It's Anti-Suit Injunctions All The Way Down – The Strange New Realities of International Litigation Over Standards-Essential Patents

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IT’S ANTI-SUIT INJUNCTIONS ALL THE WAY DOWN – THE STRANGE NEW REALITIES OF INTERNATIONAL LITIGATION OVER STANDARDS-ESSENTIAL PATENTS

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Today’s markets for technology products — from smartphones to home appliances to automobiles— are inherently global. This is especially true of products that embody technical standards – protocols like 5G, Wi-Fi, Bluetooth and USB that are covered by hundreds, thousands, or tens of thousands of patents (so-called “standards-essential patents” or “SEPs”). Given the global scope and size of these markets, it is not surprising that patent litigation over standardized products is often conducted on a global scale. For example, when technology firm Vringo sued Chinese smartphone manufacturer ZTE for infringement of a group of wireless telecommunications SEPs, the litigation played out over four years across twelve different jurisdictions: the United States, Brazil, United Kingdom, Germany, France, Spain, Netherlands, Romania, Australia, India, China and Malaysia.2

This article looks at an increasingly important aspect of these global standards wars: the ability of a court in one jurisdiction to prevent a party from pursuing litigation in another jurisdiction using a procedural mechanism called the anti-suit injunction (ASI). To complicate matters further, a litigant may also petition a court in one jurisdiction to prevent a party from seeking an ASI in another jurisdiction – the so-called anti-anti-suit injunction (AASI). And, curiouser still, litigants have recently re-invigorated the anti-anti-anti-suit injunction (AAASI), a procedural move that seeks to prevent a litigant from obtaining an AASI to block another litigant from requesting an ASI. If there is no theoretical limit to the procedural machinations to which parties can go in such disputes, it may, indeed, be injunctions “all the way down”.3

The Nature of FRAND Disputes

Many different types of disputes have arisen over the years in connection with technical standards and standard-setting.4 Recently, however, the highest-profile litigation in this area has involved disagreement over the royalty rate that a SEP holder may charge the implementer of a standard to operate under its SEPs. Under the policies of the standards development organizations (“SDOs”) in which most standards are developed, participants often agree to license their SEPs to

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producers of standardized products on terms that are royalty-free or, in the alternative, which bear royalties that are fair, reasonable and non-discriminatory ("FRAND"). However, because the meaning of FRAND is not widely agreed, disputes can arise regarding royalty rates and other terms that SEP holders must offer to potential licensees.\(^5\)

The typical remedy for infringement in U.S. patent cases is a reasonable royalty that compensates the patent holder for infringing products made, used or sold.\(^6\) Cases involving FRAND royalty determinations are somewhat different, as the court-assessed royalty does not represent compensatory damages, but the rate that the patent holder was contractually committed to offer the potential licensee.\(^7\) Thus, the outcome of such a determination is often the issuance of a royalty-bearing license by the patent holder, and the infringer’s payment of back royalties for the period prior to the issuance of the license.

**Jurisdictional Competition in FRAND Litigation**

Courts adjudicating FRAND disputes face a dilemma. On one hand, patents are issued under national law and, by definition, have legal effect only in the issuing jurisdiction.\(^8\) On the other hand, the parties to FRAND disputes are often multinational corporations with operations (and patents) in jurisdictions around the world. In determining a FRAND royalty rate, a court must decide whether to focus only on the patents issued and asserted in its own jurisdiction, or to consider the global business relationship between the parties.

In some cases involving FRAND determinations, courts have limited their analysis to the national patents before them. These cases have included *Microsoft v. Motorola*, *In re. Innovatio*, *Ericsson v. D-Link*, and *Optis v. Huawei*. In each of these cases, a U.S. district court determined a FRAND royalty rate and awarded damages to the SEP holder based on the asserted U.S. patents only.

