Antitrust and FRAND: *Unwired Planet v Huawei*

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Overview

- role of competition law and FRAND commitments
- dominance
- abuse of dominance

Unwired Planet v Huawei

- High Court (HC) [2017] EWHC 711, 5 April 2017
- Court of Appeal (CA) [2018] EWCA Civ 2344, 23 October 2018

Licensing of IPRs (I)

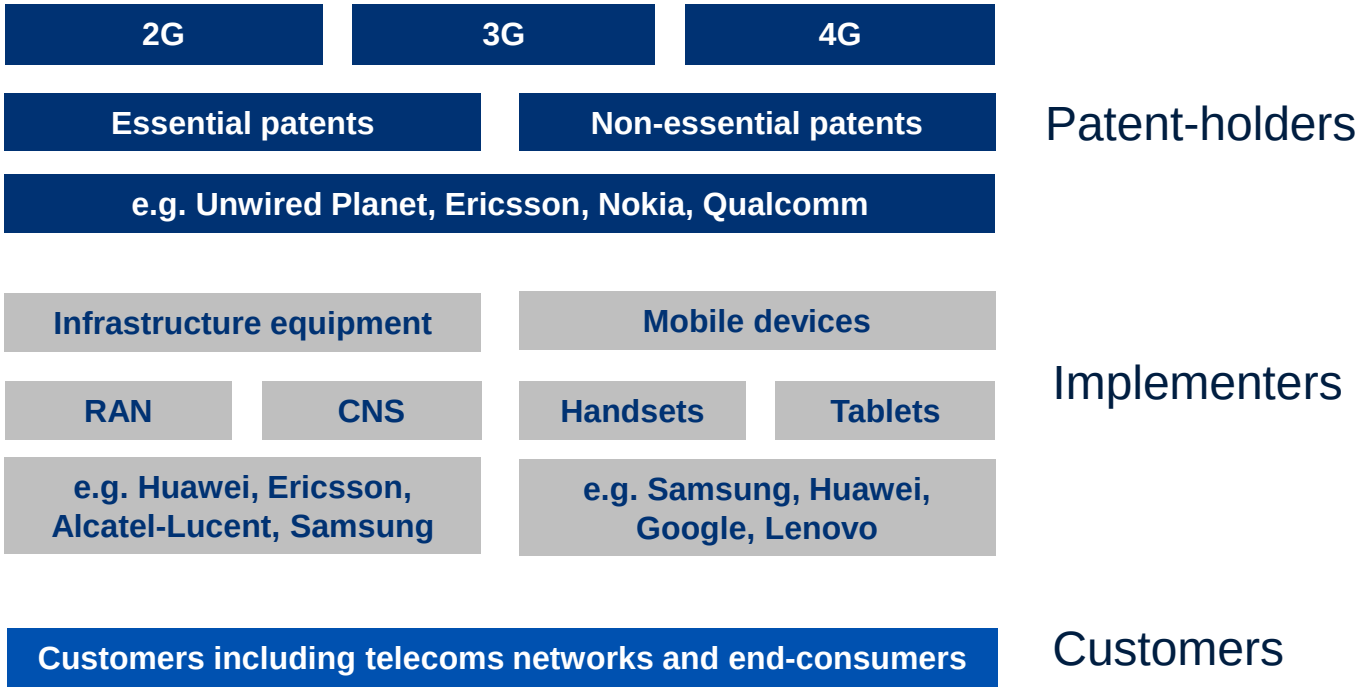
What should be the royalty rate for a licence?

