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FRAND and Injunctive Relief: Exploring a Standard-Essential Patent Owner's Right to Injunctive Relief

Introduction

Often, an industry-adopted technical standard includes technology covered by patents, and the owners of these patents agree to license the patents on fair, reasonable, and non-discriminatory (FRAND) terms as part of the standard-setting process.[1] This article explores options available to the patent owners when a member of the industry declines to accept a license on terms deemed to be FRAND by the patent owner, and nevertheless, implements the standard.

A technical standard may be defined as an established norm or requirement which provides a common design for a product or process. Examples of technical standards include application programming interfaces, communication protocols (*e.g.*, Wi-Fi and Ethernet), and computer hardware standards (*e.g.*, USB and HDMI), to name a few. While some technical standards may arise as the result of widespread use and acceptance in a market (*i.e.*, "*de facto*" standards) or a government mandate (*i.e.*, "*de jure*" standards), in many instances, the adoption of a technical standard is determined by a standard setting organization (SSO) including manufacturers, engineers, and users of a given industry.

SSOs and IP Rights

Members partaking in the standard-setting process of an SSO meet with the goal of adoption of a technology as a standard for the industry. Participation in the standard-setting process of an SSO is typically voluntary and open to all industry members.[2] However, because of the potential market power resulting from including a member's intellectual property (IP) in a standard, members of an SSO must agree to accept the terms and conditions specified in a given SSO's bylaws. Most SSO bylaws include two requirements governing ownership of IP. First, members must disclose, prior to the adoption of a standard, IP rights of which they are aware that would be essential to the implementation of a proposed standard.[3] Second, members must commit to license any IP that proves essential to an adopted standard on FRAND terms.[4]

While some discrepancies have arisen over the scope of an IP owner's duty to disclose IP,[5] the commitment to license a standard essential patent (SEP) on FRAND terms has "led to an increasing number of litigation claims alleging that one party or another . . . has failed to comply with its FRAND obligations."[6] Even though SEP owners commit to license SEPs on FRAND terms, the "typical SSO patent policy mandating that a royalty be 'fair, reasonable and non-discriminatory' gives little guidance for royalty determination because 'reasonable' can mean different things to a technology owner and a technology buyer"[7]. As a result, many failed licensing negotiations result in litigation between an SEP owner and a party that nevertheless implements the standard in a product.

Entitlement to Injunctive Relief

Given a party's refusal to accept a proposed license which an SEP owner believes includes FRAND terms, what remedies are then available for the SEP owner in light of potential infringement of their IP? Does the embedding of a patent into a standard restrict the SEP owner's "right to exclude others" from making, using, or selling their invention?[8] It is not challenged that, if an SEP owner has offered a FRAND license and an implementer of a standard does not license

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an SEP associated with the standard, the SEP owner is entitled to damages.[9] But should the SEP owner be entitled to injunctive relief?

In 2011, the Federal Trade Commission (FTC) initiated a policy project to discuss standard-setting issues. As part of the project, a workshop was held, and comments from consumers, academia, and industry members were solicited.[10] Interestingly, one of the questions for which the FTC requested comments was whether a FRAND commitment should preclude a patent owner from seeking an injunction against practice of the standard.[11] Comments both for and against an SEP owner's entitlement to injunctive relief were received. Notably, Broadcom, Cisco Systems, Hewlett-Packard, IBM, and Research In Motion commented that SEP owners should not be entitled to injunctive relief while Microsoft, Nokia, and Qualcomm disagreed.[12] However, those comments are not binding and, perhaps as an indication of the current level of uncertainty surrounding the issue, Microsoft has since published a statement suggesting that it will not seek an injunction against any firm on the basis of an SEP.[13]

Much of the debate stems from the perceived role that the threat of an injunction plays in SEP licensing negotiations. For example, often an implementer of a standard may invest heavily in product design or production facilities associated with a product employing SEP technology, to the point where switching to an alternative technology may prove costly. Later, during licensing of the SEP, "the patentee can use the threat of an injunction to obtain royalties covering not only the value of its invention compared to alternatives, but also a portion of the costs that the infringer would incur if it were enjoined and had to switch."[14] Grounded in the belief that the threat of injunctive relief could negatively affect licensing agreements, theories that committing to license an SEP on FRAND terms constitutes a waiver of an SEP owner's right to seek a court injunction have been developed.[15]

On the other hand, proponents of injunctive relief for SEP owners argue that a "no injunctions rule" for SEPs would harm the current standardization process. They assert that FRAND commitments, which are contracts agreed to by patent owners participating in a given SSO, do not include "no injunctions" provisions. Consequently, "adding a new 'no injunctions' provision to that contract, without patentees' consent, would be inconsistent with freedom of contract."[16] They also emphasize that FRAND commitments are a necessary component of SSO bylaws, designed to secure reasonable conditions for commercial implementation of standards and yet attract the participation of innovators. If an SSO's bylaws are too onerous for innovators, innovators might elect not to participate.[17]

Other supporters of the availability of injunctive relief argue that if SEP owners only relief were an award of damages, "standard adopters would be invited to take their chances in court and begin immediately using the invention without trying to obtain a license."[18] Further, patent owners might even opt to settle for a license that is less than what they consider fair and reasonable, rather than face expensive and uncertain court proceedings for an award of damages.