However, in other cases, most notably *Unwired Planet v. Huawei*, a case that is currently on appeal to the UK Supreme Court, the court evidenced a willingness to fashion the terms of a global FRAND license between the parties, covering not only their national patents, but also foreign patents encompassed by the licensor’s FRAND commitment. A similar approach was taken by the U.S. District Court for the Central District of California in *TCL v. Ericsson*. That court also determined worldwide FRAND royalty rates that a phone manufacturer should pay to a SEP holder; however, the case was reversed and remanded by the Federal Circuit on other grounds, and its final resolution is uncertain.

The intra-jurisdictional competition enabled by the ability of one national court to determine global FRAND rates can lead to two forms of legal “race”. First is a “race to the bottom” among jurisdictions — a well-documented phenomenon in which jurisdictions intentionally adapt their rules, procedures and substantive outlook to attract litigants.\(^15\) Second, disparities in judicial treatment of cases are likely to encourage parties to initiate litigation in the most favorable jurisdiction possible as quickly as possible, often to foreclose a later suit in a less favorable jurisdiction. This situation is referred to as a “race to judgment” or a “race to the courthouse,” which may prematurely drive parties to litigation rather than negotiation or settlement. And a natural corollary to this type of race is the attempt by one party to strike first by preventing another party from pursuing litigation in a jurisdiction that may be favorable to it.
The Anti-Suit Injunction

Anti-suit injunctions are interlocutory *in personam* remedies issued by a court in one jurisdiction to prohibit a litigant from initiating or continuing parallel litigation in another jurisdiction. ASIs are established features of the international litigation landscape and have been known since the fifteenth century (when they were developed by the English common law courts to enjoin parallel proceedings in the equitable Court of Chancery, and vice versa). Today ASIs are issued most frequently by courts in the U.S. and UK, as they have historically been viewed with disfavor by courts in civil law countries. ASIs are issued in a wide variety of disputes including international commercial, antitrust and bankruptcy actions, as well as actions to prevent a party to an arbitration agreement from commencing litigation over the matter to be arbitrated.

In the United States, the legal standard for issuing ASIs is, as one commentator puts it, “ambiguous and fragmented”. Generally speaking, however, courts follow some variant of the three-part framework developed by the Ninth Circuit in *E. & J. Gallo Winery v. Andina Licores*. Under the *Gallo* framework, a court considering a request for an ASI must first determine whether the parties and the issues in the action in which the injunction is sought (the local action) are functionally equivalent to those in the action sought to be enjoined (the foreign action). If not, an injunction barring a party from pursuing the foreign action would not reduce duplicative litigation, and would thus be unjustified. If the parties and the issues are functionally the same, the court must next determine whether resolution of the local action would be dispositive of the foreign action. Generally, a court is unlikely to find that an ASI is justified if the local action does not result in the resolution of the foreign action. Second, the court must assess whether any of the four factors identified by the Fifth Circuit in *In re Unterweser Reederei* are present. These factors include whether the foreign litigation would “(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court’s in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations.” Finally, if at least one of the *Unterweser* factors is present, the court must ask whether the injunction will have a significant impact on international comity. If not, then the ASI may be issued.

ASIs in FRAND Cases

In recent years, the most significant use of ASIs has been in connection with global FRAND disputes. Specifically, a court reviewing a SEP holder’s compliance with a FRAND licensing commitment may issue an ASI to prevent the SEP holder from bringing foreign patent infringement claims (including injunctions against the sale of infringing products) until the question of licensing terms has been resolved in the issuing jurisdiction. Below some of the more significant ASI decisions in the FRAND context are summarized, illustrating the range of issues considered by the courts and the disparate outcomes that have emerged.

