Facilitating Negotiation for Licensing Standard-Essential Patents in the Shadow of Injunctive Relief Possibilities

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I. Introduction

Apple and Samsung, two of the world's premier technology companies, have been involved in legal disputes in many parts of the world. In Korea, Samsung filed a lawsuit against Apple in 2011 at the Seoul Central District Court.[1] One of the issues before the court was whether injunctive relief can be granted when a holder of standard-essential patents (SEPs)[2] made a commitment during the process of determining the standard that it would license its patents under FRAND (fair, reasonable, and non-discriminatory) terms.[3] Whether to allow an injunction to the holder of SEPs in a dispute involving such patents would likely have significant implications for the ongoing disputes between Apple and Samsung. Further, the issue of whether an injunction can be granted may have an impact not just on the parties in the pending dispute, but also on various stakeholders who participate in the standard-setting process at various standard-setting organizations (SSOs). This would in turn have an impact on various parties' business strategies involving processes of determining standards and implementing them.

At the most basic level, parties would be placed under a drastically different bargaining situation depending on the availability of injunctive relief. If an injunc-

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1 Seoul Central District Court [Dist. Ct.], 2011Ga-Hap39552, Aug. 24, 2012 (S. Kor.).

2 Regarding SEPs, a simplistic explanation would be that they refer to a patent that must be used in order to comply with a technical standard.

3 The term FRAND is often used interchangeably with the term RAND (reasonable and non-discriminatory). Since there is no noticeable difference between the two terms, the term FRAND is used throughout this paper.

tion is available, a patent holder would seek to prohibit patent implementers from using the patents under dispute immediately, whereas if an injunction is not available, implementers would choose to continue to use the patents and pay damages that the court may (or may not) impose. In the former case, the patent holder would typically be given very strong bargaining leverage, while in the latter case, the opposite would in general be true. Due to this consideration, depending on the availability of injunctive relief, technology companies participating in the standard-setting process will adopt different strategies and behaviors at various stages of determining standards, which will impact the rules and processes of determining standards at many SSOs.

This article examines the justifiability of granting an injunction to holders of SEPs who made a FRAND commitment when those patent holders are in disputes with implementers regarding specific terms of a license arrangement. In doing so, this article explores how relevant transaction costs can be reduced. From a policy perspective, when an injunction is available, the main policy concern is about patent holders engaging in *ex post* opportunism of hold-up and demanding an exorbitant royalty amount from patent implementers. On the other hand, with no possibility of injunctive relief, the main concern is about patent implementers not engaging in good faith negotiations with the patent holder on royalty and other important license terms, and thus unduly delaying the negotiations. Indeed, if no injunction is available, an implementer may use a "wait-and-see" approach, trying to gauge the attitude of the court and of the patent holder. This type of opportunistic behavior is called reverse hold-up.[4]

Seen from this perspective, central policy considerations should include how to prompt parties to engage in good faith negotiations and how to induce them to reach mutually agreeable terms in an expedient manner. This article proposes a mechanism for court proceedings that reduces the incentives for parties to engage in opportunistic behavior and instead induces parties to engage in negotiations. Under the proposed mechanism, the parties would be pressured to negotiate in good faith and in earnest in order to reach an agreement. The court would in turn be relieved from the burden of having to determine whether to grant an injunction, at least during the initial phase of a lawsuit, and could instead exert pressure on the parties, explicit or implicit, not to engage in opportunistic behavior.

This article proceeds as follows. Section II summarizes the court proceedings in Korea between Apple and Samsung with a focus on the issues related to FRAND terms. Section III examines how parties may engage in opportunistic behavior like hold-up or reverse hold-up, depending on their business strategies and also on the court's attitude regarding the availability of an injunction. Section IV proffers a new mechanism that discourages parties from engaging in hold-up or reverse hold-up and instead prompts parties to engage in negotiations to reach an agreement on

[4] Damien Geradin, Reverse Hold-Ups: The (Often Ignored) Risks Faced by Innovators in Standardized Areas 6 (Nov. 12, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1711744.

specific license terms in relation to the associated FRAND commitment. Finally, Section V provides a conclusion.