In the midst of the disagreement, others seem to think that the threat of injunctions on FRAND-obligated patents is a perceived fear that has no factual basis.[19] The Supreme Court has held that the four traditional factors should be considered in making a determination to grant injunctive relief for patent disputes.[20] One of the four factors requires that the alternative of monetary relief must be inadequate.[21] While this is only one factor to consider, some courts have recognized that if a patentee has "engaged in a pattern of licenses under the patent," it may be "reasonable to expect that invasion of the patent right can be recompensed with a royalty rather than with an injunction."[22] Thus, injunctions on FRAND-obligated patents are by no means guaranteed or automatic, and perhaps any perceived threat should be narrowed.

Conclusion

The debate over the availability of injunctive relief for SEP owners has become a closely examined issue, as SEP owners and implementers alike await rulings by the courts and regulatory organizations on the matter. As highlighted by Judge Koh of the Northern District of California, "a number of courts have recognized a legal distinction between a normal patent—to which antitrust market power is generally not conferred on the patent owner, and a patent incorporated into a standard—to which antitrust market power may be conferred on the patent owner."[23] Additionally, the FTC recently expressed concern to Congress about SEP owners obtaining injunctions.[24] In testimony presented before the Senate Judiciary Committee, Commissioner Ramirez alluded to the rise and potential consequences of SEP owners seeking ITC exclusion orders.[25] Finally, the ITU announced that "in light of the worldwide increase in [SEP] litigation" the ITU will host a "high-level roundtable discussion between standards organizations, key industry players and government officials" in Geneva this October, where topics to be discussed include "entitlement to injunctive reliefs."[26] Therefore, the coming months should provide further insight into the availability of injunctive relief for SEP owners.

Endnotes

1 RAND is a commonly-used synonym for FRAND.

2 Carl Shapiro, *Setting Compatibility Standards: Cooperation or Collusion?*, *in* Expanding the Bounds of Intellectual Property 86 (Rochelle Dreyfuss, Diane Zimmerman & Harry First, eds. 2001).

3 Mark Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Calif. L. Rev. 1889, 1904 (2002).

4 *Id.* at 1906.

5 *See Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1100 (Fed. Cir. 2003) ("Rambus's duty to disclose extended only to claims in patents or applications that reasonably might be necessary to practice the standard.").

6 Jorge Contreras, *The February of FRAND*, Patently-O (Mar. 6, 2012), http://www.patentlyo.com/patent/2012/03/february-of-frand.html.

7 *Standard Setting and Market Power; Joint Hearings of the United States Department of Justice and the Federal Trade Commission, Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy* (Apr. 18, 2002) (statement of Richard T. Rapp, President, National Economic Research Associates), *available at* http://www.ftc.gov/opp/intellect/020418rappstiroh.pdf.

8 35 U.S.C. § 154(a)(1) (2011).

9 35 U.S.C. § 284 (2011).

10 Patents and Standards: Tools to Prevent Patent 'Hold-up', http://www.ftc.gov/opp/workshops/standards/index.shtml (last visited July 31, 2012).

11 Request for Comments and Announcement of Workshop on Standard-Setting Issues, 76 Fed. Reg. 28036, 28037-38 (May 13, 2011).

12 FTC Issues Agenda for Workshop to Explore the Role of Patented Technology in Collaborative Industry Standards, http://www.ftc.gov/os/comments/patentstandardsworkshop/ (last visited July 31, 2012).

13 Microsoft's Support for Industry Standards, http://www.microsoft.com/about/legal/en/us/IntellectualProperty/iplicensing/ip2.aspx (last visited July 31, 2012).

14 Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition 144 (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

15 *See* Joseph Scott Miller, *Standard Setting, Patents, and Access Lock-in: RAND Licensing and the Theory of the Firm*, 40 Ind. L. Rev. 351, 358 (2007); Douglas Lichtman, *Understanding the RAND Commitment*, 47 Hous. L. Rev. 1023, 1026 (2010).

16 Hill Wellford, *Reasons to Reject a "No Injunctions" Rule for SEPs and FRAND-Obligated Patents*, 4 CPI Antitrust Chron., no. 2 (2012), at 2, *available at* http://www.bingham.com/Publications/Files/2012/04/No-Injunctions-Rule.

17 *Id.* at 3.

18 Damien Geradin & Miguel Rato, *Can Standard-Setting lead to Exploitative Abuse? A Dissonant View on Patent Hold-up, Royalty Stacking and the Meaning of FRAND*, 3 Eur. Competition J. 101, 119 (2007).

19 Wellford, *supra* note 16, at 4.

20 *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391-92 (2006).

21 *Hoard v. Reddy*, 175 F.3d 531, 533 (1999) ("the inadequacy of one's damages remedy is normally a prerequisite to injunctive relief.").

22 *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 974 (Fed. Cir. 1996).

23 *Apple Inc. v. Samsung Elecs. Co.*, No. 11–CV–01846, 2012 WL 1672493, at *6 (May 14, 2012); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 ("[The value of a patent] becomes significantly enhanced . . . after the patent is incorporated in a standard."); *Research in Motion Ltd. v. Motorola, Inc.*, 644 F.Supp.2d 788, 793 (N.D. Tex. 2008) (explaining that standards essential patents are different from normal patents in that standards essential patents confer monopoly power on the patent owner because "[a] standard . . . by definition, eliminates alternative technologies," and enhances the value of the patent).

24 FTC Testimony Expresses Concern that Owners of 'Standard-Essential' Patents May Obtain Injunctions Enabling them to Hold Up Other Firms, http://www.ftc.gov/opa/2012/07/septestimony.shtm (last visited July 31, 2012).