*Microsoft v. Motorola* 24

Microsoft alleged that Motorola breached its commitment to offer Microsoft a patent license on FRAND terms in violation of the policies of two SDOs, the International Telecommunications Union (ITU) and the Institute of Electrical and Electronics Engineers (IEEE). When negotiations
over the FRAND license requested by Microsoft broke down, Microsoft filed a breach of contract action against Motorola in the U.S. District Court for the Western District of Washington. Six months later, Motorola sued Microsoft for patent infringement in Germany. The German court, finding infringement, enjoined Microsoft from selling infringing Xbox and laptop computer products in Germany. In response, Microsoft sought an ASI from the federal court in Washington to prevent Motorola from enforcing the German injunction.

The U.S. court first considered whether the issues in the two cases were effectively the same. Even though the suits technically involved different causes of action — breach of contract in the U.S. and patent infringement in Germany — the court determined that the resolution of the U.S. matter would be dispositive of the German matter. That is, if Motorola were found in the U.S. to have breached its FRAND obligations, then Motorola would not be entitled to seek injunctive relief against Microsoft in any jurisdiction, including Germany. Further, the U.S. court found that Motorola’s litigation tactics frustrated the court’s ability to adjudicate the issues before it. Thus, this prong of the analysis also weighed in favor of an ASI. Finally, the court found that comity concerns should not bar the ASI because Motorola did not initiate its German action until six months after Microsoft filed the action in Washington. In fact, because the suit was primarily a U.S. dispute lacking significant foreign issues, permitting the German injunction to stand could itself harm international comity. As a result, the district court entered the ASI against Motorola. On appeal, the Ninth Circuit affirmed.

**Vringo v. ZTE**

*Vringo v. ZTE* involved a multi-jurisdictional dispute over patents essential to ETSI’s 2G, 3G, and 4G wireless telecommunications standards. Following the commencement of litigation, the parties began settlement discussions and entered into a mutual non-disclosure agreement (NDA). Once negotiations deteriorated, ZTE filed an antitrust action in Shenzhen, China, claiming that Vringo’s failure to grant ZTE a patent license on FRAND terms constituted an abuse of its market position. In order to support its claim, ZTE presented information that had been exchanged between the parties during the time that the NDA was in place. In response, Vringo brought a breach of contract action in the U.S. District Court for the Southern District of New York and sought an ASI “[requiring] ZTE to withdraw its Shenzhen complaint and [enjoining] it from pursuing the same or similar claims in that court.” The U.S. court declined to issue the requested ASI, reasoning that the applicable threshold criteria had not been satisfied. Although the parties to the two suits were the same, the court noted “[a] decision holding that ZTE breached the NDA would not necessarily foreclose the antitrust action in the Shenzhen court.” Specifically, “[t]he fact that ‘ZTE use[d] Vringo’s highly confidential opening offer as the basis for its claims that the offer constitutes an abuse of power’ does not foreclose the possibility that ZTE provided or will provide the Shenzhen court with other evidence and reasons from which it could conclude that Vringo abused its market position.” Accordingly, the court denied Vringo’s motion for an ASI.

**TCL v. Ericsson**

*TCL v. Ericsson* involved patents required to implement ETSI’s 2G, 3G and 4G wireless telecommunications standards. TCL filed a contract claim against Ericsson in the United States
District Court for the Central District of California alleging that Ericsson breached its obligation to license the SEPs at issue to TCL on FRAND terms. TCL also sought an ASI to prevent Ericsson from maintaining patent infringement actions against it under corresponding patents in France, Brazil, Russia, the UK, Argentina and Germany. In considering whether to grant TCL’s ASI, the district court recognized that the parties were the same in both the California and the foreign actions. Then, however, it dispensed with the remainder of the analysis, concluding instead that both parties “indicated their desire” that the California action should result in a ‘global resolution’ of their SEP licensing and damages claims. As a result, the court summarily granted TCL’s request for an ASI without further discussion.

