

International FRAND: The last 18 months and what lies ahead

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A busy year and a half

The last 18 months have been an exciting time for FRAND-watchers around the world. Courts have handed down significant decisions and competition regulators continue to give the area their considerable attention. If you have not been able to keep up, you are most certainly not alone. This article summarises the major developments and considers what may come next.

December 2017 – TCL v Ericsson

Patent lawyers enjoyed Judge Selna's substantial decision in *TCL v Ericsson* as their winter holiday reading.¹ TCL is a large Chinese handset manufacturer which makes phones under the Alcatel, Blackberry and TCL brands. It sought a declaration of the rate it should pay for a licence to Ericsson's cellular standard essential patents (SEPs). Ericsson had filed patent cases against TCL in other jurisdictions, and these were stayed, or transferred to California.

The US District Court of Central California set a global portfolio rate for Ericsson's patents. The approach adopted by Judge Selna in calculating a FRAND rate was similar, in many respects, to the approach used by Mr. Justice Birss in *Unwired Planet* the year before: both used comparable licences to the portfolio as a benchmark, and each also used a form of top down analysis. However, there were differences in approach at the detail level,² the most important of which was a difference in the total number of patents assumed to be essential to the standards. These differences in detail, controversially, gave rise in the US court to a much lower rate for Ericsson's portfolio. Ericsson has appealed this decision and the result is awaited with interest.

March 2018 – China

China has traditionally been thought of as the home of the implementer. That reputation is changing fast, and it was notable that in the *Qualcomm-Apple* litigation, Qualcomm, as the asserting patent owner, filed more patent cases against Apple in China than anywhere else.

In March 2018, China's Shenzhen Court published a lengthy written decision in *Huawei v Samsung*.³ The court had given an oral decision in January which was, unusually, broadcasted over the internet.

The Shenzhen Court granted an injunction against Samsung under a Huawei SEP. While the court did not set a FRAND rate, it considered both parties' negotiations and offers in order to determine whether the parties had complied with their FRAND obligations. The Court carried out a top down analysis to find that Huawei held 5% of the total numbers of 3G SEPs. It determined that a reasonable aggregate royalty rate for 3G was 5%. For 4G, it found that Huawei held about 10% of the total number of 4G SEPs and the aggregate royalty rate for 4G would be 6%–8%. The Court

did not find that Huawei's offers were FRAND, but found that they were a reasonable opening offer in that they gave room for Samsung to negotiate a suitable price. Samsung's refusal to accept Huawei's offer of arbitration to determine the FRAND terms counted against it.

A few days later, the Beijing High Court upheld the appeal in *Inncomm v Sony*, maintaining the country's first SEP injunction.⁴

April 2018 – Jurisdiction in the UK

In April 2018, the English High Court addressed the question of jurisdiction in FRAND patent disputes in *Conversant v Huawei, ZTE*.⁵ Conversant sued Huawei and ZTE on four UK patents and asked for a "FRAND injunction"⁶: an order that the defendants should cease infringing the patent unless they take a licence on terms determined by the court to be FRAND.

The defendants challenged the court's jurisdiction to determine the portfolio FRAND rate. They argued that because most of their business was in China, determination of a FRAND rate would largely involve determining the validity and infringement of Chinese patents. The challenge failed because Henry Carr J found that the English Court had jurisdiction to determine infringement of UK patents, and the claim for an injunction was part of the relief that would be considered by the Court in the event of a finding of infringement. Considering the parties' negotiation history, the Judge considered that there was a good arguable case for an injunction to be granted and gave permission for the claimant to serve its case against the Chinese-based defendants. The Judge also considered whether England or China was the most appropriate forum. He found that the evidence before him did not demonstrate that the Chinese Court would determine a global FRAND rate unless both parties agreed (which Conversant did not).

Shortly after this decision, the Chinese Guangdong High Court issued some SEP Guidelines. Notably, they included the following provision, apparently allowing the court to determine global FRAND rates even where one party did not agree.