25 *Prepared Statement of the Federal Trade Commission; United States Senate Committee on the Judiciary Concerning Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents* (July 11, 2012) (statement of Edith Ramirez, Commissioner of the Federal Trade Commission), *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf ("Although all federal district courts must follow the equitable *eBay* injunction analysis, the ITC, another venue in which patentees may litigate, does not. That discrepancy has generated concern that the ITC now is attracting litigation by patent owners that are less likely to meet the requirements to obtain an injunction in federal court, potentially leading to hold-up and any related consumer harm.").

26 High-level ITU talks address rampant patent litigation: Innovation-stifling use of intellectual property to be tackled, http://www.itu.int/net/pressoffice/press_releases/2012/45.aspx (last visited July 31, 2012).

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Does *KSR*'s "Common Sense" Make Sense? The Federal Circuit Adjusts Obviousness in *Mintz v. Dietz & Watson*

KSR v. Teleflex marks the Supreme Court's most recent statement on the law of obviousness.[1] In *KSR*, the Supreme Court at least briefly addressed such concepts as allowing for common sense, avoiding hindsight bias, and looking to problems addressed in patents. But what do these concepts really mean? And to what extent do they apply to the obviousness equation? This year, the Court of Appeals for the Federal Circuit provided some clarification of these issues in *Mintz v. Dietz & Watson*.[2]

The *Mintz* Case

Facts

Mintz involves U.S. Patent No. 5,413,148 ("the '148 patent"), which claims a casing structure for encasing meat products. The '148 patent discusses two problems—the "adherence" problem and the "cost" problem—that arise in prior-art meat encasements. Prior art meat encasements use a netting that allows meat to bulge between the netting strands; this produces a desirable checkerboard pattern on the meat's surface. However, the meat in the prior art encasements bulges and cooks around the netting strands, making it difficult to peel the netting off the cooked meat ("adherence problem"). Some prior art encasements tried to solve the adherence problem by placing a separate layer of collagen film, or stockinette, between the meat and the netting. But doing so required a two-step stuffing process, which was labor intensive and expensive ("cost problem").[3]

To overcome the adherence and cost problems, the '148 patent "integrates a stockinette into a netting to make a new kind of meat encasement."[4] The '148 patent therefore solved the adherence problem without the higher cost of the two-step stuffing process while still allowing some bulging to create the desirable checkerboard pattern on the meat surface.

Federal Circuit's Decision

The Federal Circuit affirmed the lower court's holding of non-infringement, but reversed a ruling that the '148 patent was

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invalid.[5] The Federal Circuit determined that the district court made clear error in its factual inquiries underlying its obviousness analysis. 35 U.S.C. § 103 sets forth the statutory test for obviousness.[6] Courts have interpreted this statutory test to require a district court to make four factual inquiries: (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) objective evidence of nonobviousness.[7] The *Mintz* Court's analysis of factors (2) and (3) is particularly pertinent to a consideration of the evolving standards involved in question of obviousness.

1. Level of Ordinary Skill in the Art

The district court found "that the person of ordinary skill would have familiarity with the knitting art but no familiarity with the meat encasing art."[8] The *Mintz* Court disagreed, concluding that "the level of ordinary skill in the art of the claimed invention includes the meat encasement art."[9]

The *Mintz* Court's conclusion rested on three factors. First, the specification of the '148 patent "repeatedly focuses on the meat encasement art."[10] Second, the claims of the '148 patent recite a meat product. In particular, claim 1 of the '148 patent recites a "casing structure for encasing meat products," "a meat product is stuffed into said casing structure," and that the stockinette is "to prevent the adherence of adjacent meat product." Finally, the '148 patent's adherence problem (set forth in the specification) and the solution (embodied in the claimed invention concerns meat encasement, not knitting. In particular, the '148 patent's Description of the Prior Art states, "It is known in the meat encasing art" and goes on to discuss the prior art meat encasements and their problems.[11]

These three factors, all detailed in the '148 patent itself, led the *Mintz* court to conclude that "entirely omitting the meat encasement art led the validity search astray."[12]

2. Differences Between the Claimed Invention and the Prior Art

The district court found all limitations of claim 1 in the prior art except the "intersecting in locking engagement" claim limitation.[13] Nonetheless, that limitation, the district court opined, was common sense because it would have been obvious to try a locking engagement to solve the problem of forming a checkerboard pattern.

The *Mintz* Court disagreed for three reasons. First, the district court improperly relied on mere common sense; in the *Mintz* Court's view, common sense, without further justification, has virtually no place in the obviousness analysis: "[t]he mere recitation of the words 'common sense' without any support adds nothing to the obviousness equation."[14] As applied to obviousness, "'common sense' is a shorthand label for knowledge so basic that it certainly lies within the skill set of an ordinary artisan." Second, the district court improperly relied upon a knitter's perspective, whereas it should have relied on the perspective of a meat encasement artisan. "The basic knowledge (common sense) of a knitting artisan is likely to be different from the basic knowledge in the possession of a meat encasement artisan." Finally, the district court improperly "used the invention to define the problem that the invention solves." This approach is problematic because "when someone is presented with the identical problem and told to make the patented invention, it often becomes virtually certain that the artisan will succeed in making the invention."[15]

Suggestions for Using *Mintz* as a Tool to Combat an Obviousness Rejection or Obviousness-based Validity Challenge

Mintz takes a hard stance to safeguard against forbidden reliance on hindsight—a change from the uncertain language of *KSR*. To this end, *Mintz* advances two key principles:

1. a fact finder may not rely on common sense as a basis for a factual finding in an obviousness analysis, without sufficiently showing that the common-sense knowledge would reside in the ordinarily skilled artisan;[16] and
2. fact finder may not rely on a problem set forth in a patent or application as a basis for obviousness, without sufficiently showing that a person of ordinary skill in the relevant art at the time of the invention would have recognized the problem and found it obvious to generate the claimed invention in order to solve that problem.[17]

These principles support the following three strategies for combating an obviousness rejection or defending against an obviousness-based validity attack.

