

Seeking an Injunction Can Violate Competition Law 寻求禁令可能违反竞争法

- **Japan Fair Trade Commission: 日本公平贸易委员会**
 - "Refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder ... may constitute an unfair trade practice." See *Guidelines for the Use of Intellectual Property under the Antimonopoly Law* (2016) (see http://www.jftc.go.jp/en/legislation_gis/monopoly_guidelines_files/IPGL_FRAND.pdf) (emphasis added).
 - 对愿意接受FRAND限制的标准必要专利持有者许可的一方，拒绝许可或提起禁令诉讼。。。将构成不公平贸易行为，见《反垄断法下知识产权使用指南》(2016) (http://www.jftc.go.jp/en/legislation_gis/monopoly_guidelines_files/IPGL_FRAND.pdf) (重点强调)
- **Korea Fair Trade Commission: 韩国公平贸易委员会**
 - "However when an injunction is filed limitlessly, patent hold up which refers to a situation where an SEP owner requires the payment of excessive royalty from willing licensees or filing an injunction to impose unfair conditions when licensing all with an intention to exclude competitors or obstruct the competitors' business activities can occur. Thereby an act of filing an injunction against willing licensees by an SEP holder who promised to license its SEP on FRAND terms can be determined as a behavior that restricts competition in the relevant market as it exceeds the reasonable extent of exercise of patent right." *Guidelines for the Use of Intellectual Property under the Antimonopoly Law* (2016) (see http://www.ftc.go.kr/en/legislation_gis/monopoly_guidelines_files/IPPL_FRAND.pdf) (emphasis added).
 - 虽然一个禁令诉讼可以无限期提交，专利劫持 (IPSEP持有者要求愿意许可人或提起禁令诉讼者支付高额版税，在授权许可时施加不公平条款，意图只有一个：排除竞争对手或阻碍竞争对手的业务活动) 依然会发生。由此，承诺以FRAND条款许可其SEP的SEP持有人向愿意许可人提起禁令诉讼的行为可被认定为相关市场中的限制竞争行为，因其超越了专利权行使的合理范围。见《反垄断法下知识产权使用指南》(2016) (http://www.ftc.go.jp/en/legislation_gis/monopoly_guidelines_files/IPPL_FRAND.pdf) (重点强调)

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- **Canadian Competition Bureau 加拿大竞争局**
 - "Another way that patent hold-up can arise in the context of standard setting is when a patentee makes a licensing commitment before its technology is adopted in a standard and then later seeks injunction orders against firms that are willing to license the technology on terms and conditions meeting the commitment. By seeking an injunction against firms that are 'locked-in' to the standard and that face prohibitive costs to switch to alternative technologies, the patentee can 'hold up' potential licensees and demand higher royalties than if it did not seek the injunction. The use of injunctions can be particularly problematic when the patentee's patented technologies comprise only a small part of the standard, but can nonetheless block a prospective licensee's ability to manufacture and sell standard-compliant products. Given the significant risk to its business, a prospective licensee that is threatened by an injunction may be compelled to pay a royalty rate greater than the patentee's ex ante commitment. Similar to the other cases involving patent hold-up described above, the Bureau's concern with the patentee's conduct is that it could increase the cost of accessing the standard for firms that wish to develop products that incorporate the standard and thereby reduce their incentive to innovate or otherwise produce products that use the standard. The patentee's conduct may result in foreclosure of companies making standard-compliant products. There is also concern that the increased cost of access will result in increased prices to consumers of standard-compliant products or that the conduct excludes alternative technologies that would have been considered for the standard." *Intellectual Property Enforcement Guidelines* (2016) (see <http://www.competitionbureau.gc.ca/en/itc-ibc/ib-ibc/enforcement/guidelines.html>) (emphasis added).
 - “在标准制定背景下，专利劫持可能发生的另一种方式是，专利人在其技术被采用到标准之前作出许可承诺，然后对愿意提供承诺条款和条件许可技术的企业发出禁令。通过对技术制定到标准的企业和使用替代技术将面临高昂费用的公司发出禁令，专利持有人可以劫持愿意在标准中采用其技术的企业。当专利持有人的技术占标准的一小部分时，禁令的使用可能会造成问题，但是仍然可以阻止愿意许可人生产标准符合条件的产品。对于愿意支付重大费用，接受专利的潜在许可人可能被迫支付比专利持有人事先承诺的更多的专利费。与上述专利劫持案件类似，该案例对专利持有人行为的关注点是，它可能增加那些愿意开发与标准相关的产品的公司获得该标准的成本，进而降低他们给消费者生产使用标准产品的积极性。专利持有人的行为可能会导致符合标准的产品公司丧失市场，也有人担心，使用成本的增加将导致符合标准的产品销售价格增加，或者该行为会排除标准考虑的替代技术。”《知识产权执法指南》(2016) (见<http://www.competitionbureau.gc.ca/en/itc-ibc/ib-ibc/enforcement/guidelines.html>) (重点强调)

