

# PATENT LICENSING

## WHAT NEXT FOR FRAND?

Richard Vary of Bird & Bird LLP explains how the Court of Appeal's recent decision in *Unwired Planet* has created a new multi-jurisdictional dispute resolution forum and considers what refinements future cases in this area will make.

2018 was an exciting year for FRAND; that is, fair, reasonable and non-discriminatory terms in standard essential patent (SEP) licences. It started just after the new year, with reports of the US District Court for the Central District of California's landmark decision on FRAND royalty rates (*TCL Communication Technology Holdings Ltd and others v Ericsson Inc and others* CA No 14-CV-341, CD Cal, 21 December 2017). By March 2018 it had moved on to the decision of China's Intermediate People's Court of Shenzhen in *Huawei Technologies Co Ltd v Samsung (China) Investment Co Ltd and others* and, before summer 2018, the High Court's decisions in *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd and others* and *Apple Retail UK Limited and others v Qualcomm UK Limited and others* were published ((2016) YO3 MC No 840; [2018] EWHC 1216; [2018] EWHC 1188).

However, the most keenly awaited event of the year was undoubtedly the Court of

Appeal's October 2018 decision in *Unwired Planet International Ltd and another v Huawei Technologies Co Ltd and another* ([2018] EWCA Civ 2344, [www.practicallaw.com/w-017-7512](http://www.practicallaw.com/w-017-7512)) (see box "The dispute in *Unwired Planet*"). In largely upholding the High Court decision, the Court of Appeal confirmed the UK courts as a venue that can positively assist parties to resolve their FRAND disputes.

This article considers:

- The background to FRAND dispute resolution.
- The jurisdictional step taken by the court in *Unwired Planet*.
- The benefits of a contract law approach to FRAND, rather than a competition law approach.
- Other improvements and refinements

that may be seen in future FRAND decisions.

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### THE ROAD TO UNWIRED PLANET

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The issue that lies at the heart of every dispute between SEP owners and licensees (known as implementers) is the price that should be paid for a licence to the SEP portfolio (see box "Explaining SEPs and FRAND"). Until the Court of Appeal's decision in *Unwired Planet*, there had been no single venue that could solve this issue.

In the past, the challenge, and much of the fun, for litigators lay in trying out different means to apply pressure to the other side to return to the negotiation table. Lawyers experimented with all sorts of courts, tribunals and regulators, each side seeking a venue that would give them an edge, but no court with any sense wanted to touch the question of price. In the last decade, most

courts took the position that FRAND is a commercial matter. While the courts could decide whether a patent was infringed or invalid, they could not decide what is FRAND.

As economists wrote more about the subject, some common views emerged. Today, it is not just economists who talk about technical terms such as “top down”, “comparable licences”, “age-normalised citations” and “contributions”; many patent lawyers have an understanding of what these terms mean and how they can be used to model FRAND, even if they passionately disagree about which should be used. The term “model”, rather than “calculate” is used here because these methods use proxies for the value of a portfolio, rather than direct measures (see “Portfolio comparison methods” below). The economists’ papers and the debates around them have created a common toolbox which has made it possible for courts today to determine what is FRAND.

*Unwired Planet* is not the first time that a tribunal has adjudicated the global value of a portfolio of patents. Nokia, Samsung, LG Electronics, Huawei, Ericsson and Interdigital have all undertaken consensual portfolio rate-setting arbitrations. In the 2013 Berkeley Technology Law Journal, Mark A Lemley and Carl Shapiro proposed one possible mechanism of arbitration: “last offer” or “baseball” arbitration (<https://scholarship.law.berkeley.edu/btlj/vol28/iss2/2/>). Here, each party makes an offer and the arbitrator awards the offer they think is closest to FRAND. This acts as an incentive on each side to be as reasonable as possible, so the offers will converge. In a paper to be published in 2019, Professor Jorge Contreras of the University of Utah SJ Quinney College of Law proposes a more conventional arbitration system where the arbitrator can determine the amount (<http://sites.bu.edu/tpri/files/2018/07/Rate-Setting-law-review-article-jlc-07-12-18.pdf>).

