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Recent Trends of NPE Patent Litigation in Europe

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Types of Non-Practicing Entities (NPE) active in Europe

- Entities which acquire operating companies' patents to enforce them against other practical entities
 - Examples: IPCom, St. Lawrence, Unwired Planet, Conversant, IP Bridge
- Patent pools
 - Examples: MPEG LA, Access Advance, Sisvel, Avanci
- Companies whose operational business does not go well any more
 - Examples: Nokia, Avago (Broadcom), Sharp, Dolby

Getting sued by an NPE can be particularly unpleasant

- Defendant cannot sue back
 - Operating companies oftentimes do not sue each other because of the risk of counter-suits
 - NPEs are not at risk of a counter-suit—“cannot stab a ghost”
- Even if defendant wins, may not be able to recover legal fees (attorney fees which the loser needs to reimburse under the law)
 - NPEs may not be very well funded and simply go insolvent if they lose
 - Germany: Defendant can request that plaintiff provides a security for legal fees, but not if the plaintiff is a European or Japanese entity

Getting sued by an NPE can be particularly unpleasant

- NPEs only want money, not the market—but they use injunctions to get the money
 - NPEs try to get injunctions to force defendants into agreements favorable to the plaintiff
 - At least in Germany, injunctions are available to NPEs just like to any other plaintiff
 - No “Ebay” case law in Germany
 - Recent legislative amendment to limit availability of injunctions probably will not significantly change practice
 - Also in the UK, injunctions typically available to NPEs

How important is NPE litigation in Europe?

- Our personal estimate for Germany: maybe 20-30% of the cases
- But many NPE cases are big, with large attorney teams on both sides (attorney for IPCom: *“Every hour [of the oral hearing costs as much as] one Smart”*)
- Decrease of NPE litigation in the US (due to US system becoming less plaintiff-friendly):
 - More focus by NPEs on Europe
 - But US-based NPEs are struggling in general, and many cease operations

Technical areas of NPE litigation in Europe

- Telecommunications
 - In particular mobile (3G, 4G, 5G), but also ADSL
 - Targets: handsets or network manufacturers, telecommunications providers.
Recently: car industry
 - NPEs active in this field: e.g. IPCom, Conversant, Nokia, Sharp, St. Laurence, Unwired Planet, Avanci
 - Also many operating companies active plaintiffs in this field (e.g. Huawei, ZTE, Qualcomm, Panasonic)

Technical areas of NPE litigation in Europe

WiFi

- Broadcom, Sisvel
- Targets: manufacturers of handsets, computers, WiFi routers, telecommunications providers, car industry

Video/audio codecs

- MPEG LA, Access Advance, Nokia, St. Laurence, Sisvel
- Targets: manufacturers of handsets, computers, TVs, providers of platforms like YouTube or Netflix

TV

- Sisvel

Car industry

- The car industry has recently become a popular target of NPEs in Germany
- More and more high-tech is built into cars, for which the patents are not owned by car suppliers (who rarely sue the car manufacturers)
- Typical supply chain: chip -> network access device -> telematic control unit -> car
 - Which element in the chain is the correct royalty base?
 - Does the patent owner have to give a license to the suppliers?
 - If yes, is there exhaustion?
 - Typically, the suppliers join the lawsuits as side interveners

Car industry



- The car industry is particularly vulnerable to injunctions
- As a reaction to lobbying efforts of the car industry, Germany has changed the law on injunctions as follows:

*“The claim [to injunctive relief] is precluded to the extent that it would lead to **disproportionate hardship** for the infringer or third parties not justified by the exclusive right due to the **special circumstances** of the individual case and the requirements of good faith.”*

Car industry



- E.g., Nokia vs. Daimler
 - Nokia is a member of the Avanci patent pool, which licenses cellular technology to car manufacturers
 - Avanci is asking car manufacturers for a royalty of USD 15/vehicle for 4G, and USD 9/vehicle for 3G; Avanci/Nokia do not give licenses to car suppliers
- Other (so far quite successful) plaintiffs: Conversant, Avago/Broadcom
- Practically all car manufacturers active in Germany have recently been asked by NPEs to take licenses

NPEs and SEPs – what makes SEPs so attractive?

- Easy to prove infringement: just have to show that
 - the claim covers the standard, which is publicly available and that
 - the product complies with the standard
- Can use the same patents against many defendants
- Can reach global settlement because standard is used worldwide
- Our personal estimate: >50% of all NPE cases in Germany are based on SEPs

A “FRAND defense” provides the defendant with the possibility to avoid an injunction

- The FRAND defense is based on the SEP owner’s obligation to grant licenses under the SEP to anyone on fair, reasonable and non-discriminatory (FRAND) terms
- It is a defense primarily against the claim for injunctive relief (cease-and-desist order, recall of products, destruction)
- However, hurdles for successful FRAND defense are quite high (“willing licensee”)

Anti-anti suit injunctions

- US courts have started to grant injunction against plaintiffs seeking injunctions in Europe
- London High Court and Paris High Court have granted anti-anti-suit injunctions in *Lenovo vs. IPCom* (similar case before the Higher Regional Court of Munich: *Nokia vs. Continental*)
 - Case regards an SEP on the UMTS standard
 - The UK and Paris courts have barred Lenovo from taking any further action in the US jurisdiction
 - The Paris court in particular has directed Lenovo to withdraw its anti-suit suit at San Jose

UK perspective, in particular FRAND rate

- In Germany, SEP cases are all about avoiding an injunction. To date, there is not a single court decision in Germany stating how much is FRAND
- In contrast, UK courts are much more used to determining damages, and also do not shy away from determining FRAND rates
- In *Unwired Planet v. Huawei*, the UK High Court found in 2017 that
 - For a portfolio of 30 allegedly essential patent families, FRAND is 0.062% for 4G, and 0.096% for other standards
 - The court issued an injunction which was stayed pending appeal, under the provision that appropriate royalty payments are made from Huawei to Unwired Planet in the meantime

UK perspective, in particular FRAND rate

- On August 26, 2020, the UK Supreme Court decided on appeal (case was combined with *Conversant v. Huawei* and *Conversant v. ZTE*):
 - Court confirmed the FRAND rate determination of the lower court
 - To qualify as FRAND, a single royalty price list should be available to all market participants. This must be based on the market value of the patent portfolio, without adjustment for the characteristics of individual licensees.
 - English courts have jurisdiction and may properly exercise a power, without both parties' agreement: (a) to grant an injunction to restrain the infringement of a UK patent that is a SEP unless the implementer of the patented invention enters into a global licence of a multi-national patent portfolio; and (b) to determine the royalty rates and other terms of such a licence