANDly. That is left for future cases. One interesting note, however, is the court’s unwillingness to back away from the issue of what is a reasonable royalty. This decision has enormous significance for IEEE standard setters, and may suggest that IEEE should establish an IEEE mechanism for nonlitigation resolution of RAND disputes concerning IEEE standards.

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