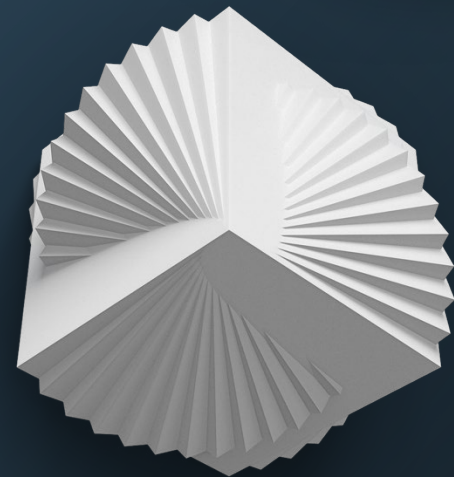
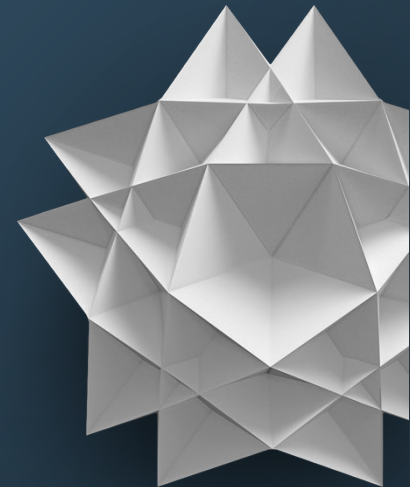


The Availability of Injunctions in Standard-Essential Patent Licensing

with Bernhard Ganglmair and Dominik Fischer

30.06.2023 - CRESSE

Dr Benno Buehler



Overview

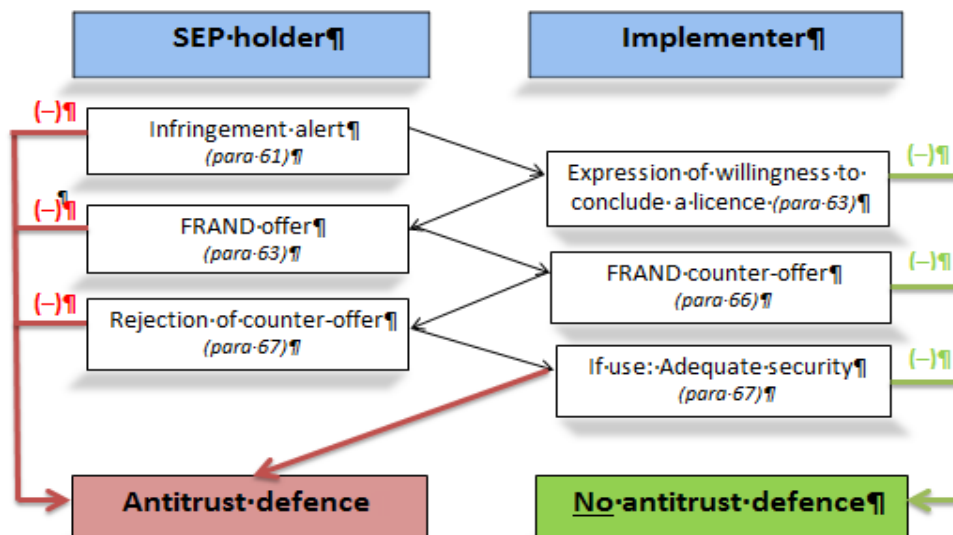
- 1. Motivation**
- 2. Model**
- 3. Results**
- 4. Conclusion / Outlook**

Huawei/ZTE was meant to restrict availability of injunctions over SEPs in Europe

Before *Huawei / ZTE* (2015), the FRAND defence in Germany was handled in a very restrictive manner

- In *Orange Book* (2009), the German Federal Court of Justice addressed the issue of whether seeking an injunction against a potential licensee could constitute an abuse of a dominant position.
- The European Commission addressed the same issue in its seminal *Motorola Decision* (2014) and found that seeking an injunction against willing licensees is generally abusive
- In light of the diverging precedents, the LG Düsseldorf referred 5 questions to the ECJ in the context of the German *Huawei/ZTE* proceeding – and the ECJ largely followed the EC’s reasoning

According to *Huawei/ZTE*, seeking injunctions over SEPs is not abusive only under very narrow circumstances – the “FRAND Dance”



Do German courts depart from Huawei/ZTE?