II. Korean Court Proceedings Between Apple and Samsung

Samsung filed a lawsuit against Apple in Korea in front of the Seoul Central District Court in April of 2011, alleging Apple's violation of its patent rights.[5] The court determined that several models of Apple's iPhone and iPad did indeed violate Samsung's patent rights and awarded damages to Samsung in the amount of 40 million South Korean Won (approximately $37,000).[6] The court additionally issued an order against Apple to cease infringements of Samsung's patent rights.[7] In the lawsuit, Samsung claimed that certain Apple products, including the iPhone 3GS, the iPhone 4, the iPad 1, and the iPad 2, infringed several patents that Samsung held concerning 3GPP (Third Generation Partnership Project) communication standards and also upon a patent that Samsung held concerning a certain method of providing data services utilizing mobile devices.[8]

On rebuttal, Apple argued five points. First, Apple claimed that it simply did not infringe Samsung's patent rights since it employed a distinct manufacturing methodology that allowed it to maneuver outside the scope of Samsung's patents.[9] Second, Apple argued that Samsung's patents at issue were invalid.[10] Third, Apple cited the patent exhaustion doctrine and asserted that, since it purchased the base chips, which implemented the patents at issue from Intel, Samsung's rights were exhausted and thus Samsung could not make a claim against Apple regarding these patents.[11] Fourth, Apple contended that Samsung's lawsuit itself constituted a violation of Korea's antitrust law because the suit was seeking to deny access to essential facilities and to impose undue and unreasonable transactional conditions on Apple.[12] In addition, Apple alleged that Samsung was practicing deceptive customer solicitation behavior.[13] Fifth, Apple proclaimed that Samsung's lawsuit violated the FRAND commitment that Samsung made at the European Telecommunications Standards Institute (ETSI) during the standard-setting process for the patents at issue.[14]

With regard to the claim that Samsung violated its FRAND commitment, Apple characterized Samsung's FRAND commitment as an offer for an irrevocable license agreement.[15] Thus, Apple's position was that a valid license agreement was entered into between Apple and Samsung when Apple began to implement Sam-

5 Seoul Central District Court [Dist. Ct.], 2011Ga-Hap39552, Aug. 24, 2012 (S. Kor.).
6 Seoul Central District Court [Dist. Ct.], 2011Ga-Hap39552, Aug. 24, 2012, at 2 (S. Kor.).
7 *Id.*
8 *Id.* at 3–4.
9 *Id.* at 4.
10 *Id.*
11 *Id.*
12 Seoul Central District Court [Dist. Ct.], 2011Ga-Hap39552, Aug. 24, 2012, at 4–5 (S. Kor.).
13 *Id.*
14 *Id.* at 5.
15 *Id.* at 4–5.

sung's patents since Apple's use of Samsung's patents constituted an acceptance of Samsung's existing offer.[16] Apple also claimed that Samsung's FRAND commitment intrinsically includes a promise not to seek a court's order for injunction.[17] According to Apple, Samsung therefore had an obligation to negotiate with Apple to finalize the terms of the license agreement.[18] Further, Apple contended that filing a lawsuit seeking an injunction constitutes an illegal abuse of rights by a patent holder.[19]

The Korean court determined that Apple violated Samsung's rights for certain patents, while acknowledging that Apple did not violate Samsung's rights in certain other patents.[20] On Apple's claim related to Samsung's FRAND commitment, the court reasoned that simply using Samsung's SEPs did not mean that a binding contract was entered into.[21] The court further reasoned that a FRAND declaration, without more, cannot be construed to include a commitment not to seek injunctive relief.[22]

