

Xiaoye Wang^{*)}

Why SEPs have been involved in Antitrust Cases – From A Chinese Scholar’s Perspective

*If patents have been included in a technical standard and thus have become standard essential patents (SEPs), the SEP holders normally have to commit to the Standard Setting Organization (SSO) to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms. Although the FRAND commitments already put constraints on the patentees, more and more disputes over FRAND licensing fees involving SEPs are reaching antitrust enforcement agencies and courts, perhaps due to the fact that the FRAND commitments are often not workable. As demonstrated in the case *Huawei v. IDC* in Chinese courts, SEPs have special characteristics compared to non-SEPs, i.e. the licensing of SEPs relates more to the public interest, the holders of the SEPs may be thought to have dominant positions in the licensing market of their SEPs, the holder of the SEPs often have made commitments to license on the FRAND terms, and the holder of the SEPs should be allowed to use the injunctive relief only in limited circumstances. This article also proposes that Article 55 of the Chinese Antimonopoly Law (AML) should be reconsidered because it exempts the undertakings who exercise their IPRs in accordance with the laws and administrative regulations on IPRs from the application of the AML. However, as this article shows, the excessive royalty requested or the injunction sought by the holder of SEPs may not violate the patent law, but nonetheless may violate the antitrust law.*

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I. Introduction

In recent years, along with the development of information and telecommunication technology, there have been more and more antitrust cases involving standard essential patents (SEPs). For example, the cases in Germany included *Orange-Book-Standard*,¹⁾ *Philips Electronics v. SonyEricsson*,²⁾ and *Motorola v. Apple*,³⁾ and the cases in the U.S. included *Ericsson v. D-Link Systems*

^{*)} Distinguished Professor at Hunan University and Law Professor at Chinese Academy of Social Sciences. The author expresses her thanks to Mr. Lijie Han, Dr. Xiaojin Huang, Dr. Sun Su and Mr. Callum Weinberg for their contributions to this article.

1) Federal Supreme Court (Bundesgerichtshof) May 6, 2009 – Case No. KZR 39/06 (*Orange-Book-Standard*).

2) District Court of Mannheim, *Philips v. SonyEricsson*, May 27, 2011, doc No. 7 O 65/10.

3) Court of Appeal Karlsruhe, *Motorola v Apple*, February 27, 2012, doc. No. 6 U 136/11.

Inc.,⁴⁾ *Laser Dynamics v. Quanta Computer Corp.*,⁵⁾ *VirnetX v. Cisco*⁶⁾ and *Microsoft v. Motorola*.⁷⁾ There were also investigations involving SEPs by antitrust enforcement agencies, such as the investigations of Samsung⁸⁾ and Motorola⁹⁾ by the European Commission, and the investigation of Google by the U.S. Federal Trade Commission.¹⁰⁾

Since China's Antimonopoly Law took effect in 2008, there have been two major SEP related cases. One is the National Development and Reform Commission (NDRC)'s decision imposing a fine of RMB 6.088 billion upon Qualcomm for Qualcomm's abuse of dominant market position on SEPs, which is by far the highest administrative penalty imposed by Chinese authorities.¹¹⁾ Another is the first instance and final decisions made by Shenzhen Intermediate People's Court and Guangdong High People's Court regarding Huawei Technologies ("Huawei") v. InterDigital Group (IDC) in February¹²⁾ and October 2013, respectively.¹³⁾ In addition, the Ministry of Commerce of China (MOFCOM), which is in charge of merger control in China, has approved three transactions involving SEPs with restrictive conditions, i.e. Google's acquisition of Motorola in May 2012,¹⁴⁾ Microsoft's acquisition of Nokia's certain businesses in April 2014,¹⁵⁾ and Nokia's acquisition of Alcatel Lucent's equity interest in October 2015.¹⁶⁾ These cases demonstrate that SEPs have become a hot topic in China within the intersection of antitrust law and intellectual property law. This article primarily discusses the special characteristics of the SEPs compared with other patents. I will then explain why SEP holders are often involved in antitrust litigations or become a subject of investigations by antitrust enforcement agencies. In response to some people in the international community who believe that patent law should always apply to cases involving SEPs, I would like to point out that under many circumstances, abuse of rights associated with SEPs should be treated as abuse of a dominant market position is treated, and therefore antitrust law should be applied.

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- 4) *Ericsson Inc. v. D-Link Systems, Inc.*, Case No. 2013-1625 at 41 (Fed. Cir. Dec. 4, 2014), available at <http://www.cafc.uscourts.gov/sites/default/files/opinionsorders/13-1625.Opinion.12-2-2014.1.PDF>.
 - 5) *LaserDynamics, Inc. v. Quanta Computer Inc.* 694 F.3d 51 (Fed. Cir. 2012).
 - 6) *VirnetX, Inc. v. Cisco Systems, Inc.*, Case No. 2013-1489 (Fed. Cir. 16 Sep. 2014), available at <http://www.cafc.uscourts.gov/sites/default/files/opinionsorders/13-1489.Opinion.9-12-2014.1.PDF>.
 - 7) *Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217 (W.D. Wash. 25 Apr. 2013).
 - 8) Case AT.39939 Samsung – Enforcement of UMTS Standard Essential Patents, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.
 - 9) Case AT.39985 – Motorola – Enforcement of GPRS Standard Essential Patents, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.
 - 10) Statement in the Matter of Google Inc., FTC File No. 121-0120, January 3, 2013, <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmttoftcomm.pdf>.
 - 11) Administrative Sanction Determination of NDRC, No. 1 (2015), Sanction Determination Document of Price Supervision Division of Development and Reform Office, http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.
 - 12) No.857 and No. 858 (2011, First Instance) Document of Intellectual Property Chamber of Civil Division of Shenzhen Intermediate People's Court.
 - 13) No.305 and No. 306 (2013) Determination of Civil Division III of Guangdong Province Higher People's Court of China.
 - 14) See Notice No. 25 (2012) of the Ministry of Commerce of China, <http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml>.
 - 15) See Notice No. 24(2014) of the Ministry of Commerce of China, <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml>.
 - 16) See Notice No. 44(2015) of the Ministry of Commerce of China, <http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml>.

