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OPPO's New FRAND Order: "You got your injunction? Well, I quit" (French perspective)

Matthieu Dhenne (Ipsilon) · Friday, September 16th, 2022

I won't go into the numerous litigations involving OPPO around the world, nor will I comment on the decisions rendered by the German Courts since this summer. What interests me is the unprecedented attitude of OPPO in these proceedings – which withdrew its products from the German market even before any injunction was enforced –, that will certainly tend to disrupt the negotiation strategies of patentees. In other words, and I must insist, this text is only a perspective of the situation seen from France.

OPPO'S Strategy

Nokia obtained several injunctions against OPPO: two in Mannheim in June and two in Munich in August. However, even before the execution of these injunctions, OPPO preferred to withdraw its products from the German market. However, it continued to fight both in Germany and in the many other parallel proceedings (to my knowledge: France, Great Britain, the Netherlands, Spain, China, Sweden, Finland, India, Indonesia, and even an action in Russia that was withdrawn following the war with Ukraine).

Instead of folding to Nokia, OPPO preferred to leave Germany. This strategy, which is the result of a fine calculation of opportunity costs, does not however prevent OPPO from continuing to hold a very strong position against its adversary in the numerous procedures that oppose them, while continuing, it seems, to negotiate licenses for other territories.

A Unique Strategy

The threat to withdraw all of its products indefinitely from a market is not new, but its execution is. Indeed, in FRAND licensing, negotiators often face this threat from the opponent: rather leaving the relevant market than negotiate a global royalty if the case is lost. But these statements often appear to be unserious, which are not numerous, prove that when there is a withdrawal it is very limited.

Thus, recently HMD temporarily withdrew some, but not all, of its smartphones, following injunctions obtained by VoiceAgeEVS. Previously Qualcomm obtained the removal of certain

Apple products (the iPhone 7 and 8). Apple was temporarily unable to sell them directly in its Apple Stores or online. However, the devices remained available from resellers, who were not affected by the injunctions. At the end of the day, Apple resolved the problem by incorporating Qualcomm instead of chips in its IPhones 7 and 8. Last year, Apple threatened to leave the UK market if the Court set the overall royalty rate too high, but it eventually accepted the UK Court's decision.

To sum up, in the past we have only seen :

- sales bans that temporarily affected limited parts of a given smartphone manufacturer's range;
- temporary removal of features;
- declarations of intent to withdraw from a market rather than give in to the demands of a patentee, but in none of these cases did this happen when the situation deteriorated.

On the contrary, OPPO took a radical decision in Germany and apparently crossed a threshold by withdrawing all its products from the market in a way that was not even implemented before the injunctions were issued: **for the first time a market player considered it better to withdraw from a market than to bend on the FRAND rate**. OPPO's withdrawal from the German market is unprecedented in scope and scale.

In any case, from my point of view, this strategy tends to redistribute the cards in the FRAND negotiations. If we stay with the current paradigm, **obtaining injunctions in one country alone will not be sufficient to set a global royalty rate**. In the light of recent French and English case law developments, this points to a contractual (or global) analysis of the FRAND commitment, focusing on the FRAND commitment to ETSI.

Competition Law Approach vs. Contract Law Approach (or "global approach")

I have discussed these two antagonistic approaches to the nature of the FRAND commitment on this blog several times before.

As a reminder, according to the Competition Law Approach, the FRAND commitment is analyzed only in relation to the criteria of this matter: this is the approach adopted by the CJEU in the Huawei case. In short, the question is whether the patentee's conduct did not degenerate into an abuse of a dominant position when negotiating the FRAND terms of the license. If this is not the case, the implementer will be considered to be acting in bad faith and may, for example, be subject to an injunction on German territory.

Thus, the German Courts, for instance, propose a strict application of this approach, so that they can result in injunctions, which are used by negotiators to get implementers to set global royalties' rates.

The Contract Law Approach ("or global approach") focuses on the very nature of the FRAND undertaking, which is a stipulation for third parties (in French a "stipulation pour autrui" in favor of future licensees that the SEP licenses will be granting to FRAND terms. As ETSI is located in France, only the French judge should have jurisdiction to set a global royalty rate. There is no need in this case to multiply the number of actions for provisional injunctions in various countries, as the OPPO precedent might require.

