



MAX-PLANCK-GESELLSCHAFT

UNA
Universität
Augsburg
University

TUM
TECHNISCHE
UNIVERSITÄT
MÜNCHEN

THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON DC

MIPLC Studies

Edited by

**Prof. Dr. Christoph Ann, LL.M. (Duke Univ.)
Technische Universität München**

**Prof. Robert Brauneis
The George Washington University Law School**

**Prof. Dr. Josef Drexl, LL.M. (Berkeley)
Max Planck Institute for Intellectual Property and
Competition Law**

**Prof. Dr. Thomas M.J. Möllers
University of Augsburg**

**Prof. Dr. Dres. h.c. Joseph Straus,
Max Planck Institute for Intellectual Property and
Competition Law**

Volume 9

Tuire Anniina Väisänen

Enforcement of FRAND Commitments under Article 102 TFEU

The Nature of FRAND Defence in Patent Litigation



Nomos

MIPLC

Munich
**Intellectual
Property**
Law Center

Augsburg
München
Washington DC

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>.

a.t.: Munich, Univ., Diss., 2010

ISBN 978-3-8329-5837-4

1. Auflage 2011

© Nomos Verlagsgesellschaft, Baden-Baden 2011. Printed in Germany. Alle Rechte, auch die des Nachdrucks von Auszügen, der fotomechanischen Wiedergabe und der Übersetzung, vorbehalten. Gedruckt auf alterungsbeständigem Papier.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich.

Table of Contents

Abstract	7
Introduction	11
1. Objectives and Benefits of Standardization	15
1.1 ETSI GSM Standards	16
1.2 The Role of SSOs and Rational Behind the FRAND Commitments	19
1.3 Criticized Pitfalls of the Current FRAND Regime	21
1.3.1 The Patent Hold-Up Problem	21
1.3.2 Royalty Stacking	23
2. Competition Law and Intellectual Property Rights	27
2.1 The Objectives of Article 102 TFEU	30
3. The Applicability of Article 102 TFEU to Enforce FRAND Commitments	33
3.1 Market Definition in Technology Markets	34
3.2 Dominance in Technology Markets	35
3.3 Abusive Conducts in a Standard-setting Context	37
3.3.1 Excessive Pricing Under Article 102 (a) TFEU	38
3.3.2 Price Discrimination under Article 102 (c) TFEU	41
3.4 Other Exclusionary Practices	44
3.4.1 The Misuse of Intellectual Property Rights	44
3.5 Conclusion on the Applicability of Article 102 TFEU on FRAND Commitments	45

4. Case Studies Related to the Enforcement of FRAND Commitments under Article 102 TFEU	47
4.1 The <i>Qualcomm</i> Case	48
4.1.1 What is the Object of the European Commission’s Decision to Initiate Proceedings in the <i>Qualcomm</i> case?	48
4.2 Possible Doctrinal Solutions based on the Meaning of FRAND Terms	50
4.2.1 The Meaning of FRAND Commitments under Article 102 (a) and (c) TFEU - Possible Doctrinal Solutions Based on Established EC Case Law	52
4.2.2 Deceptive Conduct in the Standard-Setting Process - Is the AstraZeneca “ <i>Doctrine</i> ” Applicable to FRAND Commitments?	55
4.3 Need for a Precedent from the European Commission	60
5. FRAND Defence in Patent Litigation under German Law	65
5.1 FRAND Defence and Limited Right to Injunctions	66
5.2 The IPCOM v Nokia Case	69
Conclusion	73
References	75