II. SEPs are related to public interest to a greater extent

1. Technology standardization has strong implications to public interest

SEPs are requisite and irreplaceable patents incorporated into the technology standard. They are also indispensable patents for enterprises to produce standardized products. It is fair to say that SEPs are the result of technology development and adoption. As technologies in certain industries, such as electronics, telecommunications and information industries, become more and more complex, such industries involve numerous manufacturing enterprises and increasingly extensive cooperation in the production process. The production of a single product may require the participation of hundreds, or even thousands of enterprises. Such complex cooperation of production facilities requires technically a high degree of unity and coordination among the enterprises. For this reason, it is necessary to create and enforce various technology standards, the purposes of which are to facilitate cooperation and coordination among enterprises and departments within enterprises to produce a standardized product.

The benefits of technology standardization are clear. Firstly, standardization can help realize compatibility and interconnectivity between products of different manufacturers. It is critical to the information technology industry, which involves voice, signal and data transmission through networks. For example, a telephone call from Beijing to Chicago will not go through if interconnection between China and U.S.'s telecommunication networks has not been established, or if telecommunication products of both countries are incompatible. Secondly, technology standardization can increase the number of users of technical products, which in turn will increase the production scale of enterprises and reduce production costs. Moreover, as more enterprises are able to manufacture standardized products and spare parts, consumers will have more choices, which may further promote competition and innovation among producers. Thirdly, technology standardization normally utilizes state-of-the-art technologies, and therefore it helps to promote the quality and safety of the products. Fourthly, as shown in the aforementioned example of the phone call between Beijing and Chicago, technology standardization can reduce the obstacles to imports and exports due to technical differences, which is of paramount importance to international trade in goods and services. Because technical standardization is critical to the modern economy and society, it is widely acknowledged to be "one of the engines driving the modern economy".¹⁷⁾

Without doubt, the industries that most actively promote technical standardization are those whose products involve compatibility and interconnectivity, especially IT-related industries. To organize and formulate technical standards, the players in these industries have established many standard-setting organizations (SSOs), for example, the Institute of Electrical and Electronics Engineers (IEEE), the European Telecommunications Standards Institute (ETSI), the International Telecommunication Union (ITU), and the Internet Engineering Task Force (IETF). Considering technical standardization can affect a nation's economic and technological development, as well as product safety and government procurement, governmental organizations are usually also involved in the formulation of several important technical standardizations. Taking the wireless communication industry as an example, because the industry is involves international spectrum resources that are distributed uniformly by the ITU, it is necessary to coordinate and coop-

17) Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, issued by the U.S. Department of Justice and the Federal Trade Commission, April 2007, available at <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>, at p. 33.

erate with governments all over the world. Hence, almost all of the countries and regions have adopted CDMA, WCDMA, CDMA2000 as 3G standards, and LTE as a 4G standard. In addition, although some technical standards are not formulated or acknowledged by technical standard-setting organizations, as long as the related products using such technical standards have been widely accepted by the consumers, such technical standards are also regarded as “de facto standards” as they have been chosen by the market.

Given the above analysis, technical standardization reflects more than the cooperation and coordination between various enterprises that participate in the setting of the technical standard; it can be viewed as a contractual relationship between the members of the standard-setting organization. In addition, it also involves the interests of many other entities, and therefore it has public interest implications. For example, technical standardization has a very close relationship with the entities that implement the technical standards and rely on the essential patents incorporated into the standards, and in this case, they often have invested a significant amount in the production of the technical products. Technical standardization also reflects the interests of end-consumers, because they can benefit from innovation, creativity and new technology and enjoy the development of new products. Technical standardization also reflects the interests of governments and regulatory authorities, since it involves the regulation of technical products and procurement by the governments. That's to say, “Standards permit society to make more effective use of limited resources and allow improved communication among all parties involved in particular activities, transactions, or processes.”¹⁸⁾ It is clear that technical standards are often crucial to scientific and industrial processes, and they are public goods and involve broad public interest.

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2. SEPs relate to public interest to a greater extent compared with other patents

However, with the extensive application of technical standards, including industrial standards or national compulsory standards, the standardization process will inevitably result in one of two consequences: either competing technologies to SEPs will partially or completely lose their value once they have failed to become incorporated into the standards, or, the technologies accepted as the standard will be isolated from competition, and therefore will become technologies with monopolistic characteristics. In the latter case, the manufacturers of standardized products will not be able to supply such products or services if they have not been licensed to use the SEPs. This means it has become a compulsory requirement for manufacturers to obtain the right to use such SEPs. In this situation, if the holder of SEPs refuses to license the SEPs, or licenses SEPs at exorbitant prices, the impact of the “patent hold-up” of the SEPs will be entirely different from that of ordinary patents, because it will not only seriously affect the interests of the counterparties, but will also seriously affect the interests of consumers as well as the production and the sales of the downstream products, and it will become an issue closely related to the public interest.

Because the dissemination and promotion of the technical standard is closely related to the public interest, and the “patent hold-up” involving SEPs is in conflict with the purpose of technical standardization and undermines the interest of consumers and the public, some competition authorities expressly pointed out that the public interest factor must be considered in cases involving the SEPs. For example, *Policy Statement on Remedies for Standards-Essential Patents subject to voluntary F/RAND Commitments* issued by U.S. Department of Justice and U.S. Patent and Trademark Of-

18) *Maureen A. Breitenberg*, The ABC's of Standards Activities, NISTIR 7614, August 2009, p. 2, available at http://gsi.nist.gov/global/docs/pubs/NISTIR_7614.pdf.

rice in January 2013 pointed out, “a patent owner’s voluntary F/RAND commitments may also affect the appropriate choice of remedy for infringement of a valid and enforceable standards-essential patent. In some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest.”¹⁹⁾ On June 4, 2013, the U.S. International Trade Commission issued an injunction to Apple, prohibiting it from importing some products to the United States for infringing SEPs of Samsung. However, on August 3 2013, the U.S. Trade Representative, representing the Obama administration, vetoed this injunction and pointed out, “in any future cases involving SEPs that are subject to voluntary FRAND commitments, the Commission should be certain to examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest.”²⁰⁾

III. The holder of SEPs has a dominant position in its SEP licensing market

1. Technical standardization may enable the licensing of each SEP to constitute a separate relevant technology market on its own

In most cases involving SEPs, it is claimed that holders of SEPs abuse their dominant market position. For example, the administrative sanction decision against Qualcomm made by the National Development and Reform Commission of China (NDRC) and the final adjudication on Huawei v. IDC by the High Peoples’ Court of Guangdong Province of China both found the defendants abused their dominant market positions. However, before determining abuse of the dominant market position, the enforcer should establish that the defendant has a dominant market position, and before that, the authorities should first define the relevant market. Without an accurate definition of the relevant market, it is difficult to identify the competitors and potential competitors, and to decide on the market shares of the related companies and the degree of concentration in the relevant markets. These are often needed to make a decision regarding the market position of a company and the impact of its business activities on the market.