**Apple v. Qualcomm**

In 2017, Apple sued Qualcomm in the District Court for the Southern District of California, alleging sixty-three separate causes of action relating, among other things, to Qualcomm’s licensing practices for patents essential to ETSI’s 3G and 4G standards. Shortly thereafter, Apple filed eleven additional actions against Qualcomm in the UK, Japan, China and Taiwan, each making similar allegations. In response, Qualcomm sought an ASI seeking to enjoin Apple’s prosecution of its foreign actions. Qualcomm argued that the foreign actions constituted “part of a single licensing dispute already before [the California] court” and were thus duplicative. The court disagreed, holding that Qualcomm failed to demonstrate that the issues in Apple’s U.S. and foreign actions were functionally similar in the sense that an adjudication of the claims in the U.S. would dispose of Apple’s foreign claims. Likewise, the court found that Apple’s foreign suits could be considered neither vexatious nor oppressive, as they were not unduly delayed or duplicative, and because Apple had a reasonable interest in challenging Qualcomm’s patents jurisdiction by jurisdiction. Finally, the court found that enjoining Apple’s foreign actions “would effectively deprive the relevant foreign courts of [their] jurisdiction to consider whether [Qualcomm’s licensing agreements] have anticompetitive effects” within their jurisdictions — a result intolerable to international comity. Accordingly, the court denied Qualcomm’s request for an ASI.

**Conversant v. Huawei and ZTE**

In this UK case, Conversant owned four UK patents alleged to be essential to the implementation of ETSI mobile telecommunication standards. Conversant commenced a patent infringement suit against Huawei and ZTE, both Chinese manufacturers, in July 2017, requesting that a UK court determine FRAND terms for a license of its global portfolio of patents covering the ETSI standards. Concurrently, ZTE brought an action in the Shenzhen Intermediate People’s Court in China requesting a determination of the FRAND royalty rate for Conversant’s Chinese patents and a declaration that Conversant’s prior licensing offers violated its FRAND commitments. ZTE also sought an injunction restraining Conversant from ‘unfair, unreasonable, discriminatory overpricing and other acts which are in violation of the FRAND principle,’ including the continuation of its UK proceeding.

In response, Conversant alleged in the UK that ZTE’s pleadings in the Shenzhen case “directly attacked, and sought relief in respect of, the proceedings before the English court . . . and sought to block and frustrate the English [p]roceedings.” Accordingly, Conversant requested an ASI
barring ZTE from prosecuting its conflicting claims in Shenzhen. Soon thereafter, ZTE amended its Shenzhen complaint “to remove all claims for liability that might involve . . . damages or other financial relief . . . other than in relation to the FRAND royalty rate and FRAND licence terms for [Conversant’s] Chinese [p]atents.”

The UK court explained that the test for granting an ASI depends on whether the foreign claims “were vexatious, in that they sought to obstruct, or could have had the effect of obstructing, pending proceedings before the English court; or of undermining or frustrating the performance of a judgment given by the English court.” The elements that ZTE had recently deleted from its Shenzhen complaint would have given rise to an ASI in the UK. However, in view of the amended complaint, no such injunction was required.

**Optis v. Huawei**

In *Optis v. Huawei*, PanOptis (an affiliate of Unwired Planet) brought suit against Huawei in the U.S. District Court for the Eastern District of Texas for the infringement of six U.S. patents that PanOptis obtained from Ericsson and Panasonic. In addition to denying infringement, Huawei asserted that PanOptis breached its FRAND commitment to ETSI (which it inherited from Ericsson and Panasonic) with respect to five of the asserted patents. Shortly thereafter, Huawei brought suit against PanOptis in the Shenzhen Intermediate People’s Court in China, alleging breach of contract and antitrust violations. In the Shenzhen action, Huawei asked the court to set the FRAND royalty rate for PanOptis’s Chinese patents and to order that PanOptis cease all civil infringement actions against Huawei.

In response, PanOptis filed a motion in the Eastern District of Texas seeking an ASI preventing Huawei from continuing its Chinese actions.