When common sense is proffered as a basis for obviousness, demand sufficient evidence showing (1) scope of the relevant art, and (2) that the allegedly common-sense knowledge would reside in a person of ordinary skill in the relevant art.

Mintz went to great lengths to explain that the district court had erred in its use of common sense to find obviousness. The opinion found the district court in clear error for using an "unsubstantiated reliance" on a "common sense approach."[18] In particular, "[t]he mere recitation of the words 'common sense' without any support adds **nothing** to the obviousness equation. . . . With little more than an invocation of the words 'common sense' . . . the district court overreached in its determination of obviousness."[19]

This principle arms those seeking to defend a claimed invention against an attack that the claimed invention is "common sense" or "obvious to try." A fact finder must articulate exactly why something would be "common sense" or "obvious to try."[20] According to *Mintz*, this articulation requires a showing of what "knowledge would reside in the ordinarily skilled artisan."[21] This is important because "common sense" is meaningless in a vacuum; basic knowledge in one field often differs from basic knowledge in another. Therefore, a meaningful obviousness determination requires a fact finder to articulate the scope of the basic knowledge of a skilled artisan.[22]

Thus, the fact finder should be urged to advance a prior art reference that demonstrates the basic knowledge of a skilled artisan. Additionally, the fact finder should be reminded that this basic knowledge is required to determine exactly what would be "common sense" to that skilled artisan.

When a fact finder relies on a problem that is set forth in a patent or application as a basis for obviousness, demand evidence showing (1) the relevant art and its scope, (2) that at the time of the invention, the person of ordinary skill in the relevant art would have recognized the problem, and (3) that at the time of the invention, the person would have arrived at the claimed invention in order to solve that problem.

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Mintz also emphasizes that a fact finder errs when using the invention itself to define the problem being solved.[23] *Mintz* is clear that the problem sought to be solved may in itself be nonobvious, even if the solution to that problem is obvious.[24] This is because "the inventive contribution often lies in defining the problem in a new and revelatory way."[25] In other words, "when someone is presented with . . . [a] problem and told to make the patented invention, it often becomes virtually certain that the artisan will succeed in making the invention."[26]

This principle allows a patentee or applicant to require the fact finder to demonstrate that a person of ordinary skill in the relevant art would have recognized the problem.[27] A fact finder may demonstrate that a problem is obvious by, for example, identifying the problem in a reference published before the date of the invention.[28]

Another strategy for demonstrating an improper use of hindsight is to define the problem solved "in a new and revelatory way"; this can prevent certain art from being considered analogous art. In another recent Federal Circuit case, *In re Klein*[29], the Federal Circuit determined that certain prior art was not analogous because it was not "reasonably pertinent to the particular problem" addressed by the invention.[30] As a result, that prior art could not be considered in an obviousness analysis.[31] However, it should be noted that narrowing the scope of the problem being solved, perhaps to avoid certain art, may also narrow the scope of the invention.

Consider drafting a patent application that recites a problem in the prior art and that contains rationale clearly linking that problem to the solution that is embodied in the claimed invention.

Based on the outcome in *Mintz*, certain patentees may find it worthwhile to clearly recite the problem being solved in the specification of the patent. Clearly presenting the problem, along with a link between the problem and the solution, may be more likely to prevent the use of certain prior art against the claims in obviousness contentions. *Mintz* forbids a fact finder from using a stated problem in a patent or application, without more, to further an obviousness argument.

However, clearly reciting a problem and a link between it and the inventive solution is not without danger to the patentee or applicant. By clearly stating the problem and solution, a patentee may limit the scope of their claims to a particular art or industry.

MBHB Favorably Ranked in *IAM Patent 1000—The World's Leading Patent Practitioners 2012* Guide

McDonnell Boehnen Hulbert & Berghoff LLP ("MBHB") has been favorably ranked in the *IAM Patent 1000—The World's Leading Patent Practitioners 2012* guide, as published by *Intellectual Asset Management* (*IAM*) magazine. MBHB was recognized within Illinois in the *IAM Patent 1000* guide-designated categories of "Prosecution," "Litigation," and "Licensing." In the *IAM Patent 1000* guide ranking, MBHB is described as follows:

"Practical, commercially focused, responsive and cost effective," McDonnell Boehnen Hulbert & Berghoff can rightly count itself among the most respected boutiques in Illinois. It boasts a "solid, robust" prosecution group that obtains quality patents for clients and provides invaluable technical muscle to the litigators. In litigation, it deploys leaner and more agile teams than are commonly used at larger, general-service firms, resulting in more efficient case handling. It has the dexterity to handle complex patent cases involving a range of technical disciplines, but biotechnology and pharmaceuticals are particular areas of aptitude.

View complete details at www.iam-magazine.com/patent1000/rankings/.

In *Mintz*, for example, the claims at issue were limited only to meat encasements.[32] Some patentees may find this type of situation acceptable, particularly when the patentee has a clear understanding of the scope of the relevant industry. However, in a relatively new or nebulous industry, a patentee may prefer to seek the broadest claims possible. In this type of situation, drafting a well-defined problem and solution may not be advisable.

