

Contemporary Anti-Competitive Practices of Patents Usage

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Abstract: Intersection of patent and competition laws was discussed widely before. In fact, this issue is not regulated properly at the moment, but the activity of courts around the world made it possible to limit abusive patent practices which often lead to restriction of competition. However, new times raised new issues and to make the patent system relevant to needs of today legislators and judiciary have to pay attention to contemporary problems in patent law. This article is focused on recently revealed practices of patent management which could be dangerous for fair markets.

1. Introduction

The patent system was developed and implemented to protect results of intellectual work of an inventor and to reward him for his contribution to development of science and technology. In other words, the patent system serves for encouragement of innovation. In simple language the concept of that system could be described as an entitlement of an inventor with the right to prevent others from unauthorized usage of a patented invention for a period of time in response to disclosure of the invention for a public. And in that concept lies a key issue in balance between protection of intellectual property rights and protection of competition.

However, such quality of patents is seen in positive way because innovative activity could make positions of existing monopoly power weaker and undermine them.¹

A patent could be very valuable asset of a company and in fact for high technology company patents create significant part of its value. Also because of the nature of patents they could be used as effective tools for gaining market power. And sometimes such activity could violate terms of anti-competitive legislation.

There were some landmark cases before in which abuse of patent rights was admitted as contravention. For example, *Hangards Inc. v Ethicon Inc.* where Ethion Inc., which had filed series of infringement lawsuits against Hangards Inc., was recognized as being guilty for violation of antitrust legislation because patent litigation initiated by Ethion pursued an intention to monopolize an industry.² In *Kobe Inc. v Dempsey Pump Co.* court also emphasized unfair nature of litigation started by Kobe Inc. which was directed on creation of monopoly and awarded to the defendant antitrust damages as well as denied plaintiff's allegations on infringement.³ However, there is an important thing in this case that Kobe Inc. had accumulated over 70 patents pertained to oil pumps. And when Dempsey Pump had introduced its own oil pump, Kobe Inc. approached it and its potential clients and indicated prospective lawsuits. Kobe Inc. threatened Dempsey Pump and its partners with a litigation and while threatening it used patents which were already expired and this fact was taken into account by the court. So in fact Kobe Inc. case includes both aspects of anti-competitive behavior as well as misrepresentation activity by using invalid patents.

There is also another sample of abusive behavior which is related to the drugs market. Pharmaceutical companies often try to continue a period during which a patent still be valid by adding insufficient

¹ McConnel, Brue (2000). Economics: principles, problems and policies, translated from English, 11th edition, HaGar, at 612

² Chu (1992). An Antitrust Solution to the New Wave of Predatory Patent Infringement Litigation, 33 Wm. & Mary L. Rev. 1341 at 1358

³ Id at 1361

indications to claims of existing patents and filing new patent applications.⁴ Such practice, however, has other sides: (1) claims become narrow and producers of generic drugs could avoid them and bring cheaper medicine to the market; (2) such producers could file a suit to repeal the patent on a basis of its obviousness, for example. To delay entering the market by generics pharmaceutical companies pay generic producers for refraining from market entering and patent litigation. As a result they save their dominant position.⁵

All mentioned examples have one common aspect – in all cases patent holder had dominant position or tried to gain it and used own or acquired patents for this purpose. But, for instance, in most cases involved so-called “patent trolls” measures of anti-competitive law will be inefficient, because in such cases holder of patent rights does not try to exclude a competitor from a market but tries to get infringement damages or to force a potential infringer to enter into a license agreement.⁶ Moreover in such cases “troll” and his “target” are often even not rivals at all.

Also, does a legislation can protect fair principles of trade when a patent holder does not try to exclude its competitors from a market and does not try to gain dominant position but create barriers for providing business under cover of patent rights? This issue concerns terms of legal protection from unfair trade practices rather than antimonopoly law.

This article is an attempt to discover practices lie on the edge of competition law and patent law and concern influence of patent rights on competition. Also potential measures to limit abusive behavior are proposed.

Most of practices covered by this article are related to IT industry because of increasing number of issued patents and contentions in this area.

2. Patent infringement cases and aspects of competition

American legal practice created two methods of counteraction against abusive behavior of patent holders: initiating the private anti-competitive case and patent misuse doctrine.