III. Hold-Up and Reverse Hold-Up

An interesting and perhaps unique aspect of standard-setting through a SSO is that the parties involved in the standard-setting process do not determine the applicable royalty rates at the time they determine the standard.[23] During the standard-setting process, holders of SEPs only commit that they will provide a license under FRAND terms.[24] Specific royalty rates and other key terms that would apply in an individual license contract are to be determined between the patent holders and individual implementers after SEPs are determined.[25] Due to this aspect of standard-setting, determination of SEPs is sometimes followed by a difficult and complex bargaining process between the holders of the SEPs and the implementers. This bargaining process can become convoluted and prolonged since there is a serious incentive problem for parties that encourages them to engage in opportunistic be-

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16 *Id.*
17 *Id.*
18 Seoul Central District Court [Dist. Ct.], 2011Ga-Hap39552, Aug. 24, 2012, at 4–5 (S. Kor.).
19 *Id.*
20 *Id.* at 184–86.
21 *Id.* at 172.
22 *Id.* at 172, 176.
23 Geradin, *supra* note 4, at 4.
24 *See, e.g.*, Dennis W. Carlton & Allan L. Shampine, *An Economic Interpretation of FRAND*, 9 J. COMPETITION L. & ECON. 531 (2013) (attempting to decipher and analyze the economic and legal meaning of FRAND). It remains unclear, however, if the results of academic attempts to understand FRAND can easily and readily be applied to actual court cases in order to get a definitive answer as to whether certain proposed license terms should be deemed to satisfy FRAND.
25 If the applicable royalty rate could be pre-announced during the process of standard-setting, then there would not be a need for the parties to negotiate the royalty rate after a standard had been determined, and that way the overall bargaining process could be simplified a great deal. However, pre-announcing royalty rates is practically impossible due to concerns related to antitrust and other legal issues. Jorge L. Contreras, *Rethinking RAND: SDO-Based Approaches to Patent Licensing Commitments*, Int'l Telecomm. Union [ITU] Patent Roundtable, at 11–13 (Geneva Oct. 10, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159749.

havior. The patent holder, once its patents become SEPs, has an obvious incentive to charge a high royalty rate in order to maximize its profits, possibly defying expectations of the parties involved in the process of determining the SEPs. On the other hand, implementers of SEPs have a strong incentive to use the patents for commercial purposes, often on an expedited basis, and to minimize the payment of royalties to the patent holder by proclaiming that FRAND dictates a low royalty rate.

Because of this conflict of interest between patent holders and implementers, determining the applicable royalty rate can easily become a very contentious process, and sometimes a legal dispute arises as a result. In dealing with the possibility of legal disputes, individual parties consider and calibrate their respective bargaining power once a lawsuit is brought to a court. This, in turn, determines the parties' bargaining power during the initial phase prior to the filing of a lawsuit. When considering the possibility of a lawsuit, a crucial factor that determines the parties' bargaining power is the availability of an injunction. A legal regime in which a court may grant an injunction against an implementer gives patent holders a strong bargaining advantage. This is because a patent holder would simply file a lawsuit seeking an injunction if the parties failed to reach an agreement through negotiation. Some argue that a patent holder may even have an incentive to engage in hold-up by imposing a royalty rate that could be viewed as exorbitant or unreasonably high.[26] Because filing a lawsuit seeking an injunction could serve as a readily available and extremely powerful alternative for patent holders, patent holders may be adamant in demanding a royalty rate that is extraordinarily high. At the same time, the mere possibility of an injunctive order from the court would place the implementer at a grave disadvantage vis-à-vis the patent holder. The inequality of the bargaining power would be particularly severe if the immediate use of the patent was indispensable for the implementer in order to beat or at least follow the current market trend. Consideration of the time-sensitive nature of implementing newly developed and patented standard technologies may be especially important in fast changing markets, such as the market for mobile devices, where older versions of products become obsolete in a matter of months and newer versions appear constantly.