The court denied the injunction, noting that:

> the Chinese actions only relate to Chinese patents. Thus, although there may be similar factual disputes about PanOptis’s global offer, and whether that offer complied with its FRAND obligations, the scope of any relief awarded by this court or the Chinese court extends only as far as jurisdiction allows. There is nothing obviously vexatious or oppressive in allowing the lawsuits to proceed simultaneously, nor would any relief awarded by either court overlap with relief awarded by the other.

**Huawei v. Samsung**

In this case Huawei held patents that it claimed were essential to ETSI’s 3G and 4G wireless standards. In 2011, Huawei and Samsung began to negotiate a cross-license of their respective patents. After several years of negotiation, Huawei brought suit against Samsung in the Northern District of California, alleging that Samsung’s products breached eleven patents allegedly essential to the ETSI standards. At the same time, Huawei filed suit against Samsung in the Shenzhen Intermediate People’s Court in China. Samsung filed counterclaims in both actions.

In 2018, the Shenzhen court found that Samsung infringed two of Huawei’s Chinese patents (both counterparts of patents asserted in the U.S. action), that Huawei had complied with its FRAND
commitments to ETSI, that Samsung did not comply with its own FRAND commitments and was largely responsible for the six-year delay in negotiations. Accordingly, the Shenzhen court issued an injunction prohibiting Samsung from manufacturing and selling smartphones with 4G LTE functionality in China. Samsung appealed the Chinese ruling and filed a motion in the Northern District of California to enjoin Huawei from enforcing the Chinese injunction.

In analyzing Samsung’s motion for an ASI, Judge Orrick in the Northern District of California first considered the similarity of the actions before the courts in the U.S. and China. He observed that the positions of the parties were reversed from that in Microsoft v. Motorola. That is, in Microsoft, the German court granted Motorola an injunction against Microsoft without determining whether or not Motorola had complied with its FRAND commitments (a question then before the U.S. court in Washington). In contrast, “the Shenzhen court issued injunctive relief because it found that Samsung had not complied with its FRAND obligations.” Thus, he concluded that the cases before the U.S. and Chinese courts differed significantly. Nevertheless, Judge Orrick found these differences “irrelevant” to the more important question: whether the local U.S. action would dispose of the Chinese action. As both actions depended on whether a party breached its FRAND commitment to ETSI, the U.S. court’s answer to this question would, indeed, dispose of the Chinese action.

Moreover, the Chinese injunction posed a significant commercial risk to Samsung, “not just in China, but with impacts percolating around the world”. As such, the Shenzhen injunction would “interfere with ‘equitable considerations’ by compromising the U.S. court’s ability to reach a just result … free of external pressure on [Samsung] to enter into a ‘holdup’ settlement before the litigation is complete.” Accordingly, the court found that the integrity of the U.S. action would “be lessened without an ASI”. Finally, Judge Orrick found that the limited scope of the proposed ASI and its limited duration would present a “negligible” impact on international comity.

Thus, the court granted Samsung’s motion to enjoin Huawei from enforcing the Shenzhen orders.

The Anti-Anti-Suit Injunction (AASI)

If a litigant believes that its opponent is likely to seek an ASI barring litigation in its preferred jurisdiction, then it may request an injunction preventing the opponent from seeking an ASI. This is the anti-anti-suit injunction (sometimes called a “counter-anti-suit injunction”). Like the ASI, the AASI operates in personam, prohibiting a litigant from taking a particular action – in this case, petitioning a court for an ASI. Yet unlike an ASI, an AASI does not seek to bar a parallel action in another court, but to prevent the blocking of that action, effectively permitting the parallel action to continue. As such, the considerations that guide courts when considering ASIs are not directly applicable to their consideration of AASIs.