First method was already indirectly described in the introduction, it based on landmark cases mentioned therein, especially on *Hangards* case. Usually a defendant alleged in patent infringement lodges a counterclaim where accuses the plaintiff in attempt to restrict or exclude competition by enforcement of his patent rights which presumed to be not infringed. In such type of cases the defendant must prove that the plaintiff tried to obtain monopoly power over a market by bringing an infringement suit; that probability of success of the plaintiff in obtaining monopoly power is high; and that such actions of the plaintiff caused damage to competition on a market. Of course, it is not the easiest mission, so most attempts to defend in patent infringement cases on a basis of antitrust legislation in the USA were unsuccessful. From existing analyses it is known that between 1985 and 1993 only in two such cases liability of plaintiffs on violation of antitrust law was proved.⁷

Patent misuse doctrine is based on principles of obligation of patent holder to act in good faith and protection of public interest. Patent misuse term, by the way, could include a violation of antitrust terms by a patent holder. Also patent misuse occurs when a holder of patent rights tries to extend exclusive rights beyond those guaranteed by the patent. Reflection of patent misuse doctrine found itself in 35 U.S.C. § 271 by enactment of the Patent Misuse Reform Act of 1988.⁸

Specific limitation regarding abuse of IP rights was adopted by Chinese legislators too in Anti-Monopoly Law which came into effect on 1 of August, 2008. Article 55 of the Act states that the Law is not applicable to the undertakings which use Intellectual Property Rights according to the laws and administrative regulations relevant to intellectual property, but is applicable to the undertakings which abuse IP and eliminate or restrict market competition. However, commentators said that such Article

⁴ Temmerman (2011). The Legal Notion of Abuse of Patent Rights, NCCR Trade Regulation Working Paper No 2011/23 at 17

⁵ Carrier (2011). *Provigil: A Case Study of Anticompetitive Behavior*, Hastings Science & Technology Law Journal, Vol. 3, No. 2 at 444

⁶ Meurer (2003). Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation, Boston College Law Review, Vol. 44, Issue 2, at 539

⁷ Wied (1999). *Patently Unfair: State Unfair Competition Laws and Patent Enforcement*, Harvard Journal of Law & Technology, Vol. 12, No 2 at 8

⁸ *Id* at 10

needs further clarification because it could be construed too wide and effective application of it will be impossible.⁹

Understanding that endless patent disputes could block innovation and trade on market at all, a measure was found – standardization. At first stage it was really productive tool. Due to activity of Standard Setting Organizations (SSOs) standards in different fields were adopted. Every entity involved in specific technology area may join to standard by allowing other members of standard to license its patents related to specific technology defined as “essential patents” on Fair, Reasonable and Non-Discriminatory (FRAND) terms. Such cross-license activities made it possible to develop products using unified solutions, so the consumers may exploit same networks, use content of the same format and so on. There are different SSOs around the world like Institute of Electrical and Electronics Engineers (IEEE), the Joint Electron Device Engineering Council (JEDEC), the International Telecommunications Union (ITU) in the USA or European Telecommunications Standards Institute (ETSI) in Europe. Another example of similar institution is patent pools which could be defined as consortia of patent owners that place patents into a pool and then, as a group, cross-license them.¹⁰

With development of technology and rise of competition on a market defects of standardization system and FRAND terms unveiled. Participating in SSOs is voluntary and companies want to join them to avoid probable prosecution by regulators for anti-competitive behavior and to benefit from patents of other player on a market. Usually SSOs acts on a basis of policies which also defines what does the term “essential patent” mean for purposes of SSO and FRAND terms licensing. With the lapse of time practices of “ambushing” were discovered when a member of a standard avoid to contribute an essential patent to it and then brings a patent infringement suit against other members. Then long contentions arise, because in fact SSOs policy envisages that its members must act in good faith and effective leverages to prevent unfair behavior and punish the violator do not exist. Also there is unclarity in understanding the term FRAND and unified way to determine what does “Fair, Reasonable and Non-Discriminatory” mean is still suspended in the air.¹¹

Aforementioned loopholes and uncertainties in balance of competition and patent laws led to practices which have impacted the market of consumer electronics recently.