The problem with arbitration is that it requires consent. In the typical SEP dispute, whatever the parties may say outwardly, one party may not want FRAND to be determined. Therefore, it will not consent to arbitration. *Unwired Planet* is the first time that a court has determined FRAND in circumstances where one party does not consent. In doing so, it has created a dispute resolution tool that obviates the need for expensive multi-jurisdictional patent litigation. That is good news for the industry, even if it is not such good news

## The dispute in *Unwired Planet*

*Unwired Planet International Ltd and another v Huawei Technologies Co Ltd and another* concerned six of Unwired Planet’s patents, of which five were standard essential patents (SEPs) ([2018] EWCA Civ 2344, [www.practicallaw.com/w-017-7512](http://www.practicallaw.com/w-017-7512)). Unwired Planet sued some implementers, including Huawei, for infringing those patents. The High Court held that Unwired Planet’s licensing offers were not on fair, reasonable and non-discriminatory (FRAND) terms. It also held that a FRAND licence to Unwired Planet’s SEP portfolio would be a global licence, and determined the global FRAND royalty rates on the basis of existing comparable licences.

Huawei appealed, arguing, among other things, that it would be wrong in principle for a national court to be able to impose a global licence and set the terms of that licence. The Court of Appeal dismissed the appeal.

for patent litigators. Two significant points that have emerged which make the UK courts a better venue than other courts: their approach to questions of jurisdiction and their treatment of FRAND as an issue of contract law, rather than competition law.

## JURISDICTION

One of the issues with courts determining FRAND is that patents are national sovereign rights. Most national courts accept that they cannot determine the validity of a foreign patent, even if they can determine infringement (*Chugai Pharmaceutical Co Ltd v UCB Pharma SA* [2017] EWHC 1216 (Pat), [www.practicallaw.com/w-008-7946](http://www.practicallaw.com/w-008-7946)). Opponents argue that setting a royalty rate for sales outside the country is an indirect determination of the validity of foreign patents. It offends principles of comity; that is, the doctrine under which one court may defer to another as a matter of courtesy.

## The approach in *Unwired Planet*

Both the High Court and the Court of Appeal in *Unwired Planet* looked at the matter in a different way. The relief sought was an injunction against the sale of products in the UK that were infringing UK patents. This was clearly a matter for the UK courts. The implementer may raise a FRAND defence. If it does so, it must show that it has not been offered a FRAND licence.

If the SEP owner has a global portfolio and the implementer has a global market, a FRAND offer would be a global offer. If the court has sufficient evidence, such as good comparable licences, it can determine what a FRAND global offer would be. However, it cannot impose a global licence on those terms: the implementer remains free to decide whether

to accept. If the implementer accepts, the matter ends there. If it does not, the court would go on to consider whether to grant an injunction against infringement in the UK.

## Small step, giant leap

*Unwired Planet* has attracted criticism from other countries. Comments on the Kluwer Patent Blog ask whether the court of other countries will be prepared to “sit back and allow the English court to play ringmaster” on issues of FRAND and SEP (<http://patentblog.kluweriplaw.com/2018/10/24/unwired-planet-v-huawei-court-appeal-upholds-birss-js-judgment/>). A leading Indian blog on intellectual property suggests that some part of the *Unwired Planet* judgment appears to be yearning for the “good old days” of the British legal system, which might explain its “grand assumption” of having global jurisdiction, or even perhaps represents a “colonial hangover that refuses to go away” (<https://spicyip.com/2018/10/an-oxymoron-by-definition-the-decision-by-uk-court-of-appeal-in-unwired-planet-v-huawei.html>).