LG / TCL



Thus, the licence seeker's conduct on the merits must be examined to see whether it reasonably furthers the negotiations. Therefore, as a general rule, a non-FRAND counter-offer suggests that the infringer, who is sufficiently informed after the infringement notice and receipt of an explained plaintiff's offer, does not aim at reasonable and non-discriminatory conditions



Regional Court of Mannheim, judgment of 2 March 2021, 2 O 131/19 - LG v. TCL, recital 168

Daimler / Nokia



Since the plaintiff thus does not receive a fair share of the benefit of the technology in the saleable end product, the counter-offer is not FRAND-compliant, which decisively confirms the lack of willingness to license. The lack of willingness to license is also not justified by an alleged discrimination, hindrance or insufficient information basis.



Regional Court of Mannheim, judgment of 18 August 2020, 2 O 34/19 - Nokia v. Daimler

- Interpretation of German courts implies a higher likelihood of an injunction.
- We will show that this increases the bargaining power of the patent holder vis-à-vis its licensee, compared to the Huawei/ZTE framework.

Availability of injunctions – ZTE/Huawei v. German courts' interpretation

Injunctions under the Huawei / ZTE regime

		SEP-user's counteroffer	
		FRAND	non-FRAND
SEP-holder's offer	P \ L		
	FRAND	No injunction	Injunction
	non-FRAND	No injunction	No injunction

Injunctions under the Amended Framework

		SEP-user's counteroffer	
		FRAND	non-FRAND
SEP-holder's offer	P \ L		
	FRAND	No injunction	Injunction
	non-FRAND	No injunction	Injunction

The Model (I)

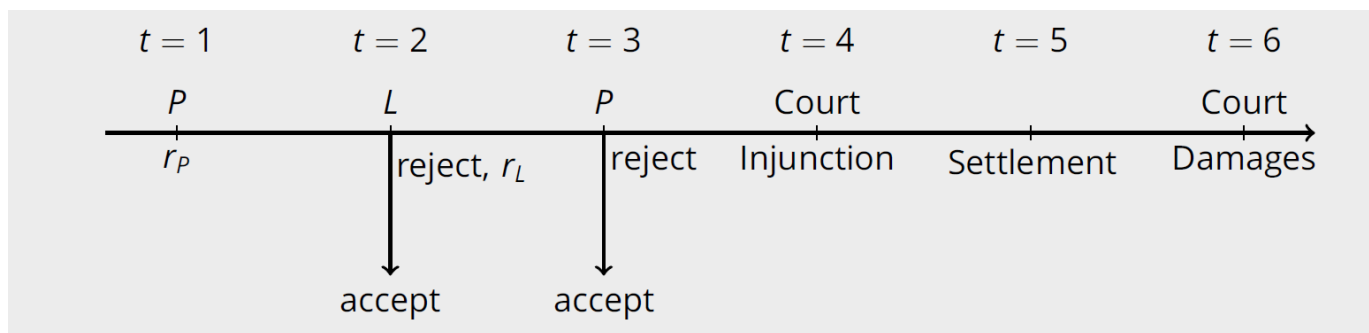
We model the licensing negotiations as sequential game and solve by backward induction

Actors: SEP holder P and implementer = licensee L

Sequencing of negotiation/litigation reflects the standard procedure as required in Huawei / ZTE:

- P offers a royalty rate r_P ; if L accepts, the offer is implemented
- If L rejects the offer, L must propose some counteroffer r_L ; if P accepts, the counteroffer is implemented
- If P rejects, litigation ensues; P can seek an injunction and damages
- The court then needs to assess whether the offer r_P and / or counteroffer r_L are FRAND
- Depending on the legal framework and FRAND assessment, an injunction is granted (or not) and damages are awarded (or not)

Timing:



The Model (II)

Level of royalties / damages:

- In case of an injunction (FRAND offer and non-FRAND counteroffer, **or non-FRAND/non-FRAND under Amended Framework**)
 - L cannot wait for the court to decide on damages (i.e. a royalty rate)
 - ⇒ P has all bargaining power in the settlement negotiations
 - However, P is bound by his initial offer, the resulting royalty rate is r_P
- In case of a FRAND counteroffer:
 - If L rejected the original offer and its offer is found to be FRAND by the court, r_L is implemented
- In case of non-FRAND offer and non-FRAND counteroffer - **Huawei / ZTE framework**:
 - No injunction and court determines the royalty rate as midpoint of its FRAND interval

Resulting royalty levels depending on the court's FRAND assessment:

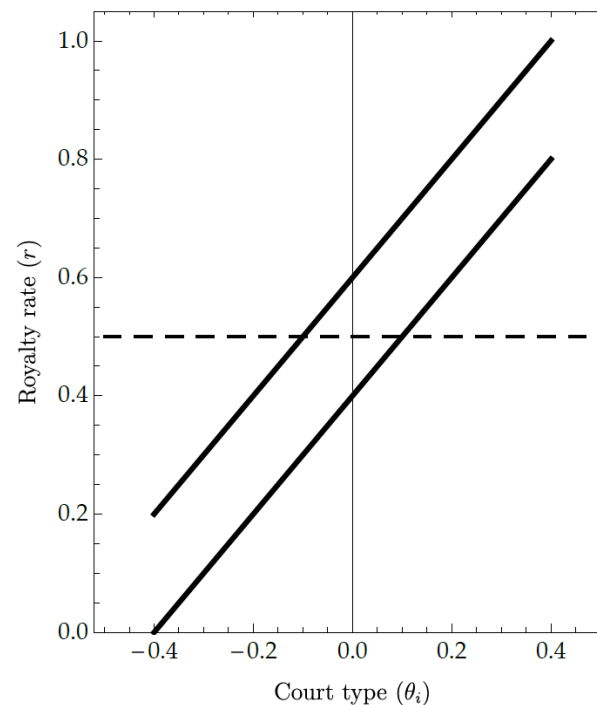
	(a) Huawei/ZTE Framework		(b) Amended Framework	
	$r_L: \mathbf{F}$	$r_L: \mathbf{N}$	$r_L: \mathbf{F}$	$r_L: \mathbf{N}$
$r_P: \mathbf{F}$	r_L	(r_P)	r_L	(r_P)
$r_P: \mathbf{N}$	r_L	$1/2 + \theta_i$	r_L	(r_P)

The Model (III)

Court assessment is imperfect: FRAND midpoint determined by a random draw of $\frac{1}{2} + \theta_i$ with $\theta_i \sim U[-\theta, \theta]$

Key parameters:

- θ : Fuzziness of court's assessment
- 2δ : Width of court's FRAND interval $[\theta_i - \delta, \theta_i + \delta]$



Further remarks:

- The parties P and L do not observe the court's "type" θ when entering their negotiations
- Courts are unbiased in expectation (i.e. midpoint of FRAND range is $\frac{1}{2}$ on average)
- There are no costs to litigation
- The expected royalty rate derives from the *ex ante* distribution of court types and the equilibrium negotiation strategies

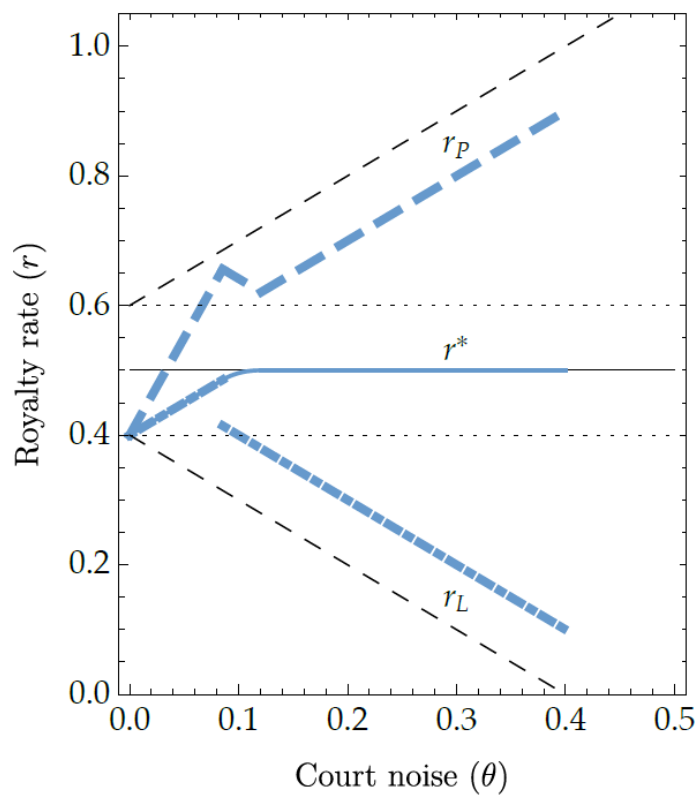
Optimal offer, optimal counteroffer, and expected equilibrium royalty rate r under the *Huawei/ZTE* framework