Regarding cases involving SEPs, since the SEPs to be licensed to the licensee are unique and irreplaceable, the relevant technology market in such cases is the requisite patents involved. It’s necessary to point out that since the technical standard is complex and the technologies in a standard are diverse, it’s often impossible for one holder of the SEPs to own all SEPs for one standard. Accordingly, one technical standard typically involves a number of SEP holders. Since various SEPs incorporated into one standard are functionally not interchangeable, if an enterprise wants to produce a product subject to a standard, it may have to negotiate with each holder of the SEPs to obtain licenses to use the whole set of SEPs. Under such circumstance, each SEP contained in the standard could constitute a relevant market.²¹⁾ Chinese courts illustrated this issue expressly in the Huawei v. IDC case, indicating that as there is no substitute for IDC’s SEPs on the market and obtaining such SEPs is a requisite step to produce 3G wireless telecommunication products, each SEP for the 3G wireless telecommunication standard owned by IDC could constitute a rele-

19) U.S. Dep’t of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents subject to voluntary F/RAND Commitments, available at https://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf, at p. 6.

20) *T. Vann Pearce, Jr., et al*, White House Reins in ITC on Standard-Essential Patents, available at <http://www.jdsupra.com/legalnews/white-house-reins-in-itc-on-standard-ess-06171/>.

21) When holders of SEPs have more than one SEPs, these SEPs may be viewed as a series of relevant products. When licensees own SEPs, licensors and licensees may set up a cross-licensing arrangement.

vant market on its own. The court further pointed out, “although there are hundreds of standards for the production of a computer or a smartphone, and hundreds or even thousands of SEPs for each standard, considering each SEP is irreplaceable to a potential licensee, each SEP may constitute a relevant market in a specific case.”²²⁾ NDRC also opined in its administrative decision against Qualcomm that “as a highly complex standard, the technical standard for wireless telecommunication includes a large quantity of SEPs. A patent for wireless telecommunication becomes a wireless telecommunication SEP once it is incorporated into CDMA, WCDMA and LTE technical standards, and then becomes irreplaceable and unique, precluding competitive patents. Therefore, each SEP for wireless telecommunication constitutes a separate relevant product market.”²³⁾ To further elaborate why each SEP owned by Qualcomm constitutes a separate relevant market, NDRC also considered the demand substitutability and supply substitutability. NDRC pointed out, “from the perspective of demand substitutability, to produce wireless telecommunication terminals complying with a specific standard, each SEP incorporated into the standard is necessary and irreplaceable. Wireless telecommunication terminals will fail to comply with the relevant technical standards and won’t be marketable if any SEP is not applied.”²⁴⁾ “From the perspective of supply substitutability, each SEP is unique, and after it is incorporated by wireless telecommunication standards and implemented, there will no longer be any potential substitutes for the SEP.”²⁵⁾ It seems that this judgment by Chinese courts and this decision by the NDRC may follow the experiences of other jurisdictions. For example, in its decision on Google’s acquisition of Motorola, the European Commission pointed out that “The specificity of SEPs is that they have to be implemented in order to comply with a standard and thus cannot be designed around, i.e. there is by definition no alternative or substitute for each such patent. Therefore, each SEP constitutes a separate relevant technology market on its own.”²⁶⁾

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2. The holders of SEPs are often considered to have a dominant position in their SEP licensing market in Chinese practices

After the relevant market has been defined, the antitrust authorities are able to decide whether an enterprise has a dominant market position. According to Article 17 of the Antimonopoly Law of China, a dominant market position means “the market position of undertakings to control the price and quantity of products or other transaction terms in the relevant market, or to enable them to block or affect other undertakings in entering into the relevant market.” This means that a dominant market position reflects the relationship between a business operator and the market, i.e. the business operators with a dominant market position are not constrained by competition; on the contrary, they are able to determine prices and business strategies without considering the reactions from their competitors or other business counterparties. For example, in its administrative decision to sanction Qualcomm, NDRC analyzed the reasons why Qualcomm has a dominant market position in SEP markets in accordance with Article 18 of the Antimonopoly Law: (1) Qualcomm has 100 % market share; (2) Qualcomm has the ability to control wireless telecommunication SEP markets; (3) manufacturers of wireless telecommunication terminals highly

22) No.305(2013) Determination of Civil Division III of Guangdong Province Higher People’s Court.

23) Administrative Sanction Determination of NDRC, No. 1 (2015) (fn. 11).

24) Ibid.

25) Ibid.

26) Case No COMP/M.6381 – Google/Motorola Mobility, Commission decision of 13/02/2012, para 54 and 61, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf.

rely on Qualcomm's portfolio of wireless telecommunication SEPs; and (4) it's very difficult for other business operators to enter into the relevant markets.²⁷⁾ This line of analysis is correct. Actually, because the technical standard-setting organizations have excluded potential competition in the relevant technology market after the technology underlying the SEPs were chosen, and the licensing of these SEPs became mandatory for the manufacturers to make the standardized products, the holders of SEPs consequentially hold a dominant market position in the relevant SEPs markets.

