

# Injunctions for FRAND-encumbered SEPs: Setting Standards ... for Abuse



GCR LIVE CONFERENCE

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NICOLAS PETIT  
UNIVERSITY OF LIEGE (ULG)  
[NICOLAS.PETIT@ULG.AC.BE](mailto:NICOLAS.PETIT@ULG.AC.BE)  
[WWW.CHILLINGCOMPETITION.COM](http://WWW.CHILLINGCOMPETITION.COM)

# What (Legal) Technology is on the Market?

| Source                       | Tests                                                                                                                                                                                                       |
|------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Existing case-law proof test | <p>Abusive Litigation (<i>Protégé International</i>)</p> <p>Abusive refusal to supply (<i>Magill/IMS Health/Microsoft III</i>)</p> <p>Generic abusive anticompetitive foreclosure (<i>Post Danmark</i>)</p> |
| New test                     | <p>Modified abusive refusal to supply (Emanuelson; Körber)</p> <p>Abusive bargaining (Mariniello)</p> <p>“<i>Willing licensee</i>” (reconfigured <i>Orange Book Standard</i>)</p>                           |
| Other                        | “ <i>Serious doubts</i> ” (article 9, R1/2003)                                                                                                                                                              |

# How to Select the Right Standard?

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- No criterion in the ~~by-laws~~ case-law
  - Lawyers v Economists
  - Economists v Economists; Lawyers v Lawyers
- “*Consistency*” as a selection rule?
- Various facets of consistency
  - Internal consistency
  - Transversal consistency
  - Economic consistency
  - Constitutional consistency

# Brief Overview of Potential Implications

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- Internal consistency
  - ▲ => *Protégé International; Magill/IMS Health/Microsoft; Post Danmark*
  - ▼ => MARINIELLO
- Transversal consistency
  - ▼ => “Willing licensee” test (reconfigured *Orange Book Standard*) but HGC (yet, not case-law proof)
- Economic consistency
  - ▼ => “Willing licensee” test (reconfigured *Orange Book Standard*)
- Constitutional consistency
  - ▲ => *Protégé International*

# Thank you