- legal frameworks vary by type of IPR
  - **standard essential patents (SEPs):** included in standard with commitment to license on fair, reasonable and non-discriminatory (FRAND) terms
  - **other patents**: not technically essential but may be important; no formal FRAND
  - **copyrights**: aim is 'fair balance of rights and interests'; for collectively managed rights, licence should be 'reasonable in relation to economic value'

Keywords: 'fair' and 'reasonable'

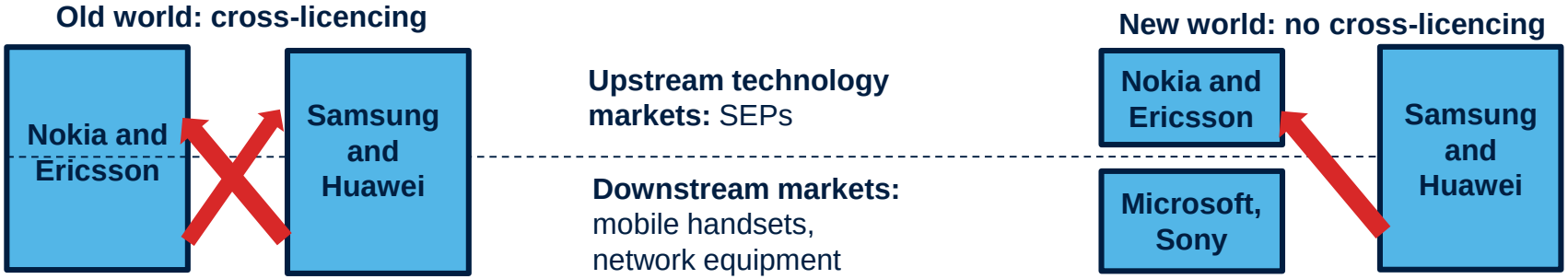
Licensing of IPRs (II)

Example: mobile technology patents



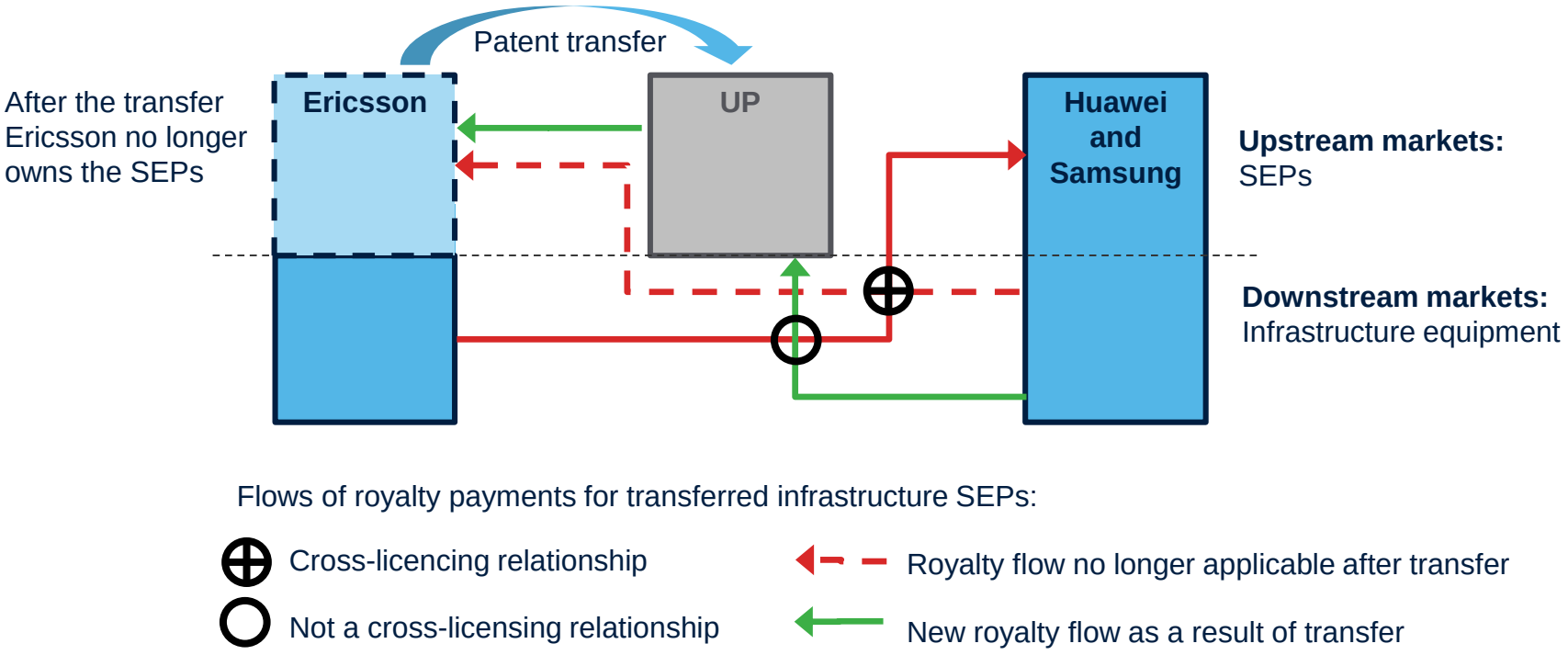
FRAND and the ‘smartphone wars’
Why now?