Defendants in SEP cases seldom raised objections to law enforcers' findings of their dominant market positions. For example, in Qualcomm's case, Qualcomm did not provide evidence to prove that it did not hold a dominant market position.²⁸⁾ However, some SEP holders have refused to admit that they had a dominant market position. For example, in Huawei v. IDC, although IDC has a large number of SEPs in 2G, 3G and 4G standards, it insisted that it does not hold dominant market position under Article 19 of the Antimonopoly Law of China because these SEPs account for less than half of all the SEPs in the respective standards.²⁹⁾ IDC further asserted that, as a holder of SEPs, its exercise of its rights under the SEPs is constrained by the development of the wireless telecommunication industry and technologies in the industry, and therefore, it does not have dominant market position and is unable to preclude competition.³⁰⁾

However, IDC's view is obviously not correct. Huawei does not wish to acquire all of the SEPs relating to the 3G standards, such as WCDMA and CDMA2000, from IDC, but only the SEPs owned by IDC in such standards. As pointed out by the court, "in this case, IDC owns the SEPs in the 3G communication of WCDMA, CDMA2000, and TD-SCDMA, both worldwide and in China, and given the uniqueness and irreplaceability of each SEP in the relevant 3G standards, IDC has the entire share in each of the relevant 3G SEP licensing market and is able to obstruct and affect the entry of other business operators into the relevant market."³¹⁾ As we know, the European Commission also expressed a similar view in the case involving Samsung, "Samsung holds a 100 % market share in each of the relevant markets. While ownership of a SEP does not confer a dominant position, UMTS is factually the only 3G standard in the EEA. Due to the wide application of the standard, it is indispensable for manufacturers of mobile devices to comply with the UMTS standard."³²⁾

In fact, when finding IDC had a dominant market position in its SEP licensing markets, the court additionally also considered IDC's unique situation that IDC is a technology company that does not use its own patents to produce wireless telecommunication terminal products. Generally speaking, manufacturers more or less own some patents used in their technical products. To reduce the disputes and lawsuits as well as relevant costs, the manufacturers usually agree to cross license their patents or create a patent pool. Because IDC's business model is only to license its patents but never produce any end products, the licensing of its patents cannot be counteracted by manufacturers of wireless telecommunication equipment who also hold SEPs. That's to say, since all manufacturers of the wireless telecommunication equipment in the downstream of 3G SEPs licensing markets need to seek licensing from IDC, IDC's dominant position is strengthened in

27) Administrative Sanction Determination of NDRC, No. 1 (2015) (fn. 11).

28) Administrative Sanction Determination of NDRC, No. 1 (2015) (fn. 11).

29) No.858 (2011, First Instance) Document of Intellectual Property Chamber of Civil Division of Shenzhen Intermediate People's Court.

30) Ibid.

31) No. 306 (2013) Determination of Civil Division 3 of Guangdong Province Higher Court.

32) EU Commission, Case AT.39939 –Samsung Enforcement of UMTS Standard Essential Patents (fn. 8), para 45, 46.

the SEPs licensing markets. Indeed, IDC proudly admitted that “each cellular maker of the wireless communications equipment in the world is using the technology of the company.”³³⁾ This further shows that IDC has a dominant position in the SEP markets.

IV. The holder of SEPs commits to FRAND licensing

1. FRAND licensing is an agreement between SSO and the SEP holder

Since patents are legally proprietary rights, the holders of the patents have two basic rights. The first right is to prevent any third party from acquiring or using their patents; the second right is to license their patents under conditions designed by them, especially for the condition that the holder has the right to determine the royalties as returns for their R&D and innovation. For example, China's Patent Law provides: “After the grant of the patent right for an invention or utility model, except where it is otherwise provided in this law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, making, using, offering to sell, selling or importing the patented product, or use the patented methods, or use, offer to sell, sell or import the product directly obtained by the patented methods, for production or business purposes.”³⁴⁾ The Patent Law also provides that “any entity or individual wishing to exploit the patents of others, shall enter into a written licensing contract with the patentee, and pay the patentee patent royalties.”³⁵⁾ The TRIPS Agreement, an important document of the World Trade Organization (WTO) framework, has similar provisions.³⁶⁾

However, when it comes to SEPs, if the underlying technology is widely used, for example, by becoming an industrial standard or an international technical standard, there will be a “locked in effect” for the SEPs. Because the SEPs are immune from competition, all manufacturers of relevant products must use the SEPs incorporated into the standards, and the position of the SEP holders will be strengthened remarkably. In this situation, if a holder decides to not license SEPs, or to impose disadvantageous conditions on some licensees, or to ask for excessively high royalties at its own discretion, it will not only severely affect the business operation of competitors, but will also greatly limit or weaken the commercial implementation of the technical standards. Ultimately, the consumers may not have access to the technically standardized products. This would severely contradict the original purpose of the technical standardization. To prevent holders of SEPs from abusing their dominant positions, before a patent is accepted as a SEP, the standard-setting organizations usually ask the holder of SEPs to commit to licensing its SEPs to manufacturers, users, or sellers of relevant products on fair, reasonable, and non-discriminatory conditions. This commitment is called FRAND or RAND.³⁷⁾ For example, in 2008, the European Telecommunications Standards Institute published its intellectual property policy which provides “when an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant

33) No. 305 (2013) Decision of Civil Division III of Guangdong Province Higher People's Court.

34) Art. 11 of The Patent Law of P. R. China.

35) Art. 12 of The Patent Law of P. R. China.

36) See Art. 28 of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

37) Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, issued by the U.S. Department of Justice and the Federal Trade Commission (fn. 17).

irrevocable license on fair, reasonable and non-discriminatory (“FRAND”) terms and conditions under such IPR.³⁸⁾

FRAND can be seen as a contract between standard-setting organizations (SSOs) and the holder of SEPs. From the perspective of the SSOs, requiring the holders of the SEPs to make FRAND commitments is to require them to bear the social responsibilities, and therefore, the SSOs should not tolerate SEP holders to refuse to license, or to charge excessively high royalties. On the other hand, this is a result of the balancing of interests among various members within the SSOs. Since no holder can own all SEPs of a standard, the members of a SSO include both licensors and licensees, and additionally it must also accept new members continuously. In this situation, the intellectual property policy of the SSOs should reflect the interests of both licensors and licensees. On the one hand, the FRAND commitment guarantees that the SEP holders should receive reasonable royalties, with the purpose to maintain the incentive to innovate and motivate the holders of SEPs to participate in the SSOs.³⁹⁾ On the other hand, the FRAND commitments also require the holders of the SEPs to fulfill their obligations to be fair, reasonable and non-discriminatory in licensing to the licensees, preventing them from charging excessively high royalties by holding up the licensees.