On the other hand, in a legal regime where injunctive relief is not available to SEP-holders, reverse hold-up by a patent implementer is possible.[27] Reverse hold-up could take the form of an implementer's use of SEPs without obtaining a license from the patent holders and without exerting serious effort to negotiate with the patent holders to agree on definitive license terms. That way, a patent implementer strives to obtain favorable license terms or just starts using the SEPs without engaging in any direct communication or negotiation with the patent holder. This incentive is compatible with the implementer's goal since it may not have much to lose

[26] *E.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2025 (2007); Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, 12 AM. L. & ECON. REV. 280, 297–98 (2010).

[27] Geradin, *supra* note 4, at 10–11.

by engaging in reverse hold-up. Further, even if a lawsuit is filed by the patent holder, the patent holder cannot stop the implementer from using the patent because an injunction is not available as a legal remedy in this regime. Even in the event that the court finds that the implementer has been using the patent without obtaining legitimate legal rights, all that can be awarded against the implementer would be damages for illegitimate past use. An award of damages is possible only when the patent holder files a lawsuit and when the court agrees with the patent holder that the implementer does not have a valid legal right to use the SEP at issue. Also, the amount of damages is usually capped at the amount of loss incurred by the patent holder (or amounts calculated using proxies for such loss), and no damages are awarded against prospective future violations of the patent holder's rights.[28] The maximum amount an implementer has to pay would be the amount of loss incurred by the patent holder or, more likely, an amount smaller than the actual loss incurred.[29] Therefore, SEP-implementers may well have incentives to use the SEPs without engaging in serious efforts to reach an agreement with the holders of the SEPs. Rather, the implementers may show a wait-and-see attitude even when there is a possibility of a lawsuit by choosing to use SEPs without obtaining an explicit license.

From the above discussion, it is clear that under the current regime of standard-setting through SSOs, holders of SEPs and their implementers have incentives to engage in opportunistic behavior in the forms of hold-up and reverse hold-up, respectively. These incentives could be ameliorated by the parties' consideration of their reputation in the market and other legal or business factors. These factors include the remedies available through private contracts, the generous terms that are sometimes available in cross-licensing arrangements, and the specific and concrete commitments that are often made by a patent holder not to engage in hold-up—these may be made in addition to and separate from a FRAND commitment. Thus, whether there are incidents of hold-up, reverse hold-up, or both, and how frequently these incidents take place is a matter to be resolved through observations of the parties' actual behavior in the marketplace. Nonetheless, there remains an important policy decision that courts often have to make as to whether to grant an injunction when the SEP holder requests one. In general, if the possibility of hold-up is more serious than the possibility of reverse hold-up, then it would be more difficult to justify making an injunction available to the patent holder. On the other hand, if reverse hold-up is considered to be a more serious problem, then making an injunction available would be more easily justified. Given the lack of definitive factual evidence, it could be too cumbersome for a court to declare that an injunction would or would not be readily available as a remedy. Below is a proposal for a mechanism for court proceedings under which the court would avoid the question of whether an injunction is available—at least during the initial stage of a lawsuit. Under this mechanism, the court instead exerts pressure on the parties to negotiate further in

[28] *Id.* at 17.
[29] This is due to practical limitations related to meeting evidentiary requirements.

order to reach an agreement. The parties in turn, being aware that the court's review of their negotiating behavior may have a significant impact on the court's decision as to whether the proposed license terms satisfy FRAND, would have strong incentives to negotiate in good faith and in earnest.

IV. Fostering Good Faith Negotiations: A Proposal

In considering whether the court should grant an injunction when an implementer uses SEPs without obtaining permission from the holders of the SEPs, the conceptual dichotomy between a property rule and a liability rule can serve as a useful starting point.[30] A legal regime where an injunction is available as a remedy can be considered to be a regime where a property rule is in force. On the other hand, a legal regime that does not allow for an injunction can be interpreted as a regime with a liability rule. Generally speaking, under a property rule, parties are encouraged to negotiate between themselves, and the results of the negotiation are expected to reflect the parties' preferences and subjective valuations. However, under a liability rule, a court or third-party adjudicator gets involved as a de facto price-setter by determining the amount of damages or other monetary compensation a party has to pay the other. A liability rule can be justified where parties face exorbitant transaction costs for bargaining, and where it is not too difficult to assess the value of the subject matter in dispute. This is usually the case when there is a substitute market or other proxy available. On the other hand, a property rule can be justified where the amount of the relevant transaction costs is relatively modest, and where subjective or non-market values play an important role in reaching a mutually satisfactory agreement.