However, the author’s view is that the step that the UK courts have taken is actually quite a small one. All courts accept that they can determine whether or not a particular offer is FRAND. Some have accepted that a FRAND offer is a global offer; for example, in the German cases of *Pioneer v Acer* and *St Lawrence v Vodafone* and in the US court’s decision in *TCL v Ericsson* (7 O 96/14; 4a 073/14). The additional step that the UK court has taken is to go beyond giving a yes or no answer to the question of whether an offer is FRAND, and to determine what FRAND is if neither of the offers on the table are FRAND. Jurisdictionally, this is a small step, but in terms of usefulness in resolving disputes, it is a giant leap.

## A CONTRACT LAW APPROACH

In *Unwired Planet*, the Court of Appeal treated the FRAND undertaking as contractually enforceable by an implementer against a SEP owner. Other courts, notably the German courts, and the European Court of Justice (ECJ) in *Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH*, approach FRAND through the lens of competition law (C-170/13, see Briefing “Standard essential patent injunctions: guidance for all concerned”, [www.practicallaw.com/3-618-8693](http://www.practicallaw.com/3-618-8693)). A contract law approach is a significant benefit because it sidesteps a difficult hurdle in the competition law analysis; that is, establishing whether a SEP owner holds a dominant position in the market.

### Dominance

Although the ECJ highlighted in *Huawei v ZTE* that dominance is not automatic, many people mentally equate SEP ownership with dominance. The theory is that, as SEPs are not substitutable, there is a separate market for licences to each SEP. The SEP owner has 100% market share in that market and is therefore dominant. The European Commission’s April 2014 decision in *Motorola* was the high-water mark of this approach (IP/14/489, [http://europa.eu/rapid/press-release\\_IP-14-489\\_en.htm](http://europa.eu/rapid/press-release_IP-14-489_en.htm)). However, there are situations where this does not hold true, for example:

**Competing standards.** Where there are competing industry standards, it is harder to argue that a SEP applicable to one standard confers market dominance on the SEP owner. This is because the implementer has a choice of standards, and if the price for one is too high it may choose another (see, for example, Damien Geradin and Miguel Rato’s 2010 article “FRAND Commitments and EC Competition Law: A Reply to Phillippe Chappatte” (2010) 6 *European Competition Journal* 129, 167 (2010), <https://doi.org/10.5235/ecj.v6n1.129>; and Urška Petrovic’s book “Competition law and standard essential patents: A transatlantic perspective” *Kluwer Law International* 2014, pp 71-73, available at <https://rus.wolterskluwer.com/store/product/competition-law-and-standard-essential-patents-a-transatlantic-perspective/>).

**Optional SEPs.** If a SEP covers an optional technology within a standard, and the option is not used, the implementer may not need a licence to that SEP. The counterargument to this is that, because SEPs are licensed on a portfolio basis, an implementer usually

## Explaining SEPs and FRAND

Industry standards are technical requirements or specifications that seek to provide a common design for a process or product. They are important in order to promote interoperability so that, for example, mobile phones made by different companies can be compatible and communicate with each other. Industry standards can have substantial benefits for consumers, such as in lowering production costs and increasing competition.

Standard essential patents (SEPs) are patents that are essential in order to implement an industry standard. There is therefore the potential for a holder of a SEP to engage in anti-competitive conduct, for example by excluding competitors from the market or demanding excessive royalties. As a result, standard-setting organisations require SEP owners to licence them on terms that are on fair, reasonable and non-discriminatory (FRAND).

must still take a licence to the optional SEPs because other SEPs in the portfolio read on to mandatory features.

**Designing a workaround.** There also remains unresolved the issue of the SEP which can, in practice, be designed around. The implementer may be technically departing from the standard in doing so, but it is still making a marketable product. For example, in *Nokia Corporation v IPCOM GmbH & Co KG*, the High Court found valid a divisional patent of a parent mobile phone patent, which had been held invalid in previous litigation between the parties ([2011] EWHC 1470 (Pat)). IPCOM’s patent was found to read on the Universal Mobile Telecommunications System (UMTS) standard. Nokia altered its phone handsets so that they would still work in any UMTS network and pass all conformance tests, but they worked in a different way to that specified in the UMTS standard. There is also an upcoming decision in *Koninklijke Philips v Asustek and HTC*, with the trial scheduled for July 2019, where Philips seeks a declaration of non-compliance with UMTS after HTC adopted a similar design around. This leaves the questions of whether, if an implementer is able to design a workaround, the SEP owner can be dominant.