Endnotes

1 *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

2 *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372 (Fed. Cir. 2012).

3 *Id.* at 1375.

4 *Id.*

5 *Id.* at 1374.

6 35 U.S.C. § 103 (2006).

7 *Eli Lilly & Co. v. Teva Pharm. USA, Inc.*, 619 F.3d 1329, 1336 (Fed. Cir. 2010).

8 679 F.3d at 1376.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 1377.

14 *Id.*

15 *Id.*

16 *See id.*

17 *See id.*

18 *Id.*

19 *Id.* (emphasis added).

20 *See id.*

21 *Id.*

22 *See id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 1377-78.

28 *See* 550 U.S. at 401 (recognizing that the teaching-suggestion-motivation test "captures a helpful insight").

29 647 F.3d 1343 (Fed. Cir. 2011).

30 *Id.* at 1348.

31 *Id.* at 1350-52.

32 679 F.3d at 1374.

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Generic Top-Level Domain Update

In 2012, the Internet Corporation for Assigned Names and Numbers (ICANN) introduced the generic Top-Level Domain (gTLD) Program to implement new Top-Level Domains into the Internet's addressing system. To help explain the gTLD Program, this article highlights three important aspects of the Program, including: 1) background information on ICANN's new gTLD Program and the evaluation process for applicants, 2) statistics from the first round of applications in the gTLD Program, and 3) mechanisms that rights holders may use to protect themselves (which ICANN labeled "Rights Protection Mechanisms").

Background

A gTLD is a segment of a domain name. Currently, there are 22 gTLDs, including the familiar .com, .edu, .mobi, and .org, and another 250 country-code Top-Level Domains (ccTLDs), such as .us, .ca, and .uk. An applicant may now apply for a gTLD to be about anything they would like, such as .donut, .pencil, or .apple, for example.

A gTLD application indicates a business commitment to become a registry. Becoming a registry entails a number of significant responsibilities for a gTLD operator: for instance, the gTLD operator must purchase and maintain hardware and software and pay a non-refundable $185,000 application fee and $25,000 per year in registration fees.[1]

ICANN evaluates each gTLD applicant based on procedures outlined in its gTLD Applicant Guidebook.[2] The initial evaluation is split into two parts: string review and applicant review. The first review focuses on the applied-for gTLD string. The string review comprises three elements:

- The applied-for gTLD string must not create a probability of user confusion due to similarity with other existing Top-Level Domains (TLDs), reserved names, applied-for strings, and Internationalized Domain Name country-code TLDs (IDN ccTLDS);
- The applied-for gTLD string must not adversely affect Domain Name System (DNS) security or stability such as experiencing a non-trivial load of unanticipated queries; and
- The applied-for gTLD string, in four cases, must have documentation of support of non-objection from the relevant governments or public authorities where:
  - the string is a representation, in any language, of the <u>*capital city name*</u> of any country or territory listed in the ISO 3166-1 standard;
  - the string is a <u>*city name*</u>, where the applicant declares that it intends to use the gTLD for purposes associated with the city name;
  - the string is an exact match of a <u>*sub-national place name*</u>, such as a county, province, or state, listed in the ISO 3166-2 standard; or
  - the string is listed as a UNESCO region[3] or appears on the "Composition of macro geographical sub-regions, and selected economic and other groupings" list.[4]

The second review, which focuses on the applicant, analyzes:

- Whether the applicant has the requisite technical, operational, and financial capability to operate a registry; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

The applicant must demonstrate a clear understanding and accomplishment of groundwork toward the key technical and operational aspects of a gTLD registry operation. This demonstration is accomplished through answering questions 24-44 in the Applicant Guidebook.[5] These questions inquire into the applicant's intended technical and operational approach for those registry functions that are outward facing, including interactions with registrars, registrants, and various DNS users. Further, these questions request information regarding the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry, including security policies, geographic dispersion of incoming network traffic, Whois information, system architecture, network architecture, and data backup policies.

The applicant also must demonstrate financial capability to run a registry.[6] This demonstration is accomplished through submission of financial statements, including balance sheets, income statements, statements of capital, cash flow statements, letters of independent certification, and projection templates. The applicant must also describe and explain the expected operating costs and capital expenditures of setting up and operating the proposed registry, such as DNS resolution for registered domain names, operation of the Shared Registration System, Provision of Whois service, registry data escrow deposits, and maintenance of a properly signed zone in accordance with Domain Name System Security Extension (DNSSEC) requirements.

Statistics

The first round of new gTLD applications opened on January 12, 2012 and closed on May 30, 2012. Although ICANN reaffirmed a commitment to a second round of applications for the gTLD Program, it has yet to release timing information.[7] For the first round, ICANN received 1,930 applications. The entire list of applications is available at ICANN's website.[8] Of those applications, a large majority are standard applications.

ICANN received applications for exact matches of strings in 230 cases. Predictably, there are multiple applicants for descriptive gTLDs such as .app, .book, .buy, or .llc. There are also multiple applicants for the gTLD .law. A disparity exists for the number of applications per applicant. For example, some companies applied for one gTLD, while others chose to apply for multiple. A largest number of gTLD applications for any one company was 307.[9]

Rights Protection Mechanisms

The gTLD Program contains mechanisms, known as Rights Protection Mechanisms (RPMs), to protect intellectual property interests, community interests, consumer protection, and DNS stability. These mechanisms can be roughly divided into five categories: Trademark Clearinghouse, Uniform Domain Name Dispute Resolution (UDRP), Uniform Rapid Suspension System (URS), Post-Delegation Dispute Resolution Procedure (PDDRP), and Malicious Conduct Mitigation.[10]

Trademark Clearinghouse[11]

The Trademark Clearinghouse is a centralized database of verified data on registered trademarks. The Clearinghouse is designed to minimize the time and cost to trademark rights holders by allowing them to register their trademark data with one centralized source for a one-time fee, rather than having to register their trademark data with every new gTLD registry operator. The Clearinghouse, therefore, facilitates the use of RPMs rather than performing the function of a RPM.