The court's role in a property rule regime would include delineating property rights and assigning such rights to the appropriate parties. This would indirectly prompt and facilitate the parties' direct bargaining and negotiation. On the other hand, in a liability rule regime, the court would have to assess the value of the rights violated and award damages. Of course, assessing damages may be an exceedingly difficult task for the court, particularly if the subject matter in dispute does not have comparable markets and there is no standard valuation method.

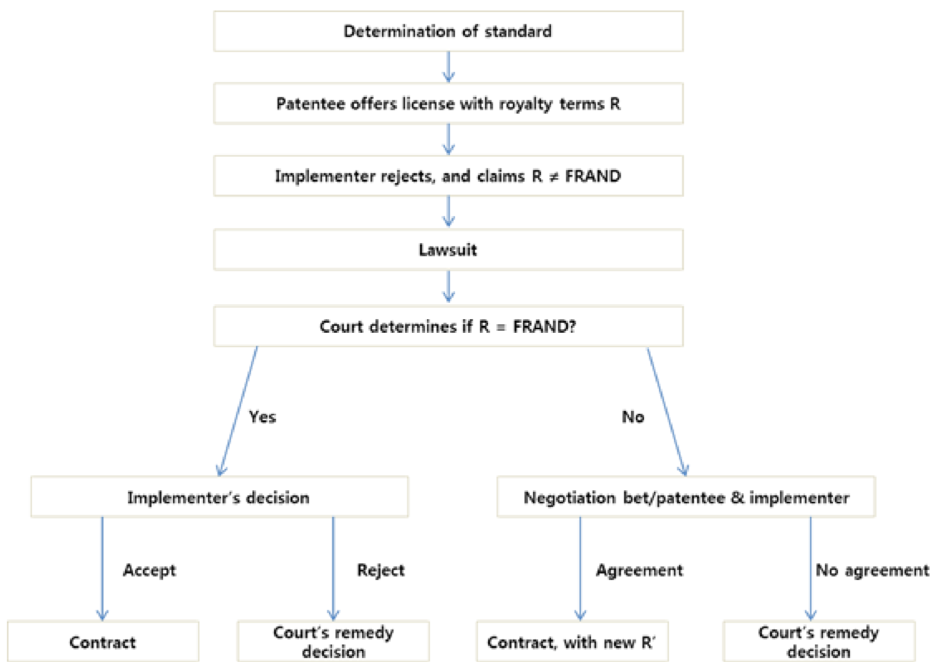
The above distinction between a property rule and a liability rule can be incorporated into a proposal for a model of dispute resolution that fosters bargaining between the parties. As seen in the above section, if no injunction is available, an implementer of a patent would not have much incentive to engage in good faith negotiation with the patent holder. Rather, if it is certain that no injunction is available and that the amount of damages will never exceed the costs incurred by the patent holder (which in turn would not be much different from the benefits conferred upon an implementer), then the implementer may have a perverse incentive to engage in reverse hold-up. On the other hand, if an injunction is available, the parties would be prompted to engage in good-faith negotiation sooner rather than later.

[30] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

The main concern in this situation is that the patent holder may engage in hold-up and demand an exorbitant amount of royalties.