- lots of disputes between implementer and patent owner: e.g. *Apple v Samsung*, *Samsung v Huawei*, *Apple v Qualcomm*, *Apple v Nokia*
- vertical ‘disintegration’ and focus on IPRs as ‘products’ in recent years
  - also questions about legitimacy of new business models: ‘non-practising entities’



Unwired Planet (and Ericsson) v Huawei (and Samsung)
Patent sale and royalty flows

- UP purchased SEPs from Ericsson (2G, 3G, 4G, infrastructure), also non-SEPs
  - ends cross-licensing relationship between Ericsson and Huawei/Samsung
  - ongoing royalty payments from UP to Ericsson (with a specified minimum rate)



FRAND dispute: economic principles (i)

- FRAND terms should reflect the added value of the patent itself, but not the value derived from the patent's inclusion in the standard
  - Ex ante value (e.g. Swanson–Baumol, 2005): price that IP holder would be willing to charge prior to acceptance of IP into the standard

- there is not one FRAND value
  - 'The economic evidence did not support such an inflexible approach, however. Dr Niels, UP's expert economist, explained in his second report that FRAND was a range for all practical purposes. Dr Neven, Huawei's expert economist, said that there are different combinations of contractual clauses including royalties that can be deemed to be FRAND, but that for a given set of contractual clauses there is only one level of royalty payments that will be agreed upon.' (CA, para 123)

Swanson, D. and Baumol, W. (2005), 'Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power', *Antitrust Law Journal*, 73:1, pp. 51-56.

FRAND dispute: economic principles (ii)

- bargaining outcome (Nash): willing buyer, willing seller
  - does not mean 50-50!
  - 'No jury could follow this Greek or testimony trying to explain it. The Nash bargaining solution would invite a miscarriage of justice by clothing a fifty-percent assumption in an impenetrable facade of mathematics' (Oracle America, Inc. v Google Inc, 798 F. Supp. 2d 1111 (N.D. Cal. 2011)

- there are multiple valuation methods
  - e.g. comparators, numeric proportionality
  - 'both sides presented the courts with a blizzard of figures' (HC, para 227)
  - economic expert hot tub to provide bigger picture

Unwired Planet (and Ericsson) v Huawei (and Samsung)
Alleged competition law infringements

- Article 101 allegation against UP and Ericsson: **patent transfer itself is anti-competitive**
  - division of SEP portfolio between two owners increases total royalties
  - use of minimum rate increases UP's incentives to charge higher royalties
  - raises Ericsson's rivals' costs
- Article 102 allegation against UP: **UP abused dominance in SEPs**
  - starting litigation and seeking an injunction against Samsung and Huawei
  - seeking above-FRAND royalty rates, i.e. excessive pricing
  - discrimination between Samsung and Huawei
  - bundling SEPs and non-SEPs, and bundling through global licencing

Market definition and dominance
Is UP dominant in the relevant market?

