Chapter IX

Patent and Antitrust Problems Revisited in the Context of Wireless Networking

Gary Lea, University of New South Wales, Australia

ABSTRACT

The author seeks to illustrate some of the ongoing problems that patents present for those seeking to standardize in the ICT field. The chapter illustrates these problems by drawing on patent and international trade disputes surrounding the rollout of IEEE 802.11 family (colloquially, “WiFi”) technologies during 2003 and 2004. It then presents several solutions including the introduction of a more systematic approach to dispute resolution by standards development organizations (SDOs) based around ADR procedures derived from the domain name Uniform Dispute Resolution Policy (UDRP), corresponding changes to dispute handling in international trade disputes and, in the long term, alternation to intellectual property laws to allow for appropriately-tailored standardization exceptions (at least at the level of interoperability).
INTRODUCTION

In a general sense, there is nothing new under the sun under the heading above. Since Morse tussled over telegraph patents in the 1850s, patents have been an issue for the ICT sector, and, since IBM’s brush with the rules against the tying of the supply in the 1930s, the relationship of intellectual-property and antitrust-competition law in the ICT context has been a vexed one. However, what is noticeable is that the pace, scale, and complexity of litigation and associated regulatory activity relating to these issues began to increase dramatically during the 1990s (Soma & Davis, 2000); this suggests that a new approach needs to be taken to matter.

It is against this background of ever-rising patent litigation, ever-stiffer antitrust and competition scrutiny, and a generally deteriorating standardization situation (especially as outlined below for IEEE 802.11-family technologies) that the author puts forward two reformist propositions for consideration: First, there is a need to move away definitively from the traditionally preferred methods used for resolving patent disputes where standards are involved, and second, consideration needs to be given to making changes to patent laws themselves.

PATENT LITIGATION AND WI-LAN

It is a truth universally acknowledged that patent litigation is expensive and, consequently, engenders considerable fear, uncertainty, and doubt (FUD) on both sides of the dispute. The first point is eminently provable: For example, given that the costs of litigating a patent dispute in the United States as a patent owner is, at present, likely to be over $2 million for $25 million in damages, and more than $4 million if the damages claim is over that (Milo, 2004), it is necessary to consider whether to sue very closely and, bearing in mind costs of roughly the same magnitude in other jurisdictions, the same issue also arises there.

Therefore, in the present context, nobody ever undertakes patent litigation lightly, but one may still legitimately ask whether parties have undertaken it advisedly. Since the 1990s, commentators have been pointing out that alternative dispute resolution (ADR) makes for quicker, cheaper disposal of patent and other IP disputes (Terdiman, 1997), and, for reasons discussed below, the need to maintain a collaborative frame of mind in a standardization context directly boosts the arguments in favour of nonlitigious approaches. Put another way, one could begin to think of those patent holders who litigate where standardization is an issue as either misguided or worse: misguided in that, in many instances, patent holders’ lawyers will not always have pushed the ADR alternatives to litigation when trying to protect legitimate IP interests, or worse in that, as will be seen below, in some instances, some companies will use litigation as an anticompetitive weapon, simply relying on having deeper pockets or a bigger legal team to force the competition off the road.