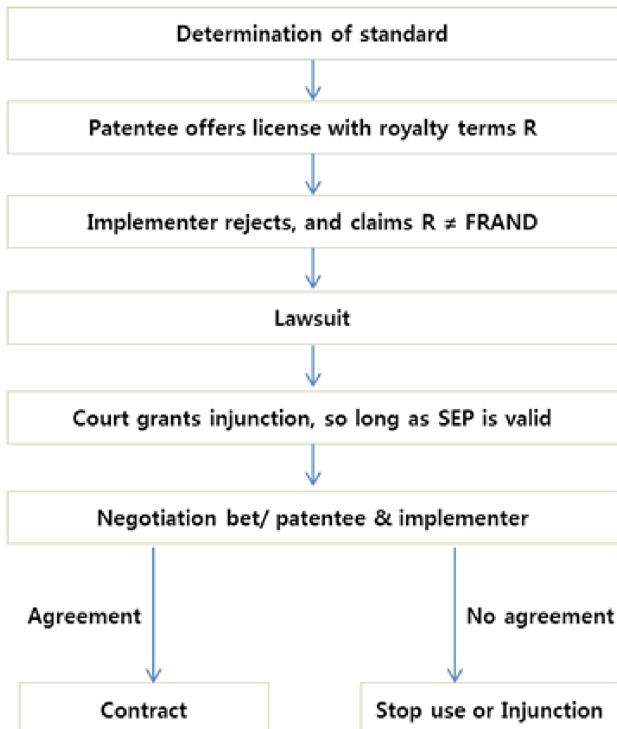
The flowcharts in Figure 1 and Figure 2 show the general court procedures when an injunction is not available and when it is available, respectively. In Figure 1, where injunctive relief is not available, the court's decision is made conceptually in two phases. During the first phase, the court determines whether the proposed license terms, represented collectively as *R*, satisfy the requirements of the relevant FRAND commitment. If the court determines *R* to be FRAND, then the imple-

Figure 1. Regime with No Injunction



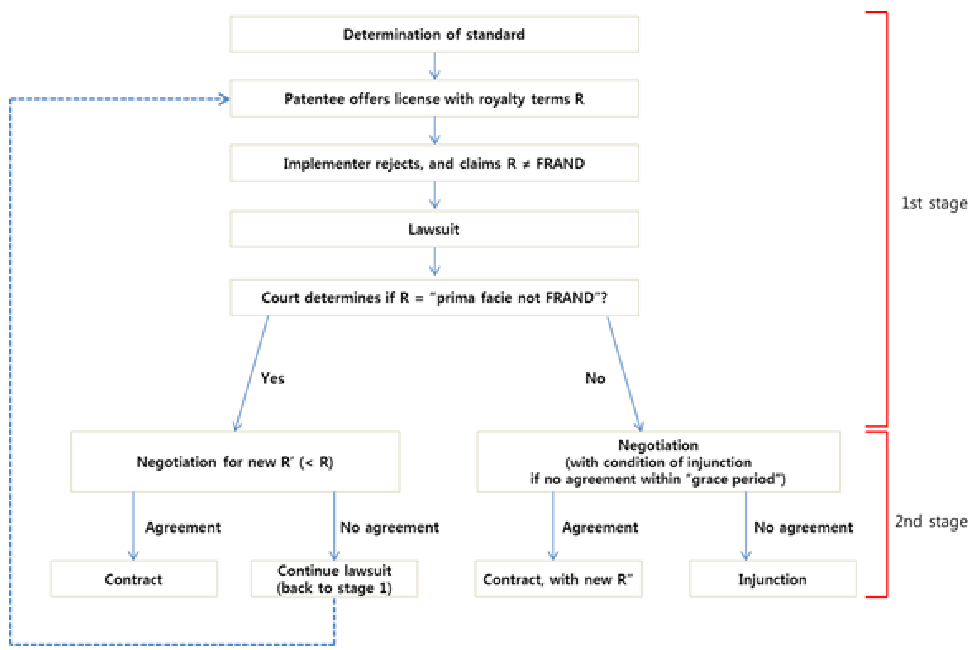
menter has to accept those terms in order to use the patent. If the court determines that *R* fails to satisfy the FRAND requirement, then the parties are left to negotiate further. If this renegotiation is successful, the parties would then reach an agreement with new contract terms. If the renegotiation is not successful, then the court would intervene and decide a remedy as the second phase of the court proceeding.