- upstream market definition: SEP-by-SEP
- downstream market definition: boundaries not assessed in detail

- is UP dominant in upstream markets?
  - 100% market share: presume dominance?
  - but FRAND commitment and hold-out
- economics literature
  - hold-up and hold-out possible in theory
  - few empirical studies of either hold-up or hold-out

Court finds dominance, but …

- ‘For the period from 2013 to today, in my judgment the FRAND undertaking does operate as a practical constraint on a SEP owner’s market power, which is what is was intended to do. In the relevant market FRAND does give buyers a form of market power they would not otherwise have which they can and do wield’ (HC, para 656)

- ‘… this is an unusual sort of market. What the customers (implementer) really want is access to the standard, which they can obtain without paying SEP owners in advance. If they have to pay licence fees then they will of course do so, but the idea that implementers are all rushing to pay licence fees is fanciful. The structure of the market inevitably gives rise to the possibility of licensees holding out.’ (HC, para 660)

Abuse through injunctions and premature litigation

- injunctions as source of hold-up, as standardisation means industry lock-in (Shapiro, 2010)
- injunctions applied specifically to address hold-out (Langus et al., 2013)
- behavioural rules set out by CJEU in C-170/13 *Huawei v ZTE*, 16 July 2015
- **Huawei**: UP litigating prematurely tilts negotiation balance
  - but: 'premature' litigation leads to court determination of FRAND rate
  - litigation as a commitment device, facilitating negotiations
- **Huawei:** several rounds of negotiations reduce information asymmetry
  - but: this can also be achieved as part of discovery in court
  - negotiation can also be costly (especially if there is hold-out)

Shapiro, C. (2010), 'Injunctions, Hold-Up, and Patent Royalties', *American Law and Economics Review*, 12: 280.

Langus, G., Lipatov, V. and Neven, D. (2013), 'Standard Essential Patents: Who is Really Holding Up (and When)?, *Journal of Competition Law and Economics*, 9(2), 253.

Excessive pricing

- economic value
  - includes downstream profits and extracting some or even most downstream profits is not necessarily excessive: ‘coming close to throttling the goose that lays the golden eggs’
    - Scandlines Sverige AB v Port of Helsingborg (Case COMP/A.36.568/D3), Decision of 23 July 2004; Attheraces v British Horseracing Board [2007] EWCA Civ 38.
- FRAND context:
  - a royalty offer is not an imposed price; other side can make counter-offer or litigate and make court set rate
  - High Court: offer excessive only if it stifles any negotiation
  - ‘To make an opening offer to Huawei which is between about 1.5 and 3 times the upper level of the FRAND benchmark is not an abuse contrary to Art 102(a). In no sense could an offer like that prejudice the inevitable negotiations.’ (HC, para 774)

Price discrimination (and ND in FRAND)

- UP is not active downstream and thus has no ‘raising rival’s costs’ incentives
- price discrimination is applying dissimilar conditions to equivalent transactions: need to analyse downstream markets

- Samsung: $14m pa on $73.0 bn sales
- Huawei: $34m pa on $30.2 bn sales

→ discrimination?

- ‘Dr Niels … explained that one could not draw the conclusion that competition would be distorted because given the average selling price of the products (for Huawei assuming $164 to 185) the rate is very, very low … I accept Dr Niels’ evidence on this. Although the relative difference in royalty rates is large, to be considered in the context of possible distortion to competition they must be expressed relative to the margins on the relevant products. Expressed that way they are very small percentages.’ (HC, paras 517-8)

Bundling

- bundling is generally efficient: lower transaction costs, less doubt about whether specific patents are covered by licence ('patent peace')

- 'It may be wholly impractical for a SEP owner to seek to negotiate a licence of its patent rights country by country, just as it may be prohibitively expensive for it to seek to enforce those rights by litigating in each country in which they subsist … In our judgment these considerations point strongly to the conclusion that, depending on all the relevant circumstances, a global licence between a SEP owner and an implementer may be FRAND. Indeed, on the face of it, it is very hard to see how a contrary view could be justified. Assuming such a licence is not discriminatory, it would be the product of two undertakings acting fairly and reasonably.' (CA, paras 55-56)

Conclusion

- economists have a role to play in FRAND disputes
  - quantification of FRAND
  - conceptual approach to FRAND

- role of competition law to support FRAND framework
  - rules for bargaining process
  - distortions to competition through bundling
  - less clear: excessive pricing (FR) and price discrimination (ND)

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