Two examples of such RPMs are Sunrise Registrations and Trademark Claims Services. A Sunrise Registration is the name for a period during which trademark owners can purchase domain names before the general public. A Trademark Claims Service, on the other hand, provides notice to a prospective domain name registrant of a potential conflict between the domain name and an existing trademark. It also provides notice to the trademark owner if the domain name is registered following the registrant's representation of non-infringement. However, the Trademark Claims Service is limited to exact matches of a domain name to a word mark.

snippets

A gTLD is a segment of a domain name. Currently, there are 22 gTLDs, including the familiar .com, .edu, .mobi, and .org, and another 250 country-code Top-Level Domains (ccTLDs), such as .us, .ca, and .uk. An applicant may now apply for a gTLD to be about anything they would like, such as .donut, .pencil, or .apple, for example.

UDRP[12]

The UDRP is an existing ICANN process for clear cases of bad-faith, abusive registration, and use of domain names. The UDRP provides a mechanism to keep cyber-squatting disputes out of the courts. Although the UDRP is optional for trademark owners, it is mandatory for gTLD registrants. The UDRP does not prevent either party from submitting a dispute to a national court of competent jurisdiction. Complainants must have rights in a trade or service mark, even unregistered rights. Personal names, descriptive terms, and geographical identifiers may be actionable to the extent they have acquired distinctiveness through secondary meaning.

URS[13]

The URS is not meant to replace the UDRP, but rather to act as a quicker complement. For example, the initial administrative review of a URS must be conducted within two business days of submission of a Complaint to a URS Provider. Upon completion of the administrative review, a registry operator must "lock" the domain within 24 hours of receiving a Notice of Complaint from a URS administrator. Thus, a rights holder can suspend a domain name within 3-5 days. Similar to the UDRP, the URS is intended for clear cases of trademark abuse. The only remedy available to a URS complainant is the temporary suspension of a domain name for the duration of the registration period.

PDDRP

The PDDRP is an administrative option for trademark owners to file an objection against a registry operator for operation or

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Generic Top-Level Domain Update

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use of its gTLD that caused or materially contributed to trademark abuse. The PDDRP provides an opportunity for an administrative review, a threshold review, an expert panel, discovery, hearings, an expert determination, and appeal of the expert determination.

Malicious Conduct Mitigation[14]

ICANN adopted further mechanisms to reduce the potential for malicious conduct. For instance, all registry applicants must be reviewed for past criminal history. Further, an enhanced Whois record, called "Thick Whois," at the registry level means rights holders have more robust access to ownership information of the registry operator to facilitate rapid resolution of malicious conduct issues. Additionally, all gTLD registry operators must establish a single point of contact responsible for handling abuse complaints.

Endnotes

1 ICANN, *New Generic Top-Level Domains, Frequently Asked Questions*, *available at* http://archive.icann.org/en/topics/new-gtlds/faqs-21oct11-en.pdf.

2 ICANN, *gTLD Applicant Guidebook* (June 4, 2012), *available at* http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf.

3 *See* UNESCO, http://www.unesco.org/new/en/unesco/worldwide/ (last visited Aug. 3, 2012).

4 *See* United Nations Statistics Division, *Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings*, http://unstats.un.org/unsd/methods/m49/m49regin.htm (last visited Aug. 3, 2012).

5 *See gTLD Applicant Guidebook supra* note 2, at Attachment to Module 2.

6 *See id.* at A-37-46.

7 ICANN, *ICANN Reaffirms Commitment to Second Round in New gTLD Program, Seeks Public Comment on Trademark Protections, and Moves Forward on Applicant Support Program*, http://www.icann.org/en/news/announcements/announcement-09feb12-en.htm (last visited Aug. 3, 2012).

8 ICANN, *Reveal Day 13 June 2012 – New gTLD Applied-For Strings*, http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en (last visited Aug. 3, 2012).

9 http://www.donuts.co/images/stories/DONUTS_TLD_APPLICATION_LIST.pdf.

10 *See gTLD Applicant Guidebook*, *supra* note 2, at Module 5.

11 *See id.*

12 *See id.*

13 *See id.*

14 *See id.*

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The Patent Exchange: A New Approach to Licensing Intellectual Property

Underutilized patents are holding intellectual property owners ransom to the tune of $1 trillion dollars annually.[1] The solution? Monetize valuable intellectual property (IP) assets on the open market, and see exactly how much your IP is worth. Such a strategy is now possible through a new Chicago-based exchange called the Intellectual Property Exchange International (IPXI), which allows IP rights to be bought and sold as unit license right™ (ULR™) contracts on an open market.[2]

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The Metes and Bounds of IPXI

IPXI, like many exchanges, provides a marketplace that brings together buyers and sellers. However, instead of offering stocks and bonds, IPXI offers ULR contracts.[3] A ULR contract represents a non-exclusive license for an individual unit of IP or a bundle of IP.[4] Purchasing a ULR contract grants the holder of the contract the right to use the IP listed in the contract for the future production of one unit of goods.[5]