Optimal negotiation strategies:

- P accepts counteroffers only if they would always be found FRAND by the court, i.e. always implemented
Intuition: r_L is P 's worst-case outcome of litigation
- L always makes a counteroffer $r_L < r_P$
 - For moderate r_P , optimal counteroffer increases in r_P
Intuition: important for counteroffer to be found FRAND to avoid injunction
 - For aggressive r_P , worthwhile to make aggressive counteroffer
Intuition: not much to lose in “marginal” situations
- P makes aggressive offers to begin with
Intuition: counteroffers are only implemented if they are moderate; otherwise, the court determines the royalty rate

Equilibrium outcome:

While both P and L make “aggressive” offers and counteroffers, the equilibrium royalty rate is FRAND in expectation



Optimal offer, optimal counteroffer, and expected equilibrium royalty rate under the Amended Framework

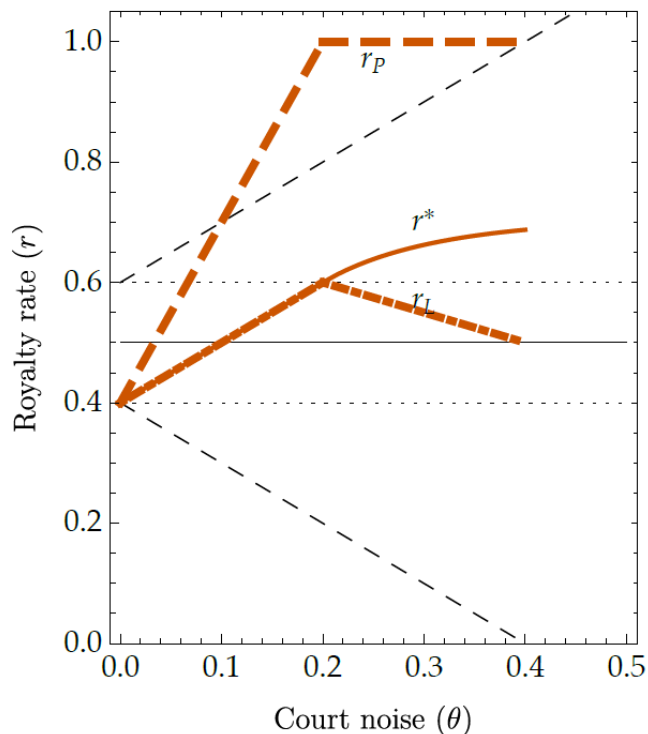
Optimal negotiation strategies:

- P accepts counteroffers (only if they would always be found FRAND by the court, as before)
- L always makes a counteroffer $r_L < r_P$, as before
 - **However:** L does not make aggressive counteroffers against aggressive offers, to minimize risk of injunction
- P makes even more aggressive offers than before...
- **and would more often be found non-FRAND if courts examined the SEP holder's offer!**