From the perspective of the holders of SEPs, they agree to make such a commitment for at least the following two reasons: Firstly, there is intense competition among patented technologies. For this reason, if a related patent cannot be accepted as an SEP, its value will be remarkably decreased, or it will even be completely eliminated from the relevant market. That’s to say, market competition limits the discretion of patent holders. Secondly, making a FRAND commitment is a precondition for a patented technology to be incorporated into a standard, and being accepted as an SEP will greatly benefit the holder of the patent. For the manufacturers, this will increase the chance of their products being sold; and for the technology companies, this will increase their opportunities to license their technologies. All of this can benefit the holders of the SEPs by enlarging their market share for the related technologies and products, and in turn, receiving a larger amount of revenue during the patent’s validity period.

However, the FRAND commitments pose also a considerable limitation to the SEP holders, i.e. they cannot charge excessively high royalties at their sweet will, nor can they refuse to license their SEPs or discriminate licensees or impose other unreasonable transaction conditions. That is to say, the FRAND commitment requires that holders of SEPs do not abuse their dominant positions, which result from their patents being accepted as SEPs, and that holders are not able to acquire unreasonable economic benefits even though they have market power. As *Alexander Italianer*, former Director-General for DG Competition of European Commission pointed out, “Ownership of intellectual property rights essential to standards can confer market power. This is why commitments to license these rights in the context of standardization agreements are extremely important in preventing IPR holders from making the implementation of a standard difficult. This could happen by refusing to license or by requesting excessive fees after the industry has been locked in to the standard, or by charging discriminatory royalties.”⁴⁰⁾ Judge *Posner* of the 7th Circuit Court in the U.S. also said, “the purpose of the FRAND requirements, (the validity

38) See ETSI Intellectual Property Rights Policy, § 6.1, pp. 34 – 35, available at http://www.etsi.org/WebSite/document/Legal/ETSI_IPR-Policy.pdf.

39) *Rajendra K. Bera*, Standard-Essential Patents (SEPs) and “fair, reasonable and non-discriminatory” (FRAND) licensing, available at website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557390.

40) See *Alexander Italianer*, Innovation and competition, 21 Sep. 2012, at 6 available at http://ec.europa.eu/competition/speeches/text/sp2012_05_en.pdf.

of which Motorola doesn't question) is to confine the patentee's royalty demand to the value conferred by the patent itself as distinct from the additional value – the hold-up value – conferred by the patent's being designated as standard-essential."⁴¹⁾

2. Chinese Practices concerning the FRAND licensing

With regards to the specificity of the SEPs compared with the ordinary patents, the Supreme Court of China expressed in its letter in response to a company on "whether the implementation of the patents designated in the Industrial Standards shall constitute infringement of the patents" on July 8, 2008 that the proprietary interests granted to holders of SEPs by the patent law shall be subject to limits, "considering that China's standard-setting organizations have not yet established a system on SEPs application and information disclosure, if patent holders join standard-setting organizations, or allow their patents to be accepted into national, industrial or local standards, it should be deemed that the holders of patents permit standard users to use their SEPs. Using the patents shall not be seen as a violation of Article 11 of the Patent Law of China. The holder of patents may ask users to make payment for use of the patents but the royalties shall be considerably lower than those in ordinary licensing arrangements."⁴²⁾ Even though the opinion of the Supreme Court of China did not solve all the problems concerning SEPs, for example, many people have challenged the idea that the royalties for SEPs shall be considerably lower than ordinary patents licensing arrangements, the Supreme Court of China has set out the general principle for SEP licensing that the holder of SEPs cannot rely on their patents that have been incorporated into the standards to charge excessively high royalties.

In the *Huawei v. IDC* case, Shenzhen Intermediate People's Court and Guangdong High People's Court decided, in accordance with the principles of FRAND, on the royalty that IDC should charge Huawei. In particular, the courts analyzed the non-discrimination principle of FRAND, and indicated that IDC, as the holder of SEPs, should charge business counterparties with the same conditions basically the same royalty fees or same royalty rates. The court pointed out that "If holders of SEPs offer comparatively lower royalties to some licensees, and higher royalties to others, the latter have reasons to claim that they are discriminated against, and the holders of SEPs therefore have broken their commitment of non-discrimination."⁴³⁾ In this case, the courts also compared transaction conditions of IDC with many other enterprises, such as RIC, LG, Intel, Beijing Nufont Mobile and HIC, in particular with the royalty fees paid by Apple and Samsung to IDC.⁴⁴⁾ The courts examined the royalties paid by Apple, considering that there is also a big difference between the royalty rates paid by Samsung and by Apple, and especially considering that the royalty rates for Samsung were decided in the background of litigations, and that the royalty rates for Apple were decided under the conditions of equal and voluntary consultations.⁴⁵⁾ Over the 7 years from 2007 to 2014, it was said that IDC received worldwide royalties of 56 mil-

41) *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N. D. Ill. 2012), quoted in *William H. Page*, Judging Monopolistic Pricing: F/RAND and Antitrust Injury, 22 ex. Intell. Prop. L.J. 181 (2014), fn. 36, p.114, available at <http://scholarship.law.ufl.edu/facultypub/588>.

42) This Industrial Standards is called "Specification for Design of Ram-compaction Piles with Composite Bearing Base" issued by the Ministry of Construction of China, see webpage: http://www.ipr lawyers.com/ipr_Html/08_03/2009-2/25/20090225101357490.html.

43) No. 305 (2013) Decision of Civil Division III of Guangdong Province Higher People's Court.

44) No. 305 (2013) Decision of Civil Division III of Guangdong Province Higher People's Court.

