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Anti-suit or anti anti-suit injunctions? That is the question

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In the second half of the year 2019, FRAND litigation was marked by several rejections of anti-suit injunctions when invoked. Quickly we talked about “anti anti-suit injunctions” or “AASIs”. Although these AASIs are sometimes criticized, it seems that arguments in its favor should, most of the time, prevail.

Anti-suit injunctions in FRAND litigation

The practice of anti-suit injunctions (“ASIs”) originated in the fifteenth century in the English courts to prohibit parallel proceedings before the common law courts and the Court of Chancery, a parallel jurisdiction based on principles of equity, that makes up for the inadequacies and rigidities of the common law.

Today, the ASI is a remedy a judge may grant to strengthen jurisdiction and arbitration clauses. A party may thus be obliged to abandon proceedings brought before a court that is not the one designated by the clause. In other words, it is a matter of enjoining the litigant from initiating or continuing parallel litigation in another jurisdiction.

The position of retaining a global royalty FRAND rate, which appeared in particular in the English *Unwired Planet* case law [1], has given rise to anti-suit injunction claims, that have sometimes been admitted, notably in China [2].

Anti anti-suit injunctions in FRAND litigation

Several European courts have nonetheless decided to reject ASIs when invoked.

Thus, in October 2019, after Lenovo filed for an ASI in the U.S. in September 2019, IPCom initiated an action in the Paris High Court, notably to obtain an AASI against Lenovo. In November 2019, the Paris Court ruled in favor of IPCom, holding that ASIs were contrary to French public order, except when they sought to enforce arbitration or jurisdiction clauses. Furthermore, according the Parisian judges, the ASI sought by Lenovo would amount to a violation of IPCom’s property right [3]. In March 2020, the Paris Court of Appeal upheld this judgment [4].

Similarly, in June 2019, Continental petitioned the U.S. Court for an ASI prohibiting Nokia and other defendants from pursuing their claims against Daimler in Germany or

elsewhere, and in July, before the U.S. Court could respond, Nokia petitioned the Munich *Landgericht* to issue an AASI prohibiting Continental from asserting an ASI against Nokia in Germany. The Munich judge issued the AASI, holding that the injunction sought by Nokia in the U.S. was incompatible with German law [5].

Why AASIs seem justified

Some have criticized the AASIs, arguing that the inability to obtain ASIs would authorize forum shopping and deprive defendants of a legal tool to neutralize the rent-seeking behaviour of patentees [6] and recalling that ASIs allow to avoid excessive costs for the defense while preventing contradictory decisions [7].

However, these arguments are not convincing, especially in view of the major drawbacks of ASIs.

First of all, as noted by the CJEU in the Turner case in 2004, these injunctions are contrary to the Brussels Convention of September 27, 1968 (replaced by Regulation 44/2001 of December 22, 2000), because of the interference they imply in the jurisdiction of a foreign court (Case C-159/02). Besides, the right to a fair trial enshrined in article 6 of the ECHR also seems to be affected, insofar as the injunction leads to a denial of access to the judge.

Moreover, as recalled by the European Court of Justice in 2008, Article 17 of the European Charter of Fundamental Rights, which protects property rights, also covers intellectual property (Case C-275/06). Thus, we should bear in mind that the patent right constitutes a form of property and must therefore be protected as such, i.e. as a fundamental right. Consequently, we can only oppose to the exercise of this right if it degenerates into a misuse, an abuse of a dominant position for instance. Asserting that the patent right is a monopoly that only ASIs would be able to limit is erroneous. The patent right constitutes a property and does not necessarily lead to a monopoly in the economic sense of the term. Besides, patent revocation actions and compulsory licenses aim to rebalance the exercise of this right, in certain specific cases, precisely to prevent it from degenerating into misuse. In any event, said misuse must be proven, otherwise preventing the patentee from initiating an infringement action would simply mean denying a fundamental right (i.e., property right).