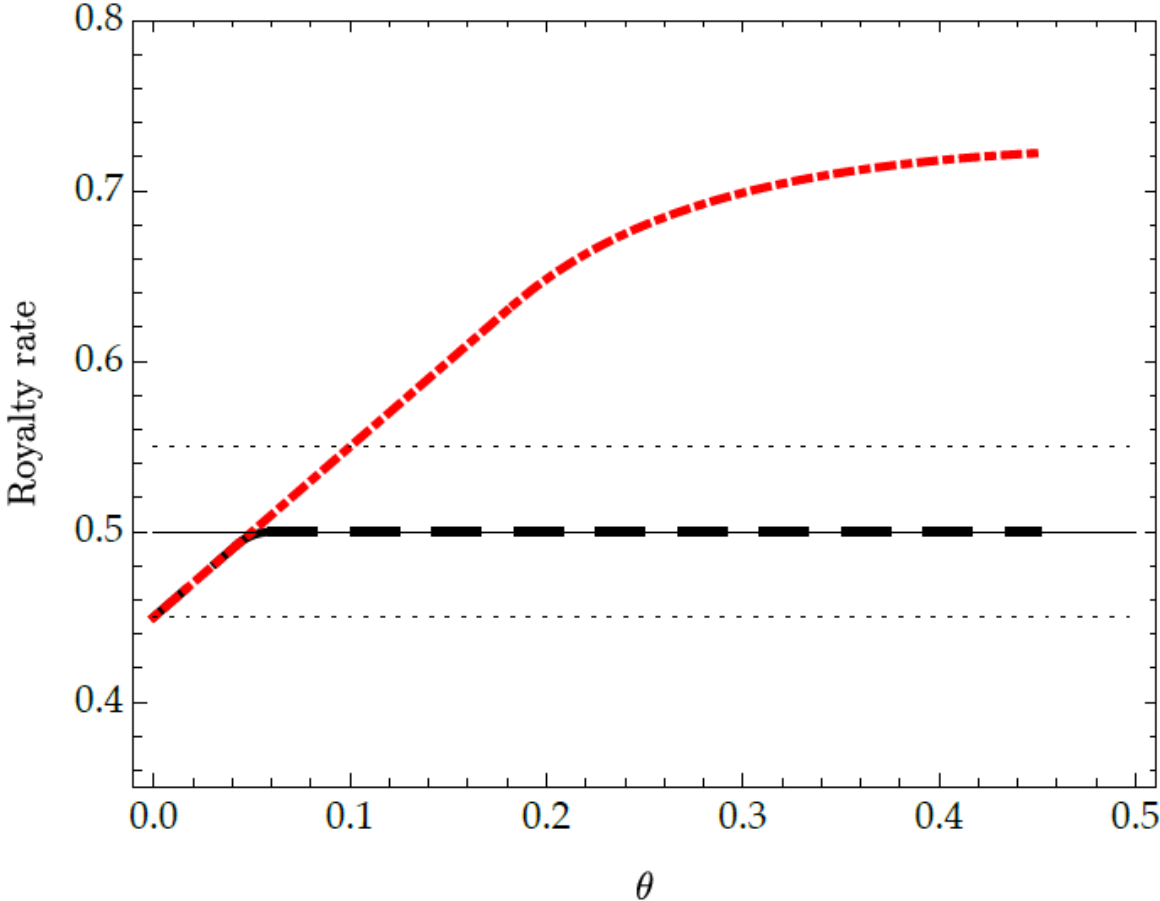
Equilibrium outcome:

While P makes aggressive offers, and L makes conservative counteroffers due to the risk of a NN injunction;

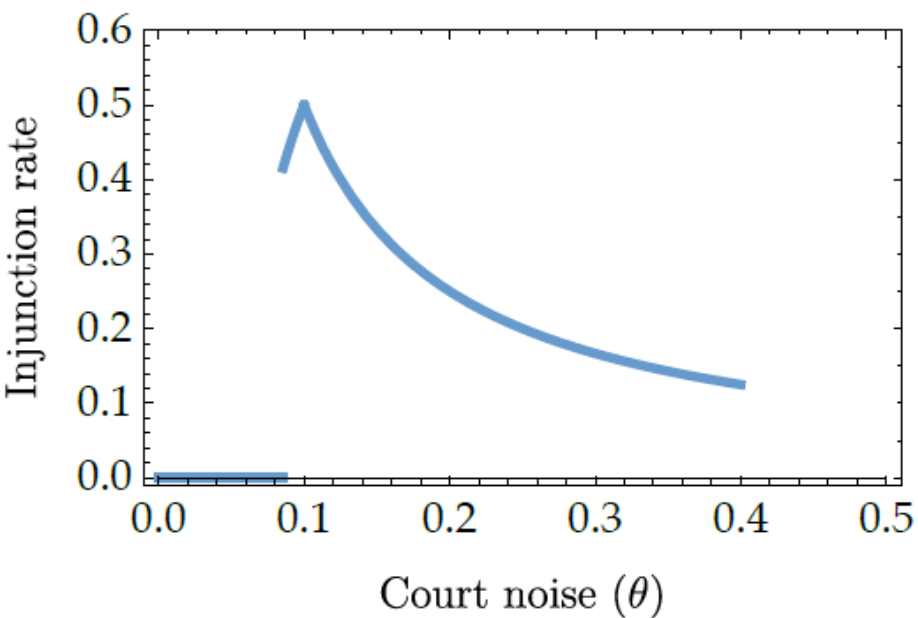
The equilibrium royalty rate is above the FRAND corridor if court precision is low