45) *Ibid.*

lion dollars from Apple. Given that during the 7-year period Apple's revenue was at least 300 billion dollars, the court calculated that the royalty rate that IDC agreed upon with Apple was approximately 0.0187 %.⁴⁶⁾ In comparison, during the 7 years from 2009 to 2016, for all the technical products concerning 2G, 3G and 4G, the royalty rate required by IDC to Huawei was 2 % of Huawei's sales revenue.⁴⁷⁾ Considering the profit margin for downstream industries is around 3 %, if Huawei accepted the licensing conditions required by IDC, the royalties demanded by IDC would account for almost all of Huawei's profits. Therefore, the courts decided that the royalties demanded by IDC from Huawei were unfair. After examining the royalties IDC received from Apple, the courts adjudicated that the royalty rate that IDC receives from Huawei should not exceed 0.019 %.⁴⁸⁾

3. Cases related to FRAND licensing should be governed by antitrust law, not by contract law

The analysis above shows that although a FRAND commitment is a contract between standard-setting organizations and the holder of SEPs, essentially it is established due to the difference between SEPs and ordinary patents. Since the holders of SEPs have a dominant market position in the relevant technical market, and they may abuse this position, they can become the focus of the antitrust court and government authorities. The logic behind these cases is the same as antitrust enforcement on abuse of dominance. Since the SEP holders are less constrained by competition, or not at all, they may be engaged in activities that would not be possible in the market with effective competition. For example, they may ask for excessively high royalties, refuse to deal, tie and bundle, impose other unreasonable transaction conditions, or discriminate against some business counterparts even if they have the same transaction conditions as others.⁴⁹⁾ A FRAND commitment essentially asks the SEP holders to give up the privileges under ordinary circumstances. If they cannot fulfill their FRAND obligation, they might be pursued by the court or the relevant authorities according to the antitrust law.

However, there are different views both in China and abroad, regarding FRAND licensing as an issue of contract law. The FRAND commitment is certainly a contract between holders of SEPs and the SSO, and indeed there are cases concerning FRAND licensing which have been adjudicated based on contract law, for example, the decision in *Microsoft v. Motorola* by the Western Washington District Court at Seattle in April 2013.⁵⁰⁾ The presiding judge pointed out that the purpose of the court's determination of the royalties paid under FRAND is to decide whether Motorola had violated FRAND as committed to the SSO. Therefore, this is a contract case.⁵¹⁾

However, in my view, if the cases related to FRAND or RAND licensing are deemed to be governed by contract law, some theoretical problems will arise that are difficult to resolve. First of all,

46) Ibid.

47) Shenzhen City Published White Book on Status of Protection of Intellectual Property, *Huawei v. IDC Has Become Classic*, by Zhang Ling and When Jinzi, http://news.eastday.com/eastday/13news/auto/news/china/u7ai1314419_K4.html.

48) Technology Industries Information Office of Taiwan Science and Technology Policy Institution: China Guangdong Higher Peoples' Court Decided Patent Loyalty Ratio Huawei Shall Pay IDC Be 0.019 %, <http://iknow.stpi.narl.org.tw/Post/Read.aspx?PostID=9585>.

49) Compare Art. 17 of China's Antimonopoly Law.

50) *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823 JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013).

51) *Microsoft*, 2013 WL 4053225, at *3, quoted in *William H. Page*, Judging Monopolistic Pricing: F/RAND and Antitrust Injury, 22 Tex. Intell. Prop. L.J. 181 (2014), fn. 6, p.108, available at <http://scholarship.law.ufl.edu/facultypub/588>.

even though the SSOs require the SEP holders to fulfill the FRAND commitments, such an agreement does not provide legal measures for punishment when SEP holders breach their FRAND commitments. Secondly, although the SSOs require the holders of SEPs to license their SEPs under the FRAND condition, there is no specific definition of RAND or FRAND royalties. In fact, it's impossible for the SSOs to set a fair and reasonable royalty rate. As there may be hundreds of technical standards for one technical product, and there also may be thousands of SEPs contained in one standard, it's both impossible to assess each set of SEPs, and for the SSO to reasonably distribute the royalties among so many SEPs. So even if there are FRAND commitments from holders of SEPs, such commitments are merely theoretical and not easily workable.⁵²⁾ Thirdly, from the perspective of the relationship between the licensor and the licensee, although the FRAND commitments made by the licensor to SSOs should benefit the licensee, from the perspective of the civil law system, if the parties have not reached an agreement on the royalties, there is no contract established on the royalties.⁵³⁾ For example, in the case *Motorola v. Microsoft* tried by a German court, Motorola was not satisfied with the decision by a court in the U.S. that favored Microsoft, and therefore pleaded with a German court to issue injunctive relief from Microsoft's infringement. However, this German court did not believe that there was a contract between Motorola and Microsoft regarding Motorola's SEP royalties.⁵⁴⁾ In the case *Huawei v. ZTE*, the European Court of Justice and the German Court also unanimously believed that there was no contract on FRAND royalties between these two disputing parties.⁵⁵⁾

I would like to say that even though the cases related to FRAND royalties should not be deemed as contract law cases in China, this does not mean that these cases have no relationship with civil law. On the contrary, the principles of fairness and honesty in civil law should be equally applied to SEP transactions and the cases in antitrust fields. For example, Article 17 of the Antimonopoly Law of China prohibits business operators with a dominant market position from abusing their position due to the fact that these activities are "unfair" or "with no justification" in nature. Actually, antitrust law is also law over fair trade. For example, many antitrust authorities have names such as "fair trade commission" or "office for fair trade".⁵⁶⁾ This shows that antitrust law and civil law are closely connected, both of which aim to promote and improve fairness and justice. Nevertheless, it is more proper to view the breach of FRAND commitment as a violation of antitrust law than a violation of contract law, because there is no competition in the relevant markets for the licensing of SEPs and competition has been eliminated because of technical standardization. Additionally, there is no agreement established on the royalty rates. Under such circumstances, behavior such as holding up by the SEP holders is actually the same as exclusionary activities in more ordinary antitrust violations, and therefore antitrust law should apply to these cases.⁵⁷⁾ In

52) In *Microsoft v. Motorola* tried by Western District of Washington at Seattle, the court asked the jury to decide on a reasonable royalty for Motorola's SEPs, i.e., H.24 and 802.11 standards. This illustrates that it is unclear whether the FRAND commitments made by holders of SEPs to standard-setting organizations constitute contracts. See Order Granting Microsoft's Motion Dismissing Motorola's claim for Injunctive Relief, Nov. 29 2012, pp.7 – 8, available at http://www.wired.com/images_blogs/gadgetlab/2012/12/microsoft_v_motorola.pdf.

53) For example, Art. 85 of China's General Provisions of Civil Law provides, "A contract is an agreement between relevant parties on establishing, changing and terminating civil relationship".

54) See *Microsoft Corp. v. Motorola Inc.* https://en.wikipedia.org/wiki/Microsoft_Corp._v._Motorola_Inc.

55) Judgment of the Court (Fifth Chamber), 16 July 2015, at paras 42, 54, available at http://curia.europa.eu/ju-ris/document/document_print.jsf?doclang=EN&docid=165911.

