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The Unwired Planet v Huawei judgments: FRAND Valuation, FRAND injunctions, and the role of competition law

Speakers: **James Segan, Blackstone Chambers**
Sophie Lawrance, Bristows

Date: **10 July 2017 at 6pm**

Venue: **Blackstone Chambers**

The purpose of the seminar was to learn more about the recent decision in *Unwired Planet v Huawei:* FRAND valuation, FRAND injunctions and the role of competition law.

Introduction

JS started the discussion by setting out the context of a FRAND licence, and how these patents relate to interoperable technology for 2G-4G networks. Since the licensing commitment to ETSI is a contractual promise under French law, there was some debate as to the enforceability of a FRAND licence.

SL then summarised the corporate history of Unwired Planet, and its litigation history with Samsung, Google and Huawei.

Topics

The Judgment

SL summarised the key findings of the non-technical trial, as set out in the lengthy judgment of 5 April 2017. The trial took place over 8 weeks in Autumn 2016 and addressed the FRAND valuation of Unwired Planet's patent portfolio and Huawei's various competition law defences and counterclaims. The Judge took a classical approach in using comparable licences to determine the FRAND rate, and treated all patents as valid and equally valuable. That two of UP's patents had been revoked did not factor in the Judge's calculation. The FRAND rates which were determined were well below what UP had offered: the Judge calculated 0.052% for 4G/LTE handsets in Major Markets, whereas UP had requested 0.2%.

JS then discussed one of the most significant issues; namely whether UP could demand a global licence. JS noted that the Judge admitted he had changed his mind on this issue: the conclusion in the judgment was that FRAND licences will generally be worldwide, which went against the Judge's comments in an interim hearing and in a previous case, *Vringo*. This gives rise to various legal questions, such as, what is the relvance of the fact that it has been found that 87% of SEPs are not, in fact, essential, or how does this position square with the fact that one cannot litigate foreign SEPs in the UK courts? Having found that only one set of licence terms in any given bilateral relationship could be FRAND, the Judge was troubled by the notion

that a worldwide licence would not be FRAND. The position is complex, and the Judge has given Huawei permission to appeal this point.

SL discussed the application of *Huawei v ZTE*, and gave an overview of the negotiations between UP and Huawei. SL commented that the process established in *ZTE* had to be interpreted flexibly in light of the Judge's determination that there is only one true FRAND rate – otherwise the licensor's offer would inevitably always fail. SL then discussed the Judge's finding that litigation was not brought prematurely by UP.

JS then commented on the non-discrimination part of FRAND, and whether it means that the licensee is entitled to receive the benchmark rate, or, if applicable, a lower rate that might have been agreed with another earlier licensee. The answer in the judgment is (1) that there is no discrimination against a party if it is not offered the earlier, lower, rate; and (2) that even if a "hard edged" discrimination obligation existed, it would apply only if there were proof of impact on competition; JS noted that these arguments will be advanced on appeal, together with the *Huawei v ZTE* point.

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JS commented that the Judge's view was that it is only natural for initial offers by the licensor to be above the FRAND rate. Ultimately it was held that there was no excessive pricing or abuse of a dominant position.

JS opined that as a result of the judgment, competition law is relevant only at the margins of FRAND discussions. As well as the non-discrimination and excessive pricing issues, bundling of patents (as here, with the bundling of patents from different jurisdictions into a single licence) was something that typically troubles a competition lawyer. But, from an economics perspective, there may be pro-competitive efficiencies of bundling complementary patents and SEPs.

The FRAND Injunction

SL summarised the main outcome of the May 2017 judgment, in which the Judge created a new type of injunction to suit the circumstances of a FRAND licence. This was necessary because the injunction would last beyond the period of the initial licence being set by the Court. The Court therefore decided that the injunction should cease to have effect when the licence is entered into; it can then re-commence upon the expiry of the licence, upon application of Unwired Planet.

JS and SL concluded by looking at questions that still remain following the judgment, and what the future of FRAND litigation in the UK might look like.

Note

The speakers used detailed slides; the information contained within them has not been repeated in this summary note. These slides should be used for further analysis of the presentation.