This last approach, that remained ignored (despised?) for a long time, has recently been recognized by the French Courts in two judgments (TCL and *Huawei* cases), retaining their jurisdiction, as well as by the English Supreme Court in *Unwired Planet*, then in *Optis* which applies Unwired Planet, while the German Supreme Court seems to open the door to it in *FRAND-Einwand II*.

If the contractual approach has been criticized when it has been applying across the Channel, in the lack of territorial jurisdiction of the British Courts, this is the opposite for France, because the headquarters of ETSI are located in France. As Professor Chiariny already recalled: "*Given ETSI's location on French territory (in Nice), the competence of the French Judge seems natural to set a global royalty rate. However, in a questionable way, the English Judge has already assumed that he could also do so*". This competence of the French Courts was recently reinforced by Judge Nathalie Sabotier (i.e. President of the Third Chamber of the Paris High Court with exclusive jurisdiction over patents) during an interview: "***French Courts are in a special situation insofar as the European Telecommunications Standards Institute (ETSI) is based in France and subjects to French law, so that the obligations undertaken in this context should also fall under French law.***"

OPPO's Lessons

It is therefore easy to see how OPPO's attitude could reshuffle the cards for FRAND strategies: if injunctions are enforced in one country, and litigation continues to multiply throughout the world, would it not be in their interest to favor a global approach by linking up with a contractual approach and centralizing their actions in the very place where ETSI is located: France?

Our purpose is not to claim that OPPO's attitude will sweep away any Competition Law approach. It is simply to point out that the patentees' strategies could change in the light of the party with whom they are trying to negotiate. For OPPO, from an economic point of view, it was more attractive to give up selling in Germany than to lose competitiveness on all world markets by paying royalties. However, OPPO apparently generates only about 1% of its worldwide sales in the German market.

In the face of this unprecedented attitude, strategies may have to change. It is to be feared that the escalation of litigation will not abate any time soon and that the patentees will become even more imaginative. For example: bringing prohibition actions in one or more countries coupled with a central action in France; bringing a single central action in France.

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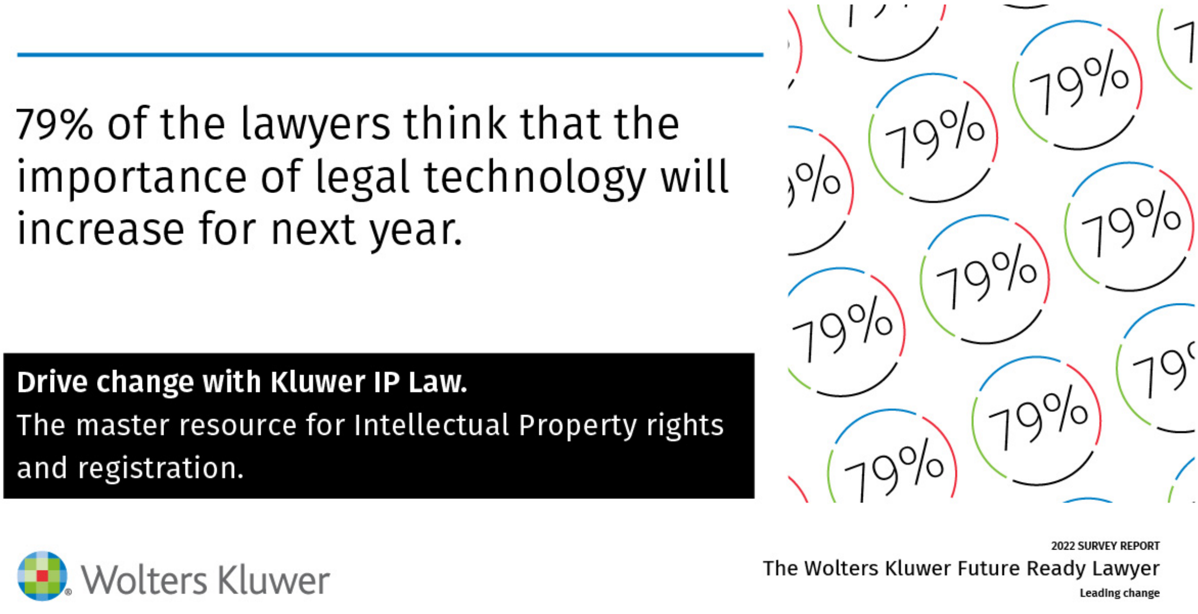

This entry was posted on Friday, September 16th, 2022 at 5:19 pm and is filed under (Cross-border) jurisdiction, France, FRAND, Injunction, SEP
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