In the spring of 2011 Apple Inc. sued Samsung Electronics for patent infringement and started the series of court disputes against Korean manufacturer around the world. Suits filed by Apple concerned infringements and unfair competition by Samsung in regard with its smartphones and tabs. In total there were approximately 50 lawsuits claimed by Apple and Samsung against each other in 10 countries.¹² Patent war between two technology giants involved many aspects of patent law as well as competition law, for instance, Samsung tried to use its patents regarding to 3G standard and assumed to be essential patents and eventually became the subject of anti-competitive investigation by European Commission.¹³ Also there were a series of mutual claims and counterclaims in the USA, Australia, Germany and other countries. Apple alleged Samsung in infringement of its interface patents, design patents and unfair competition. In Australia Apple was granted with the injunction which banned sales of Samsung tablet computer Galaxy 10.1 right on the Christmas Eve. This injunction was dismissed eventually by a higher court.

Another notable case took place in Germany. In February of 2012 Munich court granted an injunction to Apple against Motorola prevented the last from selling Xoom tablets using “slide-to-unlock” feature. At the same time Mannheim court made a decision in favor of Motorola and forced Apple to deactivate “push” e-mail system on its devices which allows users to be notified automatically when a new message is arrived.¹⁴

In all mentioned cases there were “unwanted victims” of the patent war and they are consumers. When a court decides to grant an injunction and prevent an appearance of a product on a market it always concerns consumer who already knows that he want to buy specific product but cannot do this due to the

⁹ Tian (2010). The Impacts Of The Chinese Anti-Monopoly Law On IP Commercialization In China & General Strategies For Technology-Driven Companies And Future Regulators, *Duke Law & Technology Review* at 10

¹⁰ Redfearn (2009). Patent pools in China, *Intangible Asset Management Magazine*, Issue 37 at 102

¹¹ Radcliffe, Sproul (2011). FRAND and the smartphone wars, *Intellectual Property Magazine*, December 2011/January 2012 at 45

¹² Mueller (2012). List of 50+ Apple-Samsung lawsuits in 10 countries at <http://www.fosspatents.com/2012/04/list-of-50-apple-samsung-lawsuits-in-10.html>

¹³ Id at <http://www.fosspatents.com/2012/01/eu-launches-full-blown-investigation-of.html>

¹⁴ Carrier (2012). A Roadmap to the Smartphone Patent Wars and FRAND licensing, *CPI Antitrust Chronicle*, April 2012 (2) at 4

injunction. There is an interesting fact that Motorola and Apple used their “non-essential” patents to block sales of competitor’s product. And consider this it is possible to make a presumption that if a patent which covers only a small feature of a high technology product could lead to restriction of sale of a whole product then why does such patent is not defined as essential?

It is assumed that courts must pay more attention to the intention of initiated patent dispute. Litigation must be a tool for protection of rights but must not be leverage for excluding competitors. So, all conditions of a prospective case must be considerable, even the date of filing a claim and if it will be ascertained that infringement concerns only an insufficient element of the product that is even not a key feature thereof, then injunction must not be granted. Legislation must give courts options to resolve a patent dispute with a benefit to public interest and consumer welfare. So, in cases of “slide-to-unlock” or “push” infringements award of reimbursement of damages or imposing the obligation to enter into licensing agreement look more reasonable. Legislators should also pay attention to such measure like “compulsory licensing” which is being used in copyright law. In any way, some conclusions from smartphone patent wars must be done, because when there are parties with not equal power in a litigation then usually a weaker side have to refuse from using a technology which became a subject of a dispute even before the decision was made or to change its business model (like in *Vistaprint v Unitedprint* case)¹⁵, so the patent litigation in and of itself could be an effective tool for influence on weaker competitors and increasing number of awarded injunctions only encourage patent holders to enforce their patents and seek injunctions to restrict rivals’ sales instead of focusing on quality and prices of own products.

3. Patent aggregators as tools for hindering competition

During recent years rise of activity of specific entities on the intellectual property market was noticed. Such entities do not involve in production of goods or development of technology instead they accumulate patents and patent applications for different purposes. Because of the nature of their activity they could be identified as the special kind of non-practicing entities (NPE). Generally the term NPE includes universities and research firms as well but, as was mentioned, entities which will be described herein rarely provide other activities except accumulation of patents and applications and their enforcement or licensing, that is why they are one of the kind.

Depending on purposes, such kind of NPEs could be divided on two groups. First includes individuals and small companies who acquire patents for further enforcement of them against players on different markets. They are often called “patent trolls”. Second group consists of patent holdings which include many subsidiaries and could be defined as patent aggregators. These aggregators by-turn could also be divided on three groups depending on purposes: “acquire, license, assign” aggregators; “acquire, license, accumulate” aggregators; and “acquire, develop, license and exploit” aggregators.¹⁶

As was noticed a patent confers its owner the right to restrict others from exploitation of an invention. When hundreds and even thousands patents are accumulated by one entity serious concerns about protection of competition arise. But in case of aggregators actually they do not being in direct competition with manufacturers or services providers. On the other hand it is known that behind the largest aggregators stay famous market players and this is where potential threats to competition are.