AASIs are sought less frequently than ASIs and there is no uniform framework defining when they will be granted. The leading U.S. case regarding AASIs is Laker Airways v. Sabena, an antitrust action brought in 1982 by a bankrupt British airline, Laker Airways, against a number of U.S. and non-U.S. airlines. Two British airlines obtained an ASI from a court in the UK prohibiting Laker from prosecuting its U.S. antitrust suit against them. Laker then obtained an AASI from the U.S. district court preventing Sabena, KLM and other non-UK airlines from joining the UK court’s ASI. The U.S. Court of Appeals for the DC Circuit upheld the AASI, reasoning that jurisdiction over the foreign airlines was proper in the U.S., that allowing them to evade liability under the
U.S. antitrust laws would be contrary to U.S. public policy, and that principles of international comity dictated that the UK courts should not attempt to interfere with the jurisdiction of the U.S. court.

Then in the early 1990s, a trio of related cases arose in which a group of Texas asbestos manufacturers sought to obtain ASIs preventing Canadian residents from bringing personal injury tort claims against them in Texas. The Canadians, in turn, obtained AASIs from courts in Texas preventing the manufacturers from enjoining them from suing in Texas. In upholding the AASIs, the Texas appellate court discerned four purposes that such injunctions serve: “1) to protect a court's jurisdiction; 2) to prevent the parties from evading important public policies of the domestic forum; 3) to prevent a multiplicity of suits; and 4) to protect a party from vexatious and harassing litigation.”

**AASIs and FRAND**

As noted above, ASIs are most commonly issued by courts in common law jurisdictions – primarily the U.S. and UK – while courts in civil law jurisdictions have historically found them “offensive, even violative of international law.” Thus, it is not surprising that civil law jurisdictions have recently begun to issue AASIs to prevent the enforcement of ASIs in FRAND cases.

**Continental v. Avanci**

Continental is a German-based supplier of automotive components including telematics control units (TCUs) that give an automobile 2G/3G/4G wireless capabilities. Nokia, Conversant, PanOptis and their respective affiliates hold numerous SEPs covering these wireless standards. Avanci is a Dallas-based entity that licenses wireless SEPs held by its members (including Nokia, Conversant and PanOptis) at a single rate. Continental had sought for some time to obtain a license under these SEPs, but was informed that the SEP holders preferred to license automobile manufacturers rather than automotive suppliers (presumably because higher fees could be charged to these downstream users). Negotiations soon broke down and, in March 2019, Nokia filed ten separate patent infringement suits against Continental’s customer Daimler in the German Regional Courts of Munich, Duesseldorf and Mannheim, eight of which sought to enjoin Daimler’s sale of automobiles that contained 2G/3G/4G wireless connectivity capabilities.

In May, 2019, Continental brought an action in the U.S. District Court for the Northern District of California alleging that Avanci and its members, including Nokia, Conversant and PanOptis, violated their FRAND obligations as well as the Sherman Act and the California business code. Then, in June, Continental petitioned the U.S. court for an ASI prohibiting Nokia and the other defendants from prosecuting their claims against Daimler in Germany or anywhere else. Continental argued that “Nokia’s German lawsuits are an attempt to force Daimler and other [customers] to accept non-FRAND licenses before this Court has an opportunity to adjudicate the case on the merits,” and that “Nokia’s decision to seek injunctive relief in at least eight of the German Actions, and thereby acutely increase the pressure on Daimler … to accede to Nokia’s unfair royalty demands, is also directly contrary to U.S. policy.” But before the U.S. court could respond, in July Nokia petitioned the Munich Regional Court to issue an AASI prohibiting Continental from enforcing an ASI against Nokia in Germany. The Munich court granted the
AASI, finding that the requested ASI preventing Nokia’s German actions would be incompatible with German law. In order to move quickly, before the U.S. court had a chance to act on Continental’s ASI motion, the Munich court issued its ruling in an ex parte proceeding, without oral argument or the involvement of Continental’s counsel.