As an example, a ULR contract might list a patent for a particular technology that is being offered on the exchange by a patent owner (*i.e.*, a licensor). Each ULR contract would grant the purchaser of the contract (*i.e.*, a licensee) the right to make, use, and/or sell one device with the patented technology. If the licensee wanted to produce 10,000 devices with the patented technology, the licensee would buy 10,000 ULR contracts. Each contract would expire upon the production of a product with the patented technology.[6]

All ULR contracts go through an extensive vetting and valuation process before being offered on IPXI. This process begins with IPXI evaluating the quality and validity of the proposed IP, and conducting market research to create a financial model and estimate demand for IP licenses. Once this initial evaluation is complete, the proposed IP offering is sent to a Selection Committee made up of industry leaders that independently review the proposed IP offering for viability. If approved by the Selection Committee, IPXI will conduct a deeper investigation of the IP to solidify the IP offering. This deeper investigation includes an exhaustive vetting by internal and external advisors, and ends with a second review by the Selection Committee.

snippets

IPXI offers IP owners a way to monetize IP assets through exchange traded ULR contracts. However, IPXI's approach to licensing may not be right for everyone.

If the proposed IP survives the vetting process, the IP owner must furnish a commitment fee to help fund marketing activities conducted by IPXI to ready the IP to be offered as ULR contracts in an Initial Offering, much like the initial offering of stocks. Leading up to the Initial Offering, IPXI works with the IP owner to develop an Offering Memorandum for the offering that names, among other things, the specific IP to include in the ULR contract, how many ULR contracts to sell, and at what price to list the ULR contracts.[7] The Offering Memorandum also includes details on potential Follow-on Offerings, which may be triggered when the supply of ULR contracts becomes depleted.[8] Once this entire process is complete, the ULR contracts are listed by IPXI.[9]

As an example, a licensor may go through the vetting process and determine that a fair Initial Offering is 5,000,000 ULR contracts at $1 per ULR contract. Thus, the cost for a licensee to license the patented technology for use in a single product would be $1. Licensees wanting to manufacture multiple products having the patented technology can buy multiple ULR contracts, one to cover each product. Should additional licenses be needed to cover additional products, the licensee may obtain them on the exchange at market rate. If the supply of ULR contracts becomes depleted, the licensor may create additional ULR contracts to replenish the supply as part of a Follow-on Offering. Conversely, should the supply of ULR contracts become overly saturated, IPXI may pull and retire unused contracts. However, the vetting and valuation process is designed to avoid oversupply.

In addition to purchasing ULR contracts as part of the Initial Offering or Follow-on Offering (*i.e.*, on a primary market), members may also purchase ULR

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The Patent Exchange: A New Approach to Licensing Intellectual Property

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contracts on a secondary market.[10] The secondary market allows members to buy and sell previously offered ULR contracts for market price.[11]

For example, a first licensee may decide to discontinue or reengineer a product that used a patented technology covered by a ULR contract. Rather than discard any unused ULR contracts, the first licensee may resell the unused ULR contracts on the secondary market. A second licensee, who may require additional licenses to cover a surge in product demand, may purchase the unused ULR contracts from the first licensee at the market price.[12]

IPXI from the Viewpoint of the Licensor

Licensing can be expensive. There are significant costs associated with evaluating IP, identifying and analyzing potential infringers, communicating with potential infringers, and negotiating a license agreement that is acceptable to both the licensor and the licensee. Even after the license is signed, costs may continue to mount with yearly reporting and auditing requirements. It is easy to understand that, while licensing can be a very valuable tool, in some cases the costs of obtaining the license may be higher than the value received from the license. This is where IPXI offers a promising alternative.

By its very nature, IPXI provides patent owners a way to uniformly license multiple licensees with ULR contracts. For purposes of illustration, consider a patent owner who has a portfolio of patents. It may make financial sense for the IP owner to approach a few major players in the industry to negotiate a license for these patents; however, the high transaction costs associated with enforcement and licensing a remainder of the market may outrun the potential revenue from such small scale licenses. Due to these economic realities, an IP owner may only be able to realize a fraction of the potential value of a portfolio. IPXI attempts to address this problem by making ULR contract information available to prospective licensees, large and small, and by providing those prospective licensees the opportunity to purchase ULR contracts. This limits the licensor's search costs and allows the licensor to more fully monetize the underlying IP assets.

snippets

One advantage of IPXI from the perspective of the licensee is the ability to purchase small numbers of ULR contracts to cover research and development, limited product releases, and the like.

Licensing IP on an open exchange may have drawbacks. For example, listing ULR contracts on IPXI requires that the IP owner grant IPXI an exclusive license for the underlying IP.[13] This means that IP owners cannot license the underlying IP in any other manner, and therefore must forego possible alternative licensing opportunities. Moreover, the exclusive license remains in effect through any subsequent merger or acquisition, which may affect the marketability and worth of the company owning the underlying IP.

Another potential drawback is that any member can buy ULR contracts on the exchange. This means competitors, barring field of use or other restrictions in the Offering Memorandum, can obtain licenses on a patent and use the patent to directly compete against the licensor. Moreover, there is not much to stop an alleged infringer from ex post facto purchases of ULR contracts at favorable market rates in an attempt to expunge wrong doing or limit damages. While the likelihood of such events is unknown at this time, they should not be discounted when considering whether to list on IPXI.