Of course, usually investors of patent aggregators are rivals to each other and participating in funding a patent aggregator must not be pledged as the anti-competitive act. Moreover patent aggregator model could be used as the effective defensive tool from aggressive patent trolls and in this case aggregators serve for consumers. But simultaneously a patent aggregator could be used as the watchdog to prevent newcomers from entering a market. In other words an aggregator may protect its members from new competitors by asserting existing patents against such competitors. And at the moment such activities will not be defined as anti-competitive behavior because it is almost impossible to prove that aggregator enforces its patent rights in favor of its investors and in addition to prevent arise of a new rival.

¹⁵ O’Brien (2012). German Courts at Epicenter of Global Patent Battles Among Tech Rivals at <http://www.nytimes.com/2012/04/09/technology/09iht-patent09.html>

¹⁶ Voronov (2011). Financial Service Of Patent Aggregators: The Confrontation Of Intermediaries On The Intellectual Property Market, Proceedings of the St. Petersburg University of Economics and Finance, 2011 Vol. 1 at 21

Also a patent aggregator may be an effective as intermediary in negotiations with other patent holders either NPEs or operating entities. For example, an aggregator may get a license from a patent troll or a partner of member(s) of such aggregator and then sub-license it to interested members. There is an assumption that under specific conditions such act could be seen as horizontal collusion which is prosecuted under anti-competitive law. Such activity could be admitted as the attempt of competitor manufacturers to act collusive to influence on price setting by a supplier.¹⁷

In addition a patent aggregator may serve as a proxy in patent litigation, when a member do not want to start a litigation on itself for different purposes even to not fall in sight of regulators. There was a case in Germany when NPE called IP Com sued Nokia for patent infringement. Earlier IP Com had acquired the patent portfolio regarding to GSM standard from Bosch. Bosch did not will to act against Nokia on its own to not be involved in a costly litigation process instead it used IP Com as a proxy.¹⁸ Such practices are very effective when rising costs of a rival is needed. Intent to enter in collusion with NPE to enforce patents to influence on a competitor business is unprovable and using a proxy also reduces own cost on litigation and even saves reputation in some cases.

In December, 2008 Russian antivirus software developer Kaspersky Labs was sued by IPAT for patent infringement. Kaspersky Labs was one of 23 companies which were sued by IPAT. Later, Kaspersky Lab was approached by RPX (large US-based patent aggregator) with the proposal to enter into the membership of RPX for three years to be released from a lawsuit of IPAT. 22 companies mentioned in the complaint were released from it while 11 of them became members of RPX. In January, 2011 Kaspersky Labs filed a claim to FBI where accused RPX of extortion, racketeering and wire fraud.¹⁹ The claim was dismissed.

The case with Kaspersky Labs shows how activity of aggregators may create barriers for newly arrived player on a market. Entering a patent aggregator means that a member must not assert its patents against other members and it could be useful for those members which may be potential infringers of patents hold by a newcomer. Furthermore after such newcomer became a member of an aggregator they may license its patent on lower rates. And this practice already impacts rights of a patent holder because he has to join a patent aggregator and grant its members with licenses under conditions set out by an aggregator in exchange to be released from a lawsuit. And due to size of an aggregator as the rule it will always have enough patents to use against target.

In fact it is very hard to prove presence of anti-competitive behavior in relations between aggregators and their members. It is almost impossible to charge aggregators for anti-competitive conducts because, as was already said, firstly, they are not in competition with targets, and secondly they have very complex structure with lot of shell-companies which actually act as initiators of litigation. At this time even unfair activity of aggregators is lying outside of anti-competitive law scope and when effective measures to resist aggressive aggregators will be found by legislators, patent aggregators will have a step further to adapt their practice for new rules.

4. Accumulation and acquisitions of patent portfolios

Another practice resembles activity of patent aggregators but must be distinguished from it because it relates to collecting patents by operating company. Usually manufacturers and services providers accumulate patents either for their implementing in own business or for defensive purposes. It is unlikely that operating entity acquire patents to force others to get into licensing agreements. Although accumulation and acquisitions of patent portfolios must not be recognized as an act of anti-competitive behavior, depending on objectives of a holder such practices may impact competition one way or another, and even collecting patents to create defensive pool might have ambush threats to market.