**IPCom v. Lenovo**

In 2007, IPCom, a German patent assertion entity, acquired 160 patent families claimed to be essential to ETSI’s 2G/3G/4G wireless communications standards from Robert Bosch. Since 2014, IPCom sought to license these patents to Lenovo and its affiliates. Negotiations were unsuccessful and in March 2019 Lenovo brought an action in the U.S. District Court for the Northern District of California, claiming that IPCom’s licensing offers were inconsistent with its FRAND obligations, asking the court to determine a global FRAND royalty for the patents, and alleging that IPCom’s actions constituted attempted monopolization in violation of Section 2 of the Sherman Act. IPCom responded in July 2019 with an action in the UK seeking a declaration that one of IPCom’s UK patents was essential to the standards and infringed by Lenovo, and to enjoin Lenovo from infringing the patent in the UK. In September 2019, Lenovo asked the U.S. district court for an ASI prohibiting IPCom from prosecuting any infringement action in the UK or elsewhere against Lenovo and its affiliates and customers during the pendency of the U.S. action.

Before either the U.S. or UK courts made a substantive ruling in the case, in October 2019 IPCom brought an action in the Paris Court of First Instance, seeking both to enjoin Lenovo’s sale of allegedly infringing products in France, and also preventing Lenovo from enforcing the ASI. The Paris court ruled in favor of IPCom in November, holding that, except where they seek to enforce contractual arbitration or jurisdiction clauses, ASIs are contrary to French order public, and that “seeking an anti-suit injunction—such as the one pursued by Lenovo in California—would infringe upon IPCom’s fundamental rights pursuant to French laws protecting patents, property rights in general and procedural provisions regulating fair legal proceedings.” The Court of Appeal of Paris affirmed the lower court’s ruling in March, 2020.

In October, 2019, IPCom also filed a motion for an AASI in the UK. The UK court granted this motion in November, shortly after the decision of the Paris court. It reasoned that the principles of law applicable to an AASI are broadly the same as those that apply to the grant of an ASI, though an AASI presents “an even greater danger of interfering improperly with the conduct of foreign proceedings.” Nevertheless, the court found that “it would be vexatious and oppressive to IPCom if it were deprived entirely of its right to litigate infringement and validity of [its UK patent].” The UK court enjoined Lenovo from employing its U.S. ASI to prevent IPCom from proceeding with its UK action.

**The Anti-Anti-Anti Suit Injunction -- Where Does it End?**

If an AASI can nullify the effect of an ASI, then why not seek an anti-anti-anti-suit injunction (AAASI) to prevent a litigant from seeking an AASI? The AAASI is a rare but not unknown procedural mechanism, and has recently emerged in FRAND disputes.

For example, in Continental v. Nokia, the Munich Regional Court issued an AASI prohibiting Continental from seeking an ASI in the U.S. that would have stopped Nokia’s pending German
actions against Daimler. Shortly thereafter, Continental petitioned the U.S. district court to issue a temporary restraining order preventing the other defendants (Avanci, Conversant, PanOptis and their affiliates) from seeking a similar AASI in Germany or elsewhere.47 The court denied Continental’s motion on procedural grounds,48 but if such a TRO had been granted, it would have been an AAASI.

Conclusion

The complexity, cost and unpredictability of high-stakes global FRAND disputes have markedly increased with the introduction of ASIs, AASIs and AAASIs. These rarified procedural mechanisms, conceived centuries ago to avoid the injustice of judicial decisions emanating from the ‘wrong’ courts, have devolved into mere tactical levers to be deployed in the service of any determined litigant with a sufficiently large war chest. Requests for these once-extraordinary remedies have now become routine as litigants jockey for advantage and race to judgment in the jurisdictions that they believe will be most sympathetic to their case. Moreover, courts in an increasing number of countries appear willing to grant these forms of relief. Whereas ASIs were once known only in the U.S. and UK, they and their more esoteric cousins AASIs and AAASIs have now been granted in other European countries. Recently, China’s most senior intellectual property judge suggested that China needs “strong countermeasures against foreign parallel litigation” – namely ASIs and AASIs.49