Figure 2. Regime with Injunction



In Figure 2, where injunctive relief is available, the overall procedure becomes much simpler. After a lawsuit is filed, the court makes a decision on whether to grant an injunction. The court's determination here is relatively simple because the court can grant an injunction so long as the patent at issue is valid. With an injunctive order, the patent holder can seek to enforce the order or, alternatively, the parties can negotiate further to reach an agreement. If they reach an agreement through renegotiation, they would enter into a contract. If they cannot reach an agreement, the implementer would not be able to use the patent.

Figure 3. Regime with Two-Stage Procedure



The two cases explained above can serve as important benchmarks, and they can be extended and modified as well. In particular, if the possibilities of hold-up and reverse hold-up are serious threats in the context of encouraging voluntary negotiations between the parties, an alternative procedural model can be devised. Figure 3 depicts a flowchart of the general procedure of this alternative model. This procedure would lower transaction costs between the parties and help alleviate concerns about hold-up and reverse hold-up.[31]

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[31] In a related vein, some commentators propose a model where the court is asked to determine whether the contract terms in dispute can be deemed to satisfy FRAND requirements. James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 9 J. COMPETITION L. & ECON. 1, 12–20 (2013). In their model, the availability of injunctive relief plays no significant role since the court can consider granting an injunction only as a last resort when the implementer declines the offered FRAND license and continues to infringe. *Id.* at 18. The legal regime envisaged through their model is akin to the one proposed in Figure 1 in that the availability (or not) of injunctive relief has virtually no impact on the parties' negotiating behavior. Contrary to this, some commentators discuss a model with a legal regime where the court grants an injunction only when it has sufficient evidence that the patent implementer is unwilling to cooperate, which the authors explain is similar to the general legal regime in Europe. Gregor Langus, Vilen Lipatov & Damien Neven, *Standard-Essential Patents: Who is Really Holding Up (and When)?*, 9 J. COMPETITION L. & ECON. 253, 255–56 (2013). They find that in this regime the patent implementer has a strong strategic tool and that, even with an injunction available, the holder of a weak patent can end up accepting below FRAND royalty rates. *Id.* at 277.

The new procedure shown in Figure 3 employs a two-step approach to resolve a dispute regarding license terms for SEPs. First, after a lawsuit is filed, the court would take a quick look at the submitted evidence and render an interim and provisionary decision as to whether the license terms offered or counter-offered can be considered prima facie FRAND (the "Interim FRAND" decision). During this part of the proceedings, the court would consider, in an expedited manner, the parties' prior efforts to reach an agreement containing reasonable license terms. The court's decision would not be final and would only give the parties a limited opportunity to present their evidence and argue their case. Procedurally, rules for this initial phase of the new mechanism could stipulate that, after the initial claim is submitted, each party has only one opportunity to rebut the other party's claims and any requests for further rebuttal would be denied.

In the event that the offered license terms are determined to be Interim FRAND, the parties could be given a grace period of several months to permit further negotiation. If the parties are unable to reach an agreement during the grace period, the court would make a definitive determination on the FRAND issue. At the end of the definitive determination phase, if the offered license terms are finally determined to satisfy the FRAND commitment, the court could grant an injunction to the patent holder. This court decision could be justified on the presumption that the patent implementer is perhaps more at fault in the parties' failure to reach an agreement on license terms, and that it may be more important to prevent reverse hold-up. Thus, once the court makes an Interim FRAND decision, the parties would be placed under considerable pressure to negotiate in earnest and reach an agreement in an expeditious manner during the grace period.

On the other hand, during the initial phase, if the license terms offered prior to the filing of the lawsuit are determined not to be Interim FRAND, the parties are left to negotiate new license terms. In rendering its decision regarding Interim FRAND, the court may choose to indicate which party appears to have been unreasonable or failed to show good faith during the initial negotiation process. In such a case, the designated party has a significant disadvantage during the subsequent renegotiation process. This, in turn, induces the parties to be reasonable and exhibit good faith during the initial negotiation process.