56) For example, Japan Fair Trade Commission and the Korean Fair Trade Commission.

57) See *William H. Page*, Judging Monopolistic Pricing: F/RAND and Antitrust Injury, 22 *Tex. Intell. Prop. L.J.* 181 (2014), p. 133, available at <http://scholarship.law.ufl.edu/facultypub/588>.

August 2015, Microsoft initiated an antitrust action against IDC before the federal district court in Delaware, alleging that IDC abused its market position on the SEPs for 3G and 4G standards, violating Section 2 of Sherman Act.⁵⁸⁾ IDC requested that the court dismiss this claim by Microsoft on the basis that Microsoft had no right to initiate an antitrust action on SEPs. On April 13, 2016, Judge *Andrews* of federal district court of Delaware dismissed IDC's request on the ground that the case should be tried as an antitrust case.⁵⁹⁾ This shows that even in the United States, some courts also believe that antitrust law should be applied to the cases that involve SEPs.

V. The holder of SEPs should be limited from the injunction relief

1. Probable motivation for "patent hold-up" behind the injunction litigation

In accordance with traditional civil law, if the property rights including intellectual property were infringed, the rights holder is entitled to request an end of such infringement and claim damages. The right to stop the infringement is a necessary component of the exclusivity of the property rights. However, because an intellectual property right is an intangible asset, there is no specific scope for the right of claim for suspension of infringement. Under such circumstances, if there is no limitation on the scope of this claim, the protection of the intellectual property may be unreasonably amplified, and then certain speculators may abuse their intellectual property to expand their economic profits or eliminate or limit competition unreasonably, undermining innovation as a result. This is particularly the case in the industries closely related to technical standardization such as wireless telecommunication, semiconductor and software industries, in which patent hold-up may easily occur. On the one hand, the holders of the SEPs have made the FRAND commitments in order to procure inclusion of their patents into the standards; on the other hand, after their patents have been incorporated into the standards, they may refuse to license their patents or ask for excessively high royalties from certain licensees. Moreover, there have been holders of SEPs who have become "patent trolls" and pursue excessive royalties deliberately through litigation.⁶⁰⁾

Under this circumstance, if the law absolutely insists on the traditional mode of "license first before exploitation", i.e., treating injunctive relief or suspension of infringement as an absolute right of the SEP holders, then certain SEP holders may seek injunction and damages claims as a way to obtain unreasonably excessive royalties from good faith licensees. The injunctive relief would then become a device or method for the SEP holders to compel the licensees to accept their unreasonable royalty fee or rate. Under such circumstances, the potential licensees may well consider the payment of the excessively high royalty more economically acceptable than the uncertain outcome from litigation with potentially much more money and even their entire business at stake if there is a finding of infringement. As a result, the injunction from infringement claims may become a tool to distort the licensing negotiation, and the SEP holders can easily raise the royalty for licenses of their SEPs. The European Commission pointed out in a decision related to SEPs that there could be two results from an injunction sought by the holders of SEPs: the first is exclusion of competitors in technically standardized industries, and the second is patent

58) Microsoft files antitrust suit against InterDigital in patent feud, Reuters, <http://www.reuters.com/article/us-microsoft-interdigital-us-idUSKCN0QP2CU20150820>.

59) Judge *Andrews* permits Microsoft's SEP-based antitrust claims against InterDigital to proceed (Microsoft v. InterDigital), Essential Patent Blog, <http://www.essentialpatentblog.com/2016/04/judge-andrews-permits-microsofts-sep-based-antitrust-claims-interdigital-proceed-microsoft-v-interdigital/>.

60) See *Sun Yuanzhao*, Patent Litigations are Troubled by Trolls? Studies and Analysis on How the United States Copes with Patent Trolls and the Trend, Research on Rule of Law, Issue 1, 2014.

licensees being forced to accept unfavorable conditions, which would be impossible without the injunction.⁶¹⁾

Since infringement or injunction litigation brought by the holders of SEPs may be motivated by patent hold-up, some competition authorities have expressly pointed out that in cases involving SEPs, public interest must be considered. Therefore the infringement or injunction litigation initiated by the holders of SEPs must be restricted. For example, as mentioned above in *Policy Statement on Remedies for Standards-Essential Patents subject to voluntary F/RAND Commitments* published in January of 2013, the U.S. Department of Justice and the U.S. Patent and Trademark Office pointed out that “a patent owner’s voluntary F/RAND commitments may also affect the appropriate choice of remedy for infringement of a valid and enforceable standards-essential patent. In some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest.”⁶²⁾ In the case of *Huawei v. IDC*, the Chinese court also pointed out, “IDC did not fulfill its FRAND obligations, ignored Huawei’s sincerity and good faith during the course of negotiation. It not only unreasonably adjusted price offers, but also initiated injunction litigation over its SEPs in the United States. IDC appeared to be exercising justified litigation rights, but the real purpose was to force Huawei to accept excessive SEP licensing conditions and to force Huawei to pay an extra amount beyond the patents’ value. Therefore, its behavior is unreasonable and shall be penalized.”⁶³⁾ This shows that Chinese courts believe IDC’s injunction litigation goes against the principle of good faith, constitutes an abuse of dominant market position, and violates the Antimonopoly Law of China.

2. The conflict between injunction relief and FRAND commitment

Unrestricted rights for SEP holders to resort to injunctive relief not only would result in significantly unbalanced positions and interests of licensors and licensees, but also contradicts the FRAND commitments made by the holders of SEPs. Although the FRAND commitments of the SEP holders do not necessarily mean that the terms of licensing SEPs will be based on FRAND conditions, or that FRAND terms will be accepted by licensees, such commitments at least morally bind the holders of SEPs to ensure the licensing of their SEPs will be based on the principles of fairness, reasonableness and non-discrimination. However, if the right to injunctive relief becomes an absolute right, the consequence would be that no matter whether the licensing conditions are fair, reasonable and non-discriminatory or not, such conditions must be accepted by the licensees; otherwise the licensees may face injunction lawsuits for infringement. Under these circumstances, the FRAND commitment will become a mere formality. The court may order the licensee to suspend using the SEPs without considering if the holders of the SEPs have fulfilled their FRAND commitments. As a result, the licensee will have to pay high royalties or withdraw from the market.