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- **China 中国**
 - Awaiting final version of competition law guidance from competition authorities as to the application of the Anti-Monopoly Law when a patent holder seeks injunctive relief based on FRAND-encumbered standard essential patents
 - 当专利权人基于受FRAND限制的标准必要专利提起禁令诉讼时，等待有关竞争部门的竞争法指南，以适应该反垄断法
 - China's Supreme People's Court Interpretations, Article 24
 - 中国最高人民法院司法解释，第24条，
 - Addresses patent infringement suits, not competition law issues
 - 解决专利侵权诉讼，不是竞争法问题
 - Parties encouraged to reach agreement on FRAND terms through negotiation; court can set terms if parties cannot agree
 - 鼓励各方通过协商达成FRAND条款，若双方不能达成一致，法院可设定条款
 - No injunction will be issued if the Patent Holder willfully violates FRAND and the implementer is not at fault
 - 如果专利持有人故意违反FRAND条款且实施者无过错，则不会发出禁令
 - Beijing High People's Court Guidelines, Articles 149-153
 - 北京市高级人民法院指南，第149-153条
 - Addresses patent infringement suits, not competition law issues
 - 解决专利侵权诉讼，不是竞争法问题
 - Patent holder burden of proving its terms are FRAND
 - 专利持有人负责证明其条款符合FRAND
 - If injunctive relief is sought, the court will assess each party's conduct during negotiations to determine which party was more at fault for the failure to reach an agreement
 - 如果提起禁令救济，法院将评估各方在协商时的行为，以确定在未能达成一致时，哪一方更多过错

FRAND Compensation FRAND补偿

- **Principle 2: The SEP holder's FRAND compensation must be based on the ex ante value of the patented invention reflected in the SEP apart from its inclusion in the standard.**
- 原则2：SEP持有者的FRAND补偿必须基于标准之外的SEP中所反映的专利发明的单独价值**
- In addition, FRAND compensation also cannot reflect more than the incremental value that the patented invention adds to the product taking into account all patented and unpatented product features.
- 此外，考虑到所有专利和非专利产品的特性，FRAND补偿也不能超过专利发明对产品增加的价值
- **United States (sample caselaw): 美国 (案例)**
 - U.S. Court of Appeals for the Ninth Circuit: 美国第九巡回上诉法院
 - "[A] RAND commitment should be interpreted to limit a patent holder to a reasonable royalty on the economic value of its patented technology itself, apart from the value associated with incorporation of the patented technology into the standard." (*Microsoft Corp. v. Motorola, Inc.*, Findings of Fact And Conclusions of Law, April 25, 2013, at *74.) (United States District Court, Western District of Washington) (emphasis added); affirmed by the U.S. Court of Appeals for the Ninth Circuit on July 30, 2013 (see <http://www.courts.cad.ca.us/casereports/2013/07/30/13-3533.pdf>) ("The development of standards thereby creates an opportunity for companies to engage in anti-competitive behavior... Using that standard development leverage, the SEP holders are in a position to demand more for a license than the patented technology, had it not been adopted by the SSO, would be worth.")
 - “[A] RAND许可承诺应被解释为限制专利持有人就其专利技术本身的经济价值提出合理许可费，不包括该专利技术纳入标准后产生的额外价值。”(*Microsoft v. Motorola*，事实认定和法律结论，2014年4月25日) (华盛顿西区地方法院) (重点强调)；美国第九巡回上诉法院于2015年7月30日确认。(见<http://www.courts.cad.ca.us/casereports/2013/07/30/13-3533.pdf>) (“标准制定过程为企业参与标准制定中...利用标准制定杠杆，SEP持有人可为其许可要求更多，而不仅仅是对专利技术本身而言。若专利技术没有被纳入标准组织规范，将更有价值”)
 - Use of a "comparable license" as evidence should only be permitted where the license has the same scope and was not entered into under threat of litigation or to settle litigation. 用“可比许可”作为证据，仅在许可证书相同且并非在受到诉讼威胁或诉讼时达成许可
 - "In Motorola's RIM agreement, the 802.11 and H.264 SEPs were packaged with several other patents. Motorola and RIM entered into a broad cross-licensing agreement... The royalty rate represented a blended rate for all the Motorola patents included in RIM's products, including non-standard, essential patents... Finally, the RIM agreement was subject to a royalty cap and was, like the Vtech agreement, entered into to resolve an ongoing infringement dispute between the parties, further diminishing its transparency as an indicator of a free-standing RAND rate." 在摩托罗拉和RIM的协议中，802.11和H.264 SEPs被打包了其他几个专利，摩托罗拉和RIM达成了广泛的交叉许可协议。...定期费率代表了RIM的产品中包含的摩托罗拉专利的混合费率。然而，许可协议旨在解决正在进行的侵权纠纷，并因此与Vtech协议一样，成为解决各方目前侵权纠纷达成的协议，进一步降低了其作为独立的RAND费率的可信度

Other Trending Principles Gaining Support by Competition Regulators and Courts 竞争监管机构 and 法院支持的其他热门原则

- **Principle 3: A FRAND license can't reflect improper tying of SEPs and non-SEPs (unless both parties voluntarily agree).**
- 原则3：FRAND许可无法反应不当的SEPs和Non-SEPs捆绑 (除非双方自愿)**
- **Principle 4: FRAND commitments generally run to all implementers.**
- 原则4：RRAND承诺通常由所有的实施者执行**
- **Principle 5: The implementer always can challenge the validity and non-infringement of declared SEPs without being declared an "unwilling licensee"**
- 原则5：实施者无需宣称“不情愿的被许可人”即可随时质疑已公开的SEPs的有效性和非侵权性**
- **Principle 6: SEP holders should bind successors-in-interest to the FRAND commitment.**
- 原则6：SEP持有者应将利益继承者与该FRAND承诺捆绑在一起**