IPXI from the Viewpoint of the Licensee

One advantage of IPXI from the perspective of the licensee is the ability to purchase small numbers of ULR contracts to cover research and development, limited product releases, and the like. For example, an individual inventor, startup company, university, or even a corporation could be developing a new product and want to try a specific patented method or apparatus in the product. Rather than go through a lengthy and expensive licensing process to legally use the method or apparatus, the licensee may simply purchase a ULR contract covering the patent. If the patented method or apparatus makes it into the final design, the inventor can purchase additional ULR contracts to cover the sale of products covered by the patent. If the product does not take off as expected, the licensee has avoided expensive licensing negotiations and may resell any unused

ULR contracts on the open market at a potential profit.

On the other hand, potential drawbacks may exist in licensing IP via ULR contracts. For example, consider what happens when the price of a ULR contract that is needed to produce a product exceeds the price of the product or a reasonable royalty for the product because the IP is part of a bundle of IP rights being offered on IPXI. Thus, to purchase a single ULR contract for the patent, the licensee must purchase the entire bundle of IP rights, at the bundle rate. Depending on the price of the bundle, and the number of different bundles that may be required to legally make, use, and/or practice the licensee's invention, the prospective licensing costs may surpass the price of the product. Thus, the one size fits all ULR contracts may prove too rigid for individual licensees wanting to avoid infringement.

Licensees should be conscious of inherent market related factors including pricing and risk. For example, in the context of ULR contracts, the licensee may have to buy high to avoid infringement, and sell low to offload surplus ULR contracts. Furthermore, if an underlying patent expires or is litigated and deemed invalid, the licensee bears the risk of the value of the ULR contract dropping to zero. Such market speculation may be profitable for some and detrimental to others.

Conclusion

IPXI offers IP owners a way to monetize IP assets through exchange traded ULR contracts. However, IPXI's approach to licensing may not be right for everyone. When considering whether to offer IP rights on IPXI, it is important to determine: "Is this the right licensing strategy for me?" and "What are the potential long term benefits and drawbacks of offering my IP on an open market?" Similarly, when considering whether to purchase ULR contracts on IPXI, ask: "Do I really infringe this IP?" and "What is a fair price for this ULR contract?" Such questions may not have easy answers—but a little bit of knowledge can go a long way.

Endnotes

1 Kevin G. Rivette & David Kline, *Discovering New Value in Intellectual Property*, Harv. Bus. Rev., Jan.-Feb. 2000, at 7, *reprint available at* http://www.pctcapital.com/pdfs/Harvard.pdf.

2 *See* James E. Malachkowksi, *The Next Big Thing in Monetizing IP: A Natural Progression to Exchange Traded Units*, 3 Landslide 32, 36 (May/June 2011); Ian McClure, *The value of IP as a commodity*, Intellectual Asset Management, May/June 2011 at 29, 31; Intellectual Prop. Exch. Int'l, Inc., IPXI Market Rulebook 10 (Version 1.0 2012) [hereinafter Rulebook].

3 Malachkowksi, *supra* note 2, at 36;

continued on p. 14

2012 *Chambers USA* Favorably Ranks MBHB Among Top Law Firms in Intellectual Property

McDonnell Boehnen Hulbert & Berghoff LLP ("MBHB") has been favorably ranked among top law firms in the 2012 legal directory *Chambers USA: America's Leading Lawyers for Business* in the category of "Intellectual Property." The latest annual survey of the U.S. legal market is published by the respected organization Chambers and Partners ("Chambers"). Chambers identifies the best practitioners in all the main areas of business law. Chambers' rankings are compiled from interviews with top business leaders and legal advisors. The research is in-depth and client focused and the guide is read by industry-leading companies and organizations throughout the U.S. and worldwide. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment and other qualities most valued by the client. The rankings and editorial comments about attorneys are independent and objective. Inclusion in the guide is based solely on the findings of the Chambers research team. No one can "buy their way in." Furthermore, Chambers' methodology for research into the strengths and reputations of law firms and individuals has been approved by the British Market Research Bureau. To view details regarding MBHB's ranking as it appears in Chambers' legal directory, visit www.chambersandpartners.com.

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McClure, *supra* note 2, at 31; Rulebook, *supra* note 2, at 10.

4 *Id.*

5 Malachkowski, *supra* note 2, at 36; McClure, *supra* note 2, at 31; Rulebook, *supra* note 2, at 9; *An intellectual-property exchange: Marketplace of Ideas*, The Economist, (May 12, 2012). Consumption of a ULR contract is not limited to the production of goods. The unit base may be tied to any monitorable event associated with the IP right, such as a unique website visitor or an hour of lab time.

6 *Id.* Licensees who intend to consume ULR contracts, known as Operational Users, must satisfy quarterly reporting requirements with IPXI to track the use of ULR contracts in producing goods. *See* Rulebook, *supra* note 2, at 28.

7 McClure, *supra* note 2, at 32; Rulebook, *supra* note 2, at 8. The prospectus is also known as an "Offering Scenario Document," or "OS Document."

8 *See* Rulebook, *supra* note 2, at 27.

9 Both the IP owner and IPXI benefit from a successful initial offering. The IP owner receives 80% of the revenue generated from selling ULR contracts during the Initial Offering, while IPXI retains the remaining 20% of the revenue.

10 Malachkowski, *supra* note 2, at 36; McClure, *supra* note 2, at 32; Rulebook, *supra* note 2, at 6.

11 *Id.*

12 Additional information about IPXI and the rules governing ULR contracts can be found in the IPXI Rulebook, currently at Version 1.0. *See, generally* Rulebook.

13 IP owners listing with IPXI may add field of use restrictions to narrow the scope of the exclusive license.

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