It is likely that, in the future, there will be more effective challenges to the existence of dominance. The assumption on which dominance rests: that an implementer cannot enter the market without taking a licence, does not apply in practice. Many implementers operate for years, and some build quite large market shares, before they become licensed. For example, in *Motorola*, Motorola complained that Apple had been using the patent alleged to confer dominance

for seven years, and to become the global market leader, without a licence. In addition, LG Electronics was a major market player for 15 years before taking a licence to Nokia’s patents ([www.reuters.com/article/us-nokia-patents-idUSKBN00W1HJ20150616](http://www.reuters.com/article/us-nokia-patents-idUSKBN00W1HJ20150616)).

Equally, the SEP owner is not free to set its own price, which is another test for dominance. With courts able to determine FRAND, implementers can ask a court to determine the rate. The fact that they can do this constrains the SEP owner to license at FRAND rates. Ironically, the existence of the remedy undermines the basis of the claim on which it relies.

In future cases, it may also be recognised that the concept of market dominance as a binary concept, in which dominance either exists or does not exist, does not translate well into SEP licensing. It may be better to recognise that in each licensing negotiation there exists a balance between the buying power of the implementer and the pricing power of the SEP owner. It may be that abuse, by either party, of a significant asymmetry in that power should still be actionable. However, an assessment of whether particular conduct is abusive will need to take into account the degree of asymmetry in bargaining power. It may, for example, be abusive for a large SEP owner to put a high opening offer to a small unsophisticated new entrant, but not be abusive to put the same opening offer to a large implementer that has access to an experienced and weighty legal team.

### Moving away from competition law

The UK may not be alone in moving away from a competition law approach to FRAND. The US Department of Justice’s “New Madison” approach put forward by US Assistant Attorney

General for the Antitrust Division, Makan Delrahim, argues that antitrust law should not be used as a tool to enforce FRAND commitments that patent holders unilaterally make to standard-setting organisations ([www.justice.gov/opa/speech/file/1044316/download](http://www.justice.gov/opa/speech/file/1044316/download)). He asserts that FRAND commitments are better enforced using contract law.

The main advantage to the parties to litigation in recognising a contract law basis for FRAND is that it avoids all of the argument about dominance. This makes proceedings quicker and cheaper. The UK courts only need to fall back to competition law in cases where the SEP owner is not a member of a standard-setting organisation or has not made an enforceable declaration.

### Approach of other courts

The UK is not unique in advancing the determination of FRAND cases. More FRAND cases have been heard in Germany than in any other jurisdiction to date. The German courts have long subscribed to the view that they can determine whether or not a particular offer is FRAND, but they cannot determine FRAND in the abstract. However, that attitude may be softening.

German courts may be prepared to adopt a quasi-mediator role. They will require parties to submit their respective global offers, anonymised comparable licences and other evidence, such as top-down analyses and expert reports. If they believe that a global offer is close to but not FRAND, they may informally advise the parties of this at the outset of a hearing and allow them to reconsider their positions. If, following the court's guidance, a party submits a revised global offer and this is not accepted, the court may use that offer to determine whether or not an injunction should follow.

In China, possibly in reaction to the UK courts' decisions in *Unwired Planet* and *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd and others*, the Guangdong High Court issued some draft guidelines on SEP on 26 April 2018 ([2018] EWHC 1216). The guidelines do not appear to have been finalised and are no longer publicly available. Notably, they included a provision that appears to allow the court to determine global FRAND where one party does not agree.