"If either the SEP holder or the implementer seeks the adjudication of licence [terms] of patents in territories other than the jurisdiction of the place of adjudication, and the counter party does not expressly raise any objection in the litigation proceedings or if an objection is raised by the counter party, such objection is found unreasonable, [the court] can determine the royalties applicable for such other territories."

Huawei and ZTE duly appealed and, on 30 January 2019, the English Court of Appeal handed down its decision. The Court of Appeal had to address these new Guangdong Court SEP Guidelines.

Huawei's expert claimed that if the facts before the Chinese Court were analogous to this case, the Chinese Court would now take the view that the refusal to agree to a global determination was unreasonable. Conversant's expert disagreed and pointed out that there was no case law on the circumstances in which it would be

“unreasonable” for one party to object. The Court of Appeal agreed with Conversant’s expert. The Guidelines had been introduced for a trial period and it was speculative to interpret them in the way that Huawei’s expert was seeking to do.

The case is now before the Supreme Court, to be heard together with the Unwired Planet appeal in October 2019.

May 2018 – Jurisdiction in the UK not inevitable

The following month, the English High Court determined jurisdiction in another SEP FRAND case: *Apple v Qualcomm*.⁷ Apple brought a claim against Qualcomm asking for FRAND royalty rates to be set for Qualcomm’s essential patent portfolio. Qualcomm challenged jurisdiction. Morgan J agreed with Qualcomm on this part of the claim. The reason for the different result to the Conversant decision was because Conversant’s FRAND claim was based on the infringement of UK patents in the UK, so a tort had been committed within the jurisdiction and the UK was the correct place to hear the claim. Apple’s FRAND claim was based on alleged breaches of competition law and breach of the FRAND contract by Qualcomm’s UK subsidiary and the Californian parent company. The court found that the UK company had not made the FRAND promise, so dismissed the claims against it. With the UK anchor defendant out of the case, nothing connected the FRAND claims against Qualcomm US to the UK.

October 2018 – Unwired Planet Court of Appeal

The most keenly awaited decision in this field in the UK for 2018 was the UK Court of Appeal’s October decision in *Unwired Planet*.⁸ The Court of Appeal confirmed the UK court as a venue which is prepared to look at the commercial realities of FRAND disputes and treat them not as isolated country-by-country determinations. The Court of Appeal confirmed that the UK Court would address the question of what the FRAND rate for a portfolio licence should be, as it was necessary to determine this in the context of whether the patentee was entitled to injunctive relief.

The Court of Appeal held that, in this case, a FRAND licence was a global licence. It considered other cases which have touched on this issue. Huawei relied upon the European Commission’s decision in Motorola, in which the Commission decided that Apple’s offer of a German-only licence was FRAND. But the Court referred to two German cases (*Pioneer v Acer* and *St Lawrence v Vodafone*), where the German courts had found that a global licence was FRAND. The Court also reviewed cases from the US, China and Japan, but found that these did not assist.

The Court of Appeal did not accept that, in deciding a global rate, the Judge had been adjudicating on issues of infringement or validity concerning foreign SEPs: he was simply determining the terms of the licence that UP was required to offer to Huawei pursuant to its undertaking to ETSI. It was then up to Huawei as to whether to take the licence. It could not be compelled to do so. If it chose not to, the only relief available to the patentee would be relief for infringement of the two UK SEPs the first instance Judge had found to be valid and essential.

One of the more criticised decisions that the first instance judge had made was that, for a given set of circumstances, there was only one set of FRAND terms. The finding was relevant because of what has become known as the “Vringo problem”. The Vringo problem is as follows: if FRAND is a range and the implementer will pay no more than a rate at the bottom of the range, whilst the SEP owner demands a rate at the top of the range, what should the court do? Does it refuse an injunction to a SEP owner who offers a FRAND rate? Or does it enjoin an implementer who is prepared

to pay FRAND? The first instance judge found that this theoretical problem did not arise because, in any circumstance, there was only one FRAND rate.

The Court of Appeal came to a different conclusion. They considered it unreal to suggest that two parties, acting fairly and reasonably, will necessarily arrive at precisely the same set of licence terms as two other parties, and so FRAND is a range. However, it held that it is for the SEP owner to choose between the range of FRAND terms available to it.

