



Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Abuse of a dominant market position in patent cases - the EU law approach

专利案件中的滥用市场支配地位问题 ——欧盟方法

Dr. Klaus Grabinski, President of the UPC Court of Appeal
Klaus Grabinski 博士, UPC 上诉法院院长

IP Key Symposium, Suzhou, China, 18 September 2023
中欧知识产权司法论坛, 苏州, 2023年9月18日

All written and said is my personal view and not a communication of the UPC Court of Appeal.
所有内容均为个人观点, 不代表UPC上诉法院意见。

**I. Art. 102 (1) Treaty on the Functioning of
the European Union (TFEU)
欧盟运行条约第102条第1款**

Art. 102 (1) TFEU /// 欧盟运行条约第102条第1款

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. /// 只要可能影响成员国之间的贸易，一个或多个企业滥用其在内部市场或在内部市场的实质部分占有的支配地位之行为应因与内部市场不符而予以禁止。

...

- **A patent is an exclusive right. /// 专利权是一种独占权。**
- **The exercise of an exclusive right linked to an intellectual property right by bringing an action for infringement and seeking an injunction, as such, does not constitute an abuse of a dominant position (CJEU, 16 July 2015 – C-170/13, para 46 – Huawei/ZTE). /// 通过提起侵权诉讼、请求签发禁制令，行使与知识产权相关的独占权，不构成滥用市场支配地位（欧盟法院，2015年7月16日；C-170/13，第46段；华为诉中兴案）。**

- **However, the exercise of an exclusive right linked to a patent may, in exceptional circumstances, involve the abuse of a dominant position under competition law (Art. 102 TFEU) (CJEU, para 47 – Huawei/ZTE). /// 然而，在特殊情况下，行使与专利相关的独占权可能涉及滥用竞争法所规定的支配地位（欧盟运行条约第102条）（欧盟法院，第47段–华为诉中兴案）。**

Check-list Art. 102(1) TFEU: /// 欧盟运行条约第102条第1款载明的要件:

- **Relevant market /// 相关市场**
- **Dominant market position /// 市场支配地位**
- **Abuse of the dominant market position. /// 滥用市场支配地位。**

II. Relevant Market 相关市场

- **The market have to be defined from a demand perspective. /// 必须从需求角度定义市场。**
- **Effective competition of products/services /// 产品/服务的有效竞争**
since they are /// 因为产品/服务是
 - **interchangeable or /// 可互换的, 或者**
 - **substitutable /// 可替代的**
- with regard to /// 涉及以下方面:
 - **objective characteristics of the products/services, /// 产品/服务的客观特征**
 - **conditions of competition and /// 竞争条件, 以及**
 - **structure of supply and demand on the market. /// 市场供求结构。**

- **A technical standard /// 技术标准**
 - **a de jure standard set up by a Standard Setting Organisation (SSO) or /// 由标准制定组织制定的、法律上的标准，或者**
 - **a de facto standard /// 事实上的标准**
- **defines a market if /// 对市场进行定义，前提是**
- **the product compatible with the standard cannot be substituted by a product that is not compatible with the standard. /// 与标准兼容的产品不能被与标准不兼容的产品替代。**
- Example: Mobile phones have to be compatible with 2G (GSM), 3G (UMTS), 4G (LTE), 5G (IoT) Standards. /// 例如：手机必须兼容2G (GSM)、3G (UMTS)、4G (LTE)、5G (IoT) 标准。

- A patent that claims an invention that must be used to be compliant with a technical standard is a standard essential patent (SEP). /// 实施某一技术标准必须使用的发明专利是标准必要专利（SEP）。
- **The SEP defines an upstream market to the market that is defined by the technical standard. /// 标准必要专利将上游市场定义为由技术标准所确定的市场。**

II. Dominant market position 市场支配地位

- **A company is in a dominant market position /// 处于市场支配地位的企业**

**when it is able to prevent or significantly impede
/// 能够阻止或显著阻碍**

**effective competition on a particular product or
service market. /// 特定产品或服务的有效市场竞争。**

- Such a dominant market position may have its basis in the exclusive right that an Intellectual Property (IP) right confers to its owner. /// 市场支配地位可能基于知识产权赋予其权利人的独占权。
- However, such a market dominant position cannot constitute an abuse in itself since it is based on the IP right. /// 以知识产权为基础的市场支配地位本身并不构成滥用。
- Only a dominant market position that results from circumstances that do not directly relate to the exclusive right conferred by the IP right can constitute an abuse. /// 只有与知识产权所赋予的独占权没有直接关系的市场支配地位才构成滥用。

III. Abuse of a dominant market position ///
濫用市場支配地位

Springboard scenario: /// 背景:

- Patent holder sues an implementer for infringement seeking an injunction. /// 专利权人起诉实施人侵权，要求签发禁制令。
- Implementer counters that the action is an abuse of a dominant market position under Art. 102 (1) TFEU. /// 实施人以起诉构成滥用市场支配地位（欧盟运行条约第102条第1款）进行抗辩。

- **Under which conditions will the defense be successful and the action dismissed? /// 在什么情况下，抗辩成立，驳回起诉？**

4 alternative scenarios have to be distinguished: /// 必须区分4种备选方案:

The patent is ... /// 专利是.....