But despite the complexity that they introduce on the international litigation stage, there is nothing inherently improper about the use or issuance of anti-suit measures in cases like these. Perhaps it is the uniquely global character of FRAND disputes, coupled with their high value and polarized industry, that has invited the increasing use of these forum-shopping mechanisms in multi-jurisdictional litigation. If so, such races to judgment and strategic maneuvering among jurisdictions will likely continue until a more rational, transparent and comprehensive system for determining FRAND royalty rates is established.50

3 Cf. Rapanos v. United States, 547 U.S. 715 (2006) (“an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies ‘Ah, after that it is turtles all the way down.’”) (Scalia, J.)
Comity is the recognition which one nation allows within its territory to the rights of its own citizens, or of other persons, (Eng.).

Dist. LEXIS 191512, at *10 (C. Bradford Biddle et al., eds., 2019).


See Jorge L. Contreras, et al., The Effect of FRAND Commitments on Patent Remedies and Complex Products: Toward a Global Consensus, Ch. 5 (C. Bradford Biddle et al., eds., 2019).


Microsoft v. Motorola, 2013 U.S. Dist. LEXIS 60233 (W.D. Wash., 2013), aff’d 795 F.3d 1024 (9th Cir. 2015).


Unwired Planet Intl. Ltd. v. Huawei Techs. Co. Ltd. [2017] EWHC (Pat) 711 (Eng.), aff’d Unwired Planet Intl. Ltd. v. Huawei Techs. Co. Ltd. (Unwired Planet II) [2018] EWCA (Civ) 2344 (Eng.) (as of this writing, the case has been argued at the UK Supreme Court and a decision is pending).


See Hilgard et al., supra note 17.

Strong, supra note 16, at 154.


Unterweser, 428 F.2d at 994 (“Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws” (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)).

A more detailed analysis of these and other cases can be found in Contreras, Extraterritoriality, supra note 15.

Microsoft Corp. v. Motorola, Inc., 871 F. Supp. 2d 1089, 1097 (W.D. Wash. 2012), aff’d 696 F.3d 872 (9th Cir. 2012).


Webb, 809 S.W.2d at 902.

Barceló III, supra note 17, at 2.

Continental Automotive Systems, Inc. v. Avanci LLC, Complaint, Case No. 19-cv-2520 (N.D. Cal., filed May 10, 2019).

Continental Automotive Systems, Inc. v. Avanci LLC, Motion for Anti-Suit Injunction, Case No. 19-cv-2520 (N.D. Cal., filed Jun. 12, 2019).


Lenovo (United States) Inc. & Motorola Mobility, LLC v. IPCom GmbH & Co., No. 19-1389 (N.D. Cal., filed Mar. 19, 2019).

IPCom GmbH & Co. KG v. Lenovo Technology (United Kingdom) Limited and Motorola Mobility UK Limited, EWHC Case No HP 2019-000024

Plaintiffs’ Motion for Anti-Suit Injunction, Lenovo v. IPCom, No. 19-1389 (N.D. Cal., filed Sept. 18, 2019).


See Shaknes, supra note 31, at 99-100 (describing such a case from the mid-2000s involving actions in New York, London and the British Virgin Islands).

Continental Automotive Systems, Inc. v. Avanci LLC, Continental’s Ex Parte Application For a Temporary Restraining Order and Order to Show Cause Why an Anti-Suit Injunction Should Not Issue Against Defendants, Case No. 19-cv-2520 (N.D. Cal., filed Oct. 11, 2019).

Continental Automotive Systems, Inc. v. Avanci LLC, Order Denying Plaintiff’s Ex Parte Application for Temporary Restraining Order and Order to Show Cause, Case No. 19-cv-2520 (N.D. Cal., filed Oct. 11, 2019).