The Court of Appeal resolved two further points in addition. The first of these was whether the non-discriminatory element of FRAND was “hard-edged” or soft. The problem arose because when the patentee was on the brink of insolvency, Samsung obtained a licence at a low rate. Huawei argued that it should be entitled to the same rate: in other words, the “non-discriminatory” element of FRAND should override the “fair and reasonable” requirement. The Court of Appeal disagreed: it held that this would be akin to a “most favoured licensee” clause. The parties drafting the European Telecommunications Standards Institute (ETSI) Guide on Intellectual Property Rights had considered, and rejected, such a term.

The second point was whether Unwired Planet had acted anti-competitively in not complying with the steps in *Huawei v ZTE*.⁹ The Court of Justice had set out a series of steps for patent owners and infringers to follow before bringing an SEP infringement action. The Court of Justice’s decision had been issued after the start of the *Unwired Planet* case, so could Unwired Planet be criticised for not following steps which had not yet been set out? The answer was no: the Court of Appeal found that the Court of Justice’s decision created a safe harbour. It did not follow that by being outside the safe harbour, Unwired Planet had necessarily infringed competition law.

The case is now before the Supreme Court, to be heard together with the Conversant appeal in October 2019.

January 2019 – HTC v Ericsson: SSPPU decision, Texas; UK Court of Appeal in Conversant

In a case in the Eastern District of Texas,¹⁰ HTC sought to argue that the rate it should pay to Ericsson for its SEP portfolio should be based on the price of the smallest saleable patent practising unit (SSPPU). HTC argued that this followed on from the ETSI Guide on Intellectual Property Rights, which was to be interpreted under French law. Ericsson asked the Court to rule on this point before the case went to a jury trial. Judge Gilstrap did so and disagreed with HTC. Judge Gilstrap found that the ETSI Guide could not be read in a way that required the application of the SSPPU principle. He accepted evidence of Bertram Huber (former VP at Bosch and former member of the ETSI IPR committee) that the ETSI IPR policy did not change the normal practice of licensing at the end user product level.

HTC sought to argue that a French court would imply such a rule (amongst other things, to comply with European competition law). Judge Gilstrap found that HTC’s French law experts did not support that argument. The French Civil Code preserved freedom of contract. Equity did not require that a FRAND rate must always be SSPPU.

February 2019 – HTC v Ericsson jury verdict

On 15 February 2019, the ED Texas jury delivered a verdict in *HTC v Ericsson* largely finding for Ericsson, in particular finding that Ericsson’s licensing offer to HTC was FRAND. This is an interesting contrast to the TCL decision above.

March 2019 – Daimler EU complaint and Continental US action

Most FRAND cases to date have related to mobile phones. With wireless connectivity being used in many other products, new industries are being caught up in the FRAND debate. The automotive industry is the latest.

In March 2019, German car maker Daimler, along with Tier 1 suppliers Valeo, Continental and Bury complained to the European Union Competition Authority about Nokia's licensing terms. Supplier Continental also brought a claim in the California Courts against Nokia and automotive patent pool Avanci. The issue at the heart of the dispute is: should licences for cellular SEPs be taken at the level of the car makers or the level of the component manufacturers. It is early days, but these cases are attracting a great deal of attention.

March 2019: TQ Delta and ZyXel

Henry Carr J's judgment in *TQ Delta v ZyXEL* involved patents claimed essential to digital subscriber line (dsl) technology. He found one of the patents was valid, essential and infringed. A second patent lacked inventive step.

Unfortunately for patent owner TQ Delta, the valid patent was due to expire in a few months. ZyXEL argued that the grant of an injunction at this late stage in the patent's life would be disproportionate. If an injunction was given, however, it should be stayed or there should be a carve-out to permit ZyXEL to supply certain orders.

The Judge decided to grant an injunction, refuse a stay and refuse the carve-out requested. He found that ZyXEL's behaviour was one of "hold-out". They had not paid any royalties to TQ Delta (or indeed any patent holder) in respect of any standards essential patent. Of the two patents from TQ Delta's portfolio which had been litigated in this jurisdiction, infringement of one had been established and had been continuing for many years. ZyXEL had refused to agree to submit to the outcome of the FRAND determination.