61) EU Commission, Case AT.39939 – Samsung Enforcement of UMTS Standard Essential Patents (fn. 8), para 62. It is said that “The Commission preliminarily concluded that Samsung’s seeking of preliminary and permanent injunctions against Apple on the basis of its UMTS SEPs was capable of: (i) excluding Apple, a rival manufacturer of UMTS-compliant mobile devices from the market; and (ii) inducing Apple to accept disadvantageous licensing terms, compared to those which Apple may have accepted in the absence of injunctions being sought.”

62) U.S. Dep’t of Justice & U.S. Patent & Trademark Office (fn. 19), at p. 6.

63) No.306 (2013) Determination of Civil Division III of Guangdong Province Higher People’s Court of China.

3. The practice of Chinese courts

No precedents in China have ever set out the conditions for the holder of SEPs to plead with an injunction, or elaborated the conditions for potential licensees to establish a defense against an injunction. However, in 2016 the Supreme People's Court of China has set out its views in its "Explanations on Some Issues Concerning Application of Laws When Trying Cases on Infringement of Intellectual Property (II)". Article 24 of these Explanations points out that "to the extent that recommended national, industrial or local standard specifies the relevant SEPs, when the patent holder and the alleged infringing party negotiate on terms and conditions of the patent licensing and the patent holder deliberately breaches its obligation of fairness, reasonableness and non-discrimination as committed in the formulation of the standard, causing the parties' failure to reach the license contract without obvious fault of the alleged infringing party, the relevant court generally should not support the patent holder's claim to suspend the use of the SEPs." However, there are uncertainties in this clause. For example, what constitutes a "deliberate breach" from the patent holder and "without obvious fault" of the alleged infringing party obviously needs to be further clarified.

Additionally, it is worth noting that in the *Huawei v. IDC* case, when the court found that IDC resorting to injunction constitutes abuse of its dominant market position, it emphasized the sincerity and good faith of Huawei in its negotiation with IDC as Huawei expected IDC to offer fair, reasonable and non-discriminatory conditions in compliance with its FRAND commitment. This shows that the court did not believe that the holders of the SEPs have no right to seek injunction. In fact, because SEPs essentially are also private rights, the SEP holder may seek remedies available to other patent holders under many circumstances, e.g., when the licensee faces bankruptcy and is unable to pay royalties, or monetary remedies are not enforceable because the licensee is not subject to the jurisdiction of the court, or the licensee fails to offer fair compensation for the use of the SEPs or is unwilling to pay.⁶⁴ If the SEP holders are not entitled to the right to injunctive relief or the right to suspend infringement, opportunistic licensees may potentially damage lawful interests of the SEP holders. For example, licensees may refuse to pay royalties for the use of patents, or try to postpone the negotiation with the patent holders; this is called "reverse patent hold-up" or "patent hold-out".⁶⁵ Reverse patent hold-ups not only deprive the patent holders of reasonable return for their innovations and inventions, but also eliminate the motivation of the patent holders to participate in the technical standardization activities. This will lead to serious damages to the development of industries and consumer welfare in the long term. However, this raises also another question: under what circumstances can patent holders go to the court to request an injunction order to suspend infringement? In other words, what degree of "good faith" should potential licensees present in order to establish a defense against an injunction request? Considering there are increasingly more and more disputes concerning SEPs in the high-tech industries, this is a critical issue to be promptly addressed by China's legislation and legal practice.

VI. Conclusion and a thought

In principle, the holders of SEPs may carry out business activities to the same extent as ordinary patent holders and be entitled the freedom of entering into contracts. However, if they abuse

64) EU Commission, Case AT.39939 – Samsung Enforcement of UMTS Standard Essential Patents (fn. 8), para 67.

65) Intellectual Property and Standard Setting, Note by the United States, 17 – 18 December 2014, at para 17, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)116&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)116&docLanguage=En).

their freedom to take advantage of their market dominance, such abusive activities should be prohibited. The underlying rationale is simple: a prerequisite for freedom in private law is the existence of competition in the market. Certain activities restricting competition are lawful in a competitive market, but unlawful if the market is monopolized or dominated. According to the analysis in this article, when there is a conflict between intellectual property rights and competition law concerning SEPs, competition law usually prevails. Therefore, the holders of SEPs should realize that improper exercise of their patent rights could become the subject of investigations from antitrust authorities or private antitrust lawsuits. This reminds the holders of SEPs to consider aspects of antitrust law while exercising their patent rights.

In connection with the analysis above, I would like to note that Article 55 of Antimonopoly Law of China provides that “This law is not applicable to undertakings who exercise their IPRs in accordance with the laws and administrative regulations on IPRs; however, this Law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their IPRs.” Then the question is whether the patent holders’ abuse of patent rights would necessarily violate intellectual property law. Let’s use *Huawei v. IDC* as an example. According to patent law, it’s lawful for IDC to request the court to issue an injunction on the ground that Huawei utilizes IDC’s patents without paying the high royalties required by IDC.⁶⁶⁾ However, in light of antitrust law, IDC’s conduct constitutes abuse of market dominance. Given the paradox, it appears that the provision in the Antimonopoly Law of China mentioned above is problematic in practice. This problem has been raised in both the *Huawei v. IDC* case and NDRC’s investigation of Qualcomm. It is necessary for China’s legal community to carry out in-depth discussion on the exemption clause concerning intellectual property rights as stipulated in Article 55 of the Antimonopoly Law of China.

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Abstract

Why SEPs have been involved in Antitrust Cases – From A Chinese Scholar's Perspective

*Even though the FRAND commitments set the boundary of self-governance for the patentee, due to the fact that these commitments are not very operable, and there are actually no limits, there is more and more debate over FRAND commitment, and more and more cases involving SEPs go to antitrust enforcement agencies and courts. As demonstrated in *Huawei v. IDC*, compared with owners of general patents, the SEP owners often have a dominant position in their patent licensing markets, and therefore they should not charge excessively high licensing fees or rates, and should have limited right to ask for injunctive relief. The debates in *Huawei v. IDC* were emerging issues at the crossroads of antitrust law and intellectual property law. As the first case in which the licensing rate of the SEPs was decided by a court in China, *Huawei v. IDC* has some significant impact around the world.*

66) Compare Art. 11 and 12 of the Patent Law of China.