That said, as the Paris High Court stated, ASIs are justified in the presence of a contractual forum clause. Moreover, we could take into account the circumstances of the case to qualify a misuse that would justify an ASI. One could take into account the fact that the patentee is a non-practising entity or that the multi-jurisdictional strategy is no longer aimed only at enforcing the patent but at harassing a potential licensee to push to an agreement. But at any rate the denial of a fundamental right such as the property right (i.e. here the patent right) does not seem justified if the criteria used to accept the ASI are not intended to qualify an abuse of the patentee's right.

[1] High Court ([2017] EWHC 2988 - Patent) upheld by the Court of Appeals ([2018] EWCA Civ 2344 ; [2018] RPC 20) and the Supreme Court ([2020] UKSC 3).

[2] See J. Contreras & Y. Yu *Will China's New Anti-Suit Injunctions Shift the Balance of Global Frand Litigation?*, Patently-O, Oct. 22, 2020.

[3] Paris High Court, November 8, 2019, Case n° 19/59311.

[4] Paris Court of Appeal, March 3, 2020, Case n° 19/21426.

[5] LG München I, Cases n^{os} 21 O 9333/19 et 21 O 9512/19.

[6] E. Bonadio & L. McDonagh, *Paris court grants an SEP anti-anti-suit injunction in IPCOM v Lenovo: a worrying decision in uncertain times?*, 15 J. Intell. Prop. L. & Practice 149 (2020).

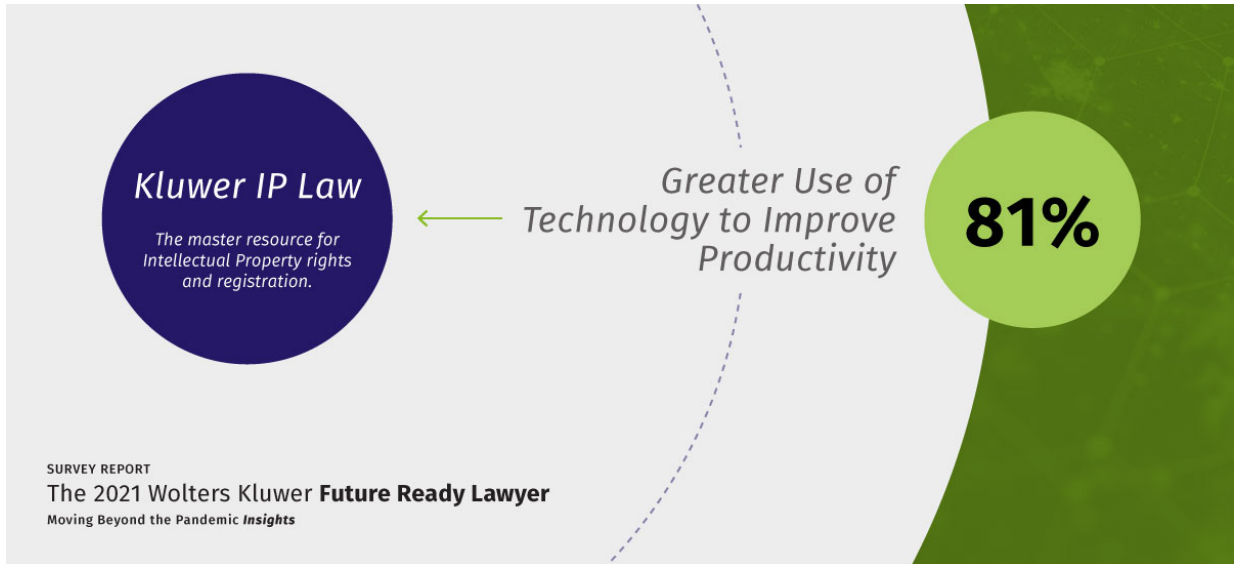
[7] J. Contreras & M. Eixenberger, *The Anti-Suit Injunction - A Transitional Remedy for Multi-Jurisdictional SEP Litigation*, J. Contreras (ed.), *The Cambridge Handbook of Technical Standardization Law - Antitrust, Competition and Patent Law*, Cambridge University Press, 2017, Chapter 27.

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This entry was posted on Tuesday, December 15th, 2020 at 12:19 pm and is filed under [FRAND](#), [Injunction](#), [Litigation](#)

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