The Judge felt that to agree to ZyXEL's requests to refuse or stay injunctive relief would permit them to benefit from their hold-out strategy and take advantage of the FRAND obligation, without having agreed to be bound by a determination.

March 2019: Unwired Planet in Germany and the "wild west"

Unwired Planet has also brought proceedings in Germany. The German Courts see by far the most patent cases in Europe and therefore, not surprisingly, they also handle the most cases concerning enforcement of SEPs and related FRAND issues. However, the German Courts have always shown a distinct reluctance to deal with any calculation of what a FRAND rate should be. Under German procedure, the SEP owner must demonstrate that its offer is within the FRAND range and that it has complied with its obligations under *Huawei v ZTE*.¹¹ If it succeeds, the defendant will face an injunction.

Where an SEP has been transferred, the FRAND obligations transfer with it (either contractually or as a result of the application of competition law). But Judge Kuhnen of the Dusseldorf Court of Appeal found that it would be discriminatory if the result of a transfer of SEPs was an increase to the overall royalty rate. Sellers of SEPs (in this case Ericsson) should make their licences available to the purchaser's potential licensees in order to comply with its FRAND obligations. Also, the Dusseldorf Court found that the non-discriminatory part of FRAND is "hard-edged": a licensee would be entitled to the lowest rate ever granted to the patent. This is the opposite decision to the UK.

The case is being appealed by Unwired Planet and Ericsson to the German Federal Supreme Court.

April 2019 – Conversant fails in France

French law often makes an appearance in FRAND cases due to the reliance on patentees' undertakings to license patents essential to the standard on FRAND terms which are made to ETSI (European Telecommunication Standards Institute). ETSI is constituted under French law and its IPR policy is governed by French law. However, there have been no cases yet from the French courts on what constitutes FRAND. The Paris Court of Appeal considered FRAND in an appeal between Conversant and LGE,¹² with the Court sitting for three days to consider two patents, FRAND and exhaustion arguments. Because the Court found that Conversant's first patent was invalid and the second was not essential, they did not go on to address FRAND issues. So we remain in the dark as to how the French court will deal with FRAND.

April 2019 MPEG v Huawei, Dusseldorf: patent pools

The Dusseldorf Regional Court addressed the question of FRAND offers in the context of patent pools, taking a pragmatic, pro-pool approach. The court granted an injunction against Huawei who had not accepted a standard licence agreement from MPEG LA in relation to their AVC pool. Instead, Huawei had counter-offered a rate for Tagivan's patents, who were one member of the pool and the claimant in this case.

Huawei's offer was worldwide but defined different rates for different regions: e.g., Huawei offered higher rates for the US and Europe than China. The Court found that Tagivan could rely on the FRAND negotiations conducted by the pool administrator, and that the pool rate had been widely accepted by the industry. The Court rejected the reduced royalty rate for China. It also rejected Huawei's argument that the rate should be reduced because the pool contained non-essential patents. The Court found that it is inevitable that any pool of standard essential patents will also contain a number of patents which would be found non-essential if it came to trial.

May 2019 – Dutch approach and difference on late declarations, and *FTC v Qualcomm*

On 7 May, the Court of Appeal in the Hague handed down a decision in an appeal between Philips and Asus, addressing a FRAND defence to infringement of one of Philips' UMTS SEPs. The Dutch Court put a lot of emphasis on behaviour of the defendant, the potential licensee. The Court found the patent to be valid and infringed, so it needed to consider the FRAND position before determining whether Philips was entitled to an injunction. Asus argued: 1) that Philips had filed its declaration with ETSI, undertaking to license on FRAND terms, late; 2) that Philips had not offered a licence with an explanation of why the requested rate was FRAND; and 3) Philips had not followed the guidelines set out by the CJEU in *Huawei v ZTE*.