The term accumulation in this section is defined as obtaining patents for own inventions of a company while the acquisition of patents relates to purchasing patents from other entities. Concerns about competition restriction may arise when an entity combines both of mentioned activities and creates large patent portfolios covering certain technologies.

¹⁷ Ewing, Feldman (2011). The Giants Among Us, 2012 Stan. Tech. L. Rev. 1 at 26

¹⁸ Jakobs (2011). Patent Trolls in the Light of IP Rights and EU Competition Law, Thesis for Degree of Master of European Legal Studies, College of Europe at 22

¹⁹ <http://gametimeip.com/2011/05/31/patent-aggregator-rpx-accused-of-extortion-racketeering-wire-fraud/>

In the summer of 2011 number of activated devices using Android as the operating system reached more than 500 thousand units per day.²⁰ Android which belongs to Google became a serious rival to other mobile platforms like Apple's iOS, Microsoft's Windows Phone and RIM's BlackBerry OS. Also Google's operating system is being distributed as an open source software and could be used by different manufacturers, as the result number of Android devices may increase constantly that may lead to market price reduction. Google's Chief Legal Officer David Drummond assumed that such state of things did not satisfy competitors (especially Apple and Microsoft) so they decided to join forces under two groups CPTN and Rockstar to acquire patent portfolios pertaining to telecommunications technologies of Novell and Nortel. On completion of such acquisitions new patent holders asserted their portfolios against Android devices manufacturers demanding 15\$ of license fees from each produced device. Drummond summarized that it was the attempt to make a price of Android devices higher than a price of Windows Phone devices.²¹

Group's purchase of Novell's and Nortel's patents was noticed by regulators. The Department Of Justice of the United States set out a number of requirements CPTN must complied with. In particular Microsoft had to sell back Novell patents and operate only a license, and all acquired patents had to be available for open source licensing.²²

Google, by-turn, made the step in response to Apple's and Microsoft's actions and purchased Motorola Mobility with its patent collection including about 17,000 patents and applications. Although both US and European regulators approved Motorola's acquisition there are some concerns which might become threats. Google possesses rights on Android OS and together with Motorola patents now Google has strong leverage on Android devices manufacturers to force last to adapt their products for Google's services and if not Google could try to enforce its patents against them. However Google states that it takes another position and acquired patents will be used only for defensive purposes. But the defense might be different.

Interesting way of how acquired patents may be used was demonstrated in the recent *Yahoo v Facebook* case. In March of 2012 Yahoo sued Facebook accusing the last of infringement of 10 Yahoo's patents related to advertising, privacy, customization and social media technologies.²³ Facebook responded with the counterclaim where alleged that Yahoo infringed 10 patents, 8 of which were acquired from other entities. Commentators assumed that situation with two lawsuits may lead to a stalemate in resolving the dispute and in that case Facebook could not bear royalty fees or refrain from operating several their services.²⁴ *Yahoo v Facebook* case showed that defense in today's patent litigation with usage of possibilities to operate large patent portfolio with acquired patents may exempt a defendant from disbursements on licensing. Moreover, a defendant with a larger portfolio may settle a case on his own conditions and force a plaintiff to give up his positions. Such practice is particularly dangerous for small entities. If a small company sues a larger competitor for infringement a defendant may counterclaim asserting own or acquired patents. At the moment the level of technology is very developed so it is not a problem for a big entity to find patents that could be used against a small plaintiff, especially in the IT area.

In today's world presence of a large patent portfolio is akin to nuclear arsenal of a country. It is unlikely that the nuclear weapon will be used in a conflict but when it exists it gives additional leverages to a country to influence on a policy in a region or even in the world. The same thing with patent portfolios, its holders may not use them against others but they could act more confidently on a market and may not pay attention to IP rights of smaller rivals and if a dispute occurs they will have a possibility to lead its resolving to deadlock or to settle it with benefit to them.