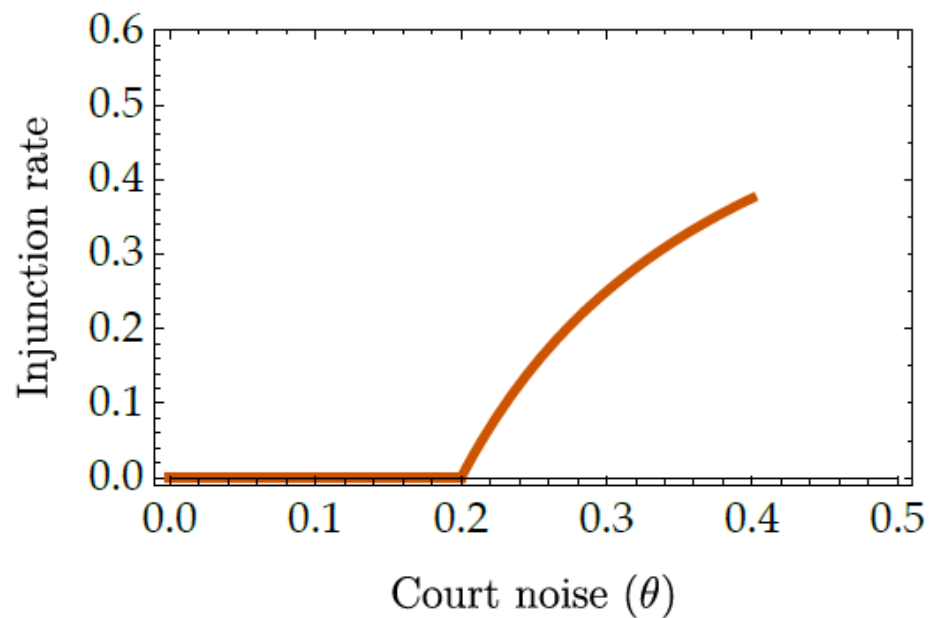
Summary: expected equilibrium royalties under Amended Framework much higher than under Huawei/ZTE and often non-FRAND



Fewer injunctions is no sign of a balanced framework!



(a) Huawei-ZTE



(b) Amended

Conclusions

- Huawei v. ZTE has restricted availability of injunctions
- Recent German court decisions have stepped back from it, easing access to injunctions
- We show that this relaxed access to injunctions can increase equilibrium royalty rates if courts are sufficiently imprecise
- Ex-ante patent hold-up in the amended framework (but not Huawei v. ZTE) for imprecise courts
- Non-monotonic effect of court noise on injunction rates

Outlook – the next deviation has already been announced

- This is not the end of the story – the SEP-holder friendly Munich Court has already identified next element to depart from Huawei / ZTE



Die Kammer geht dabei nicht davon aus, dass in Fällen, in denen ein FRANDgemäßes Angebot und ein FRANDgemäßes Gegenangebot unterbreitet werden, die Parteien eine außergerichtliche Streitbeilegung durchzuführen haben. **Vielmehr steht dann der Kartellrechtseinwand der Beklagtenpartei nicht zu, da sie ein FRANDgemäßes Angebot des klagenden Patentinhabers nicht angenommen hat.**



Own translation: The Chamber does not assume that in cases where a FRAND-compliant offer and a FRAND-compliant counter-offer are submitted, the parties are obliged to conduct an out-of-court dispute resolution. **Rather, in such cases, the defendant's FRAND defense is not applicable, since they have not accepted a FRAND-compliant offer from the plaintiff patent holder.**

LG München I, Endurteil v. 30.09.2020 – 21 O 13026/19, recital 204