- 1) a non-licensed and a non-SEP patent /// 未许可、非标准必要专利**
- 2) A licensed and non-SEP patent /// 已许可、非标准必要专利**
- 3) a licensed and SEP patent without FRAND /// 已许可 (非FRAND)、标准必要专利**
- 4) a SEP with FRAND /// 已许可 (FRAND)、标准必要专利**

1) Non-licensed, non-SEP patent: /// 未许可、非标准必要专利：

- Abuse of a dominant position when all following conditions are fulfilled: /// 满足以下所有条件的，构成滥用市场支配地位：
 - the IP holder refuses to grant a license to the license seeker, /// 权利人拒绝向请求许可人授予许可；
 - no substitute to the use of the IP right is reasonably available, /// 没有不使用专利的合理替代方案；
 - the license seeker intends to offer a new product/service that is not offered by the IP owner, /// 请求许可人意在提供（权利人尚未提供的）新产品/服务；
 - no objective consideration justify the refusal to grant a license and /// 拒绝授予许可没有正当理由，以及
 - the refusal is such as to reserve to the IP owner a downstream market by eliminating all competition on that market (CJEU, 29 April 2004 – C-418/01 – IMS Health). /// 拒绝授予许可的目的是消除下游市场竞争，维持专利权人市场份额（欧盟法院，2004年4月29日；C-418/01；艾美仕案）。

Sec. 24 (2) German Patent Act: /// 德国专利法第24条第2款:

Where a license seeker cannot exploit an invention for which he holds a patent with a later filing or priority date without infringing a patent with an earlier filing or priority date, the license seeker is entitled to the grant of a compulsory license from the proprietor of the patent with the earlier filing or priority date if /// 强制许可请求人不通过侵害某一在先专利，就无法实施自己在后获得专利保护的发明的，可以要求对在先专利权人的在先专利颁发强制许可，假如：

1. he (unsuccessfully) tried to obtain permission from the proprietor of the patent to use the invention on reasonable terms, and /// 请求人努力以合理的条件请求专利权人许可实施其专利，而未能获得该等许可；并且
2. his own invention demonstrates an important technological advance of substantial economic significance compared to that of the patent with the earlier filing or priority date. /// 请求人的发明与在先专利相比，具有显著经济意义的重大技术进步。

The proprietor of the patent can require the license seeker to grant him or her a cross-license on reasonable terms and conditions for the use of the patented invention with the later filing or priority date. /// 专利权人可以以合理的条件，要求强制许可请求人对其享有专利权的在后发明，授予一项对应的实施许可。

2) Licensed, non-SEP patent: /// 已许可、非标准必要专利:

- In general, it is not considered to be a discrimination under competition law if the patent owner treats license seekers differently. /// 一般而言，专利权人区别对待许可请求人，不被视为竞争法下的歧视。
- The exclusive right linked to the patent gives the patent owner the power to grant (and under which terms) or not to grant a license. /// 与专利相关的独占权赋予专利权人授予（以及在何种条件授予）或不授予许可的权力。
- The power to grant a license is part of the patent owner's right to exploit economically the competitive edge over other market participants that his protected creative achievement has brought him. /// 专利权人享有利用其受保护的创造性成果所带来的竞争优势获取经济利益的权利。授予许可的权力是该权利的一部分。
- Stricter requirements may however apply when additional circumstances exist in light of which unequal treatment is not compliant with the freedom of competition (German Federal Supreme Court, 13 July 2004 – KZR 40/02 – Standard-Spundfass). /// 然而，如果存在其他情节，使得不平等对待许可请求人的做法违反自由竞争原则，则可适用更严格要求（德国联邦最高法院，2004年7月13日；KZR 40/02-Stand-Spundfass）。

3) Licensed SEP but no FRAND: /// 已许可（非FRAND）、标准必要专利：

- Abuse of a market dominant position by discrimination is fulfilled if /// 构成通过歧视滥用市场支配地位的条件为
 - the technical standard defines a market /// 市场由技术标准定义
 - the patent is a SEP and /// 该专利为标准必要专利
 - the SEP owner /// 标准必要专利权人
 - treats license seekers differently /// 区别对待许可请求人
 - without a justification that is compliant with competition law (German Federal Supreme Court, 13 July 2004 – KZR 40/02 – Standard-Spundfass). /// 没有符合公平竞争法的正当理由（德国联邦最高法院，2004年7月13日；KZR 40/02-Standard-Spundfass）。

Example of what may be a justification for unequal treatment of license seekers: /// 例：不平等对待许可请求人的正当理由

The SEP holder grants licenses under preferred terms to companies that contributed significantly to the setting up of the standard (e.g. a standard for synthetic tight-head drums with improved draining characteristics to be used in the chemical industry). /// 标准必要专利权人根据优先条款向为标准制定做出重大贡献的公司授予许可（如具有改进排水性能的化工用合成闭口桶标准）。

4) Licensed SEP with FRAND: /// 已许可 (FRAND)、标准必要专利:

- **A SEP owner /// 标准必要专利权人**
- who is in a market dominant position, /// 虽然处于市场支配地位,
- but has given an irrevocable undertaking to grant a license to third parties on FRAND terms, /// 但已不可撤销地承诺向第三方授予FRAND许可
- **does not abuse its dominant position, by bringing an action for infringement seeking an injunction, as long as: /// 发起侵权诉讼, 请求签发禁制令, 不构成滥用市场支配地位, 条件是**
- prior to bringing that action, /// 权利人在提起诉讼之前.....

- **the proprietor has alerted the alleged infringer /// 已经警告被诉侵权人**
 - by designating the patent and specifying the way in which it has been infringed and /// 警告中英明确专利名称、侵权方式, 以及
- after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a license on such terms and /// 在被诉侵权人表示愿意根据FRAND条款签订许可协议后, 发出具体书面许可要约, 并且
- **where the alleged infringer continues to use the patent, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith (CJEU, 16 July 2015 – C-170/13 – Huawei/ZTE). /// 被诉侵权人继续实施专利侵权行为, 未按该领域公认的商业惯例, 遵循诚信勤勉原则, 对上述要约作出回应 (欧盟法院, 2015年7月16日; C-170/13; 华为诉中兴案)。**

Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet





Thank you for your attention
感谢聆听