²⁰ Hardawar (2011). Google activating 500K Android devices daily – 1M by October? at <http://venturebeat.com/2011/06/28/google-activating-500k-android/>

²¹ Drummond (2011). When patents attack Andoid at <http://googleblog.blogspot.com/2011/08/when-patents-attack-android.html>

²² U.S. Dep't. of Justice (2011). CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns, Justice News at <http://www.justice.gov/opa/pr/2011/April/11-at-491.html>

²³ Anderson (2012). Why I'm Not Writing An Article About The Yahoo! v Facebook Patent Case Yet at <http://gametimeip.com/2012/03/13/why-im-not-writing-an-article-about-the-yahoo-v-facebook-patent-case-yet/>

²⁴ Constine (2012). Facebook Fights Back, Countersues Yahoo For Patent Infringement at <http://techcrunch.com/2012/04/03/facebook-countersues-yahoo/>

5. Conclusion

Collisions of patent law and anti-competitive law still remain one of the most important issues of all legal systems. The key here lies in balance of rights granted by patent law and limitations imposed by anti-competitive law. And that is why it is extremely hard for authorities to resolve this issue fairly and without prejudice to rights of market players. Bias in favor of either patent system or anti-competitive system may cause unpredictable consequences. Unfortunately our world is not ideal and some patent holders knowing about delicate border between exploitation of their intellectual property rights and violation of anti-competitive law try to use defects of legal systems to create artificial barriers for competitors and as a result to gain advantage on a market.

In response to unfair practices by patent holders there were two methods on resisting such practices created. An entity targeted by aggressive patent holder may either file an antitrust claim or patent misuse claim. However both claims difficult to pursue so they could be effective only in cases where abusive behavior of patent holder is obvious. Moreover, patent misuse doctrine is applicable only in the US legal system.

To minimize number of patent disputes which could impact consumer welfare standards in different technology fields were adopted. Standards allow manufacturers to cross-license their essential patents on Fair, Reasonable and Non-Discriminatory (FRAND) terms. Although the incentive was positive in many ways several defects make it ineffective sometimes. The main problem lies in determining what the definition “Fair, Reasonable and Non-Discriminatory” means. In other words how to determine the border where terms become “unfair”, “unreasonable” and “discriminatory”? Soon after Google had announced about the acquisition of Motorola Mobility with its patent portfolio it sent a letter to IEEE where stated that Google will fulfill obligations of Motorola Mobility related to licensing on FRAND terms. In that letter Google also stated that maximum per-unit royalty rate will be 2.25% of the net selling price for the relevant end product. On 22 of February, 2012 Microsoft filed a competition complaint with European Union competition regulator where indicated that Google’s rate is not reasonable in relation to FRAND definition. Microsoft set forth that products may include several technologies covered by patents and when every patent will be licensed on 2.25% per unit rate then royalties paid by licensee will close to selling price of a product. Raymond Millien concluded that if Google’s rate is considered as 2.25% per unit regardless of the number of patents implicated then royalties only from a single licensee like Apple or Microsoft may exceed the sum paid by Google for Motorola Mobility acquisition.²⁵

Recent practices of using patents to create problems for competitors are dangerous because it is difficult to detect them and recognize them as anti-competitive. Entities use them out of the scope of competition law but under cover of patent law. Such practices may relate to initiating patent infringement cases to seek an injunction to prevent entering a market by competitors’ products or simply to force competitor to change its product or business model if it does not wish to bear litigation costs; participating in a patent aggregator to sue competitors which are not members of aggregator or to force them become the member to license their patents on lower royalty rates; collecting patent portfolios to cover specific technology as most as possible and then license patents to competitors to raise prices on their products or to assert patents in a patent dispute to slow its resolving.

Effective measures to react on mentioned practices do not exist at the moment. It is assumed that statutory limitations on preventing unfair patent activities are not required because: (1) they may unreasonably limit number of patent rights so patents lose their value; (2) it is difficult to presume all probable anti-competitive practices and when appropriate limitations come into effect patent holders could try to avoid them by implementing other unfair activities. Enactment of statutory provisions that prohibit abusive patent usage is pointless without strict borders of rights and obligations incurred from a patent. At the same time courts and state regulators must pay more attention to problems of balance between patent law and competition law and perform deeper investigation of every certain case where a risk of anti-competitive practice of patent asserting occurrence is high. In addition state bodies have to encourage activity of SSOs and take into account existing problems with determination of FRAND terms.

²⁵ Millien (2012). The Smart Phone Patent Wars: What the FRAND is Going On? at <http://www.ipwatchdog.com/2012/03/27/the-smart-phone-patent-wars-what-the-frand-is-going-on/>

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