Further, it should be emphasized that this mechanism emphasizes exerting pressure on the parties to negotiate and reach a voluntary agreement. Thus, if the venue for resolving disputes needs to be considered, it would be only natural that the parties be brought before the court or a third-party adjudicator who would play a role in facilitating the parties' negotiation instead of imposing a ruling, at least during the initial phase of the dispute resolution procedure. From this perspective, regulatory or administrative proceedings should be avoided to the extent that they face difficulties in fostering good-faith negotiations between the parties. Thus, a regulatory or administrative agency should avoid involvement unless there is a clear indication that the mechanisms for determining standards and enforcing them do not function properly and have caused the parties to not be given enough opportunities to engage in arm's length negotiations to enter into voluntary and welfare-enhancing contractual arrangements. On the other hand, a government regulatory agency should get involved if there are instances of clear violations of applicable competition law. However, the existence of a FRAND commitment would not per se warrant a regulatory intervention. One main reason why a government agency should avoid getting involved is that, when a government agency plays an active role, the parties' incentives to bargain between themselves and reach a voluntary agreement easily dissipate. The overall regime of establishing standards through SSOs and granting licenses under FRAND terms has been developed based on the premise that this regime would work because of voluntary bargaining between parties.[32] Depriving the parties of the opportunity and incentives to bargain is practically to deny the modus operandi of this regime.

The main benefits of the proposed procedure are two-fold. First, the court would not have to make a definitive determination during the initial phase of a lawsuit as to whether the license terms negotiated between the parties satisfy the FRAND commitment. Instead, the court would only be asked to make an interim determination without having to examine the case at hand very carefully or thoroughly. Second, and more importantly, with the proposed procedure, the parties would be placed under significant pressure to negotiate in good faith—exchanging offers and counter-offers with truly reasonable terms. This occurs because there is otherwise a grave risk that the terms offered or counter-offered will be declared not to satisfy Interim FRAND. If that happens, the party that is viewed to have been unreasonable would be placed at a significant disadvantage in subsequent bargaining. That way, possibilities of hold-up and reverse hold-up would be alleviated, and the parties would be prompted to engage in good faith negotiations from the start.

V. Conclusion

The legal dispute between Apple and Samsung is commonly portrayed in media as a dispute concerning the validity of several patents held by Samsung. Important policy issues surrounding the current regime of determining and implementing standards at large SSOs underlie this dispute. Since a patent holder proposing its patent be adopted as part of a standard cannot fix and pre-announce the royalty rate that would be applied once its patent becomes a standard, practically the only thing it can do prior to the adoption of the standard is to make a FRAND commitment and to induce the participants in the standard-setting process to view its patent favorably. Once the patent becomes part of a standard, the patent holder and patent implementer have to negotiate in order to fix the royalty rate and other key terms of the license agreement. This negotiation process between the parties is bound to be difficult and may commonly produce stalemates. Negotiations can easily become

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32 This presumption could be challenged. However, doing so would require a large-scale reexamination of the overall system of standard-setting through SSOs (with FRAND commitment and without determining royalty rates) and the applicable rules' impact on competition, which is beyond the scope of this article.

complicated because once a standard is determined, the parties have starkly different economic interests and have incentives to engage in hold-up or reverse hold-up.

These stalemates may eventually result in lawsuits between the parties, and the court's task is not easy. In particular, the patent holder would typically petition the court to grant an injunction against the implementer. Determining whether to allow for such an injunctive order could easily become a very contentious and complicated legal process. This article proposes a new mechanism for court proceedings under which the parties would be pressured to negotiate in good faith and in earnest to reach an agreement before coming to the court and placing their stalemate into a formal dispute resolution process. That way, concerns arising from the possibility that the parties may engage in hold-up or reverse hold-up would be ameliorated. Under the new mechanism, the court would also be relieved from the burden of having to determine whether to grant an injunction, at least during the initial phase of a lawsuit, and instead would be able to exert pressure on the parties, explicit or implicit, not to engage in opportunistic behavior.