The Court rejected Asus's arguments: Philips had filed a general declaration long before it filed the specific declaration in relation to this patent, and the standard setting process was not affected by Philips' late declaration. The Court found that *Huawei v ZTE* set out guidelines only, and the court needed to look at both parties' approach to good faith negotiations. It found in this case that Asus had not negotiated in good faith and its dealings with Philips had amounted to hold-out. This hold-out behaviour meant that Philips did not even have to make an offer and could go straight to court proceedings.

Days later in the US, a Magistrate Judge, determining an issue remanded by the Federal Circuit on enforceability, decided on the question of late declarations in a very different way to the Dutch court. This was in the case of *Conversant v Apple*, where an ex-Nokia patent had been found to be valid and infringed, but the Magistrate Judge Nathaniel M Cousins held that the patent was not enforceable

because Conversant had obtained inequitable benefits from Nokia's late declaration in relation to that particular patent. Like Philips, Nokia had also made general declarations, but unlike the Dutch court, the Magistrate Judge remained unmoved.

Judge Lucy Koh of the Northern District of California's decision in the *FTC v Qualcomm*¹³ case was handed down on 21 May 2019. This case had commenced during Apple's worldwide fight with Qualcomm about royalty rates and was issued in the final days of the Obama administration. It was accompanied by a strong dissenting opinion from FTC Commissioner Ohlhausen, who strongly objected to the FTC's decision to commence litigation. The judgment was equally controversial with the Judge dismissing the Department of Justice's intervention requesting more evidence and briefing if the Court was to find Qualcomm liable. Although Qualcomm and Apple settled their global dispute before judgment, the Judge did not hold back in finding that Qualcomm wrongfully suppressed competitors in the premium LTE modem chip market to demand unnecessary licensing fees from its customers. The Court granted an injunction prohibiting Qualcomm: (i) from conditioning the supply of modem chips on a customer taking out a patent licence (the so-called "no licence – no chips" approach); and (ii) from entering into exclusive agreements for the supply of modem chips. Further, Judge Koh ordered Qualcomm to negotiate and renegotiate the license terms for its SEPs in good faith, without the "threat of lack of access" or "discriminatory provisions". Lastly, the Court required Qualcomm to submit to compliance and FTC monitoring procedures for seven years.

Qualcomm's application to stay the enforcement of the judgment pending its appeal was rejected by the Judge and, at the time of writing, Qualcomm had appealed to the Ninth Circuit Court of Appeal for a partial stay, relating to the lower Court's orders that:

- (1) "Qualcomm must make exhaustive SEP licences available to modem chip suppliers"; and
- (2) "Qualcomm must not condition the supply of modem chips to a customer's patent licence status" and, in that respect, must "negotiate or renegotiate the license terms with customers".

A look ahead

Although there has been a significant convergence on many aspects of FRAND, there is clearly some way to go before a global consensus is reached on many issues in FRAND disputes. Some major issues are:

- 1) Should FRAND be considered as a matter of contract law or antitrust law? The English courts have applied a contract approach, whilst Germany remains firmly an antitrust jurisdiction. The US is split: the Department of Justice's "New Madison¹⁴ Approach" put forward by Assistant United States Attorney General for the Antitrust Division Makan Delrahim argues that contract law is the correct approach, and antitrust law should not be used as a tool to enforce FRAND commitments.¹⁵ The US FTC, and Judge Koh, both apply antitrust law in *FTC v Qualcomm*.
- 2) Can the English Court determine a global FRAND rate as part of a FRAND injunction? And should it refer cases involving Chinese defendants infringing English patents to Chinese Courts? These matters will come before the UK's Supreme Court on 21 October 2019, and it is possible that a judgment will be issued before the end of the year.
- 3) Can component makers demand an exhaustive patent licence to an entire SEP portfolio, or are patent owners and patent pools free to license at the end user product level? The European Commission and Californian courts may both consider these issues in the Daimler litigation.
- 4) Does notifying the SDO of a patent after the standard has been frozen prevent the patent owner from enforcing the patent? Does this mean SDOs will need to delay standard settings to allow patent offices to catch up? Or did the Dutch court get it right in *Philips*?
- 5) The German Federal Supreme Court is due to hear FRAND in *Sisvel v Haier*. Another FRAND case awaiting the Federal Supreme Court's consideration is the Unwired Planet FRAND appeal: as the Court has just upheld the validity of one of Unwired Planet's patents, it seems likely that the hearing on the infringement case will follow shortly. So, will the German Supreme Court beat the UK Supreme Court to be the first of the top Courts to rule on FRAND? It may be a close-run thing.

Endnotes

1. CASE NO: SACV 14-341 NS(DFMx) consolidated with CASE NO: CV 15-2370 NS(DFMx).
2. https://www.twobirds.com/~media/pdfs/iam91_tclvericsson.pdf?la=en&hash=50524EDB24BCDCCCFB40BCDD609A7AD975D74587.
3. <https://www.twobirds.com/en/news/articles/2018/global/shenzhen-court-issues-written-judgment-in-huawei-v-samsung-case>.
4. <https://www.twobirds.com/en/news/articles/2018/global/a-telecoms-blockbuster-beijing-high-court-upholds-patent-injunction-in-ivncomm-v-sony>.
5. [2018] EWHC 2549 (Ch).
6. See *Unwired Planet v Huawei* [2017] EWHC 711 (Pat).
7. [2018] EWHC 1188 (Pat). For further commentary see <https://www.twobirds.com/en/news/articles/2018/uk/uk-frand-home-or-away>.
8. <https://www.twobirds.com/en/news/articles/2018/uk/appeal-decision-in-unwired-planet>.
9. CJEU Case C-170/13.
10. *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 18-cv-00243, Dkt. No. 376 (E.D. Tex. Jan. 7, 2019).
11. *Ibid.*
12. *CONVERSANT WIRELESS LICENSING SARL v Société LG ELECTRONICS FRANCE, S.A.S.*, n°061/2019.
13. 17-CV-00220-LHK.
14. Inspired by James Madison's views on the necessity for strong patent protection.
15. <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>.



Jane Mutimear's practice is litigation-focused with a particular focus on telecoms patent litigation and arbitration, alongside trade mark dispute work.

Over the years, she has ran many cases through to trial in the High Court and Court of Appeal, handled IP-based arbitrations and appeared on behalf of clients in the European Court of Justice.

Her IP dispute experience covers trade marks, designs, copyright and patents. Jane has been involved in many multi-jurisdictional cases, working alongside colleagues in other countries and other law firms, to ensure that her clients have a well thought through international strategy which can be executed effectively. In addition, over the past few years, she has been involved in a number of large patent-related arbitrations. Jane is part of the team responsible for Bird & Bird's Pattern product, which is a patent portfolio intelligence offering. Pattern enables the team to provide cutting-edge advice to clients who are interested in getting analysis about the landscape of their patent portfolio, provide advance valuation methodologies and more.

She has been presented with the *Legal Business* TMT Team of the Year award for her team's work on one of the longest and largest patent disputes in Europe. Jane has also won *The Lawyer* magazine's award for Client Partner of the Year, which recognised her commitment to ensuring her clients get the best service possible. The IP team has also received Managing Intellectual Property's 'Firm of the Decade' award. She is also listed and recommended in directories including *The Legal 500 UK*.

She is a member of the UK Council of AIPPI and a member of The Sedona Conference and a former President of the Intellectual Property Constituency of ICANN.

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Richard Vary specialises in patent disputes in the technology and communications industry.

He is a Partner in the London office, where he works with a team of high-tech patent litigators. As well as the patent expertise you would expect, the team has developed a unique expertise in the valuation of portfolios, and FRAND.

Before Bird & Bird, Richard was Vice President and Head of Litigation at Nokia, where he managed global commercial litigation and was part of the Legal & Compliance leadership team. This mostly involved mobile telecoms patent litigation and arbitration all around the world, and he has a very successful track record in global patent litigation strategy. He was awarded 'In-House Counsel of the Year' by *The Lawyer*, and is twice recognised in Managing IP's annual list of the 50 most influential people in intellectual property.

Richard has also worked on a variety of international litigation and arbitration matters, from competition law to commercial and tax disputes, as well as brand protection, trade marks, and design and copyright issues.

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