If followed, this would go a step further than the UK, imposing a mandatory license on the implementer or SEP owner. However, the

status of these guidelines is unclear: shortly after their publication, China consolidated its patent system and rerouted all appeals of technology-related intellectual property cases directly to the Supreme People's Court in Beijing with effect from 1 January 2019.

## EFFECTIVE DISPUTE RESOLUTION

*Unwired Planet* is a huge advance towards an effective dispute resolution forum but there are other steps that the UK courts could take to improve matters further.

### Speed and cost

To date, portfolio determination court cases have been slow and expensive. Slow is bad: typical SEP licence durations are five years, and so a four-year or more rate-setting process is not practicable. An expensive process is acceptable if the patent owner has a large SEP portfolio and the implementer is a giant, because the costs will still be small relative to the royalties. An expensive process is not viable if the SEP portfolio or implementer is small. With more participants contributing technology to standard-developing organisations, and standardised technology being implemented in a wider range of products, there is an increasing need for a dispute resolution mechanism that can determine FRAND quickly and cheaply.

Arbitration has managed to achieve quick resolutions. International Chamber of Commerce (ICC) FRAND arbitrations have been managed from start to finish within 18 months. As it commonly takes six months just to set up a tribunal, this means that the substantive briefing, argument and decision were made within a year. In the last decade, the UK has become one of the faster courts, but even so it has rarely been able to match the speed of FRAND arbitration. One UK SEP case, *TQ Delta LLC v Zyxel Communications UK Ltd and another*, looked like it might get to trial within a comparable timeframe, but the trial originally scheduled for October 2018 has been pushed to 2019 ([2018] EWHC 1515).

The UK's new shorter trial procedure is a further step to achieving speed (see feature article "*Streamlined litigation: piloting towards shorter and flexible trials*", [www.practicallaw.com/5-620-0509](http://www.practicallaw.com/5-620-0509)). It aims to offer dispute resolution on a commercial timescale. Cases will be managed with the aim of reaching trial within approximately ten months of the issue of proceedings, and judgment within six weeks after that.

The problem with the shorter trial scheme is that litigants will not necessarily get to use it. In any case where one party wants to avoid a FRAND determination, that party will inevitably argue that the case is not suitable for the shorter trial scheme. It will argue that there is too much evidence, or too many witnesses, or that it needs at least two days to cross-examine its opponent's expert witness. If it succeeds, the case will fall back into the slower track. This makes the UK less competitive. When faced with a decision as to whether to bring a FRAND action in the UK, where one might get a quick and cheap procedure, or go for an injunction in Germany, where one will get a quick and cheap procedure, it is obvious which a claimant will choose.

It is therefore good news that, outside the shorter trials scheme, the UK is trialling a new initiative to limit the cost and delay of the discovery stage of the process (see *Opinion "Proposals for disclosure reform: do they fit the bill?"*, [www.practicallaw.com/w-012-8522](http://www.practicallaw.com/w-012-8522)). Known as the disclosure pilot scheme, it limits the scope of discovery and allows, in appropriate cases, for discovery to be almost entirely dispensed with. Parties will always be required to disclose known adverse documents so, for example, a party cannot refuse to disclose an unfavourable comparable licence.

### Portfolio comparison methods

So far, the UK courts in *Unwired Planet*, and the US court in *TCL v Ericsson*, have used relatively unsophisticated techniques for comparing portfolios. SEP portfolios are living things: they change over time. This is the reason why the High Court in *Unwired Planet*, in seeking comparable licences, preferred recent licences.

Future cases may reach a more accurate result if they use a wider range of comparable licences and adjust for changes in portfolio over time. That adjustment must account for changes in: numbers of patents; jurisdictional spread; and weighting across different generations of technologies. This requires a number of technically challenging steps, including removing expired patents, and allocating patents to the correct owner and to each standard generation. It is not possible to tell from, for example, the European Telecommunications Standardisation Institute (ETSI) database alone what size portfolio each person holds, or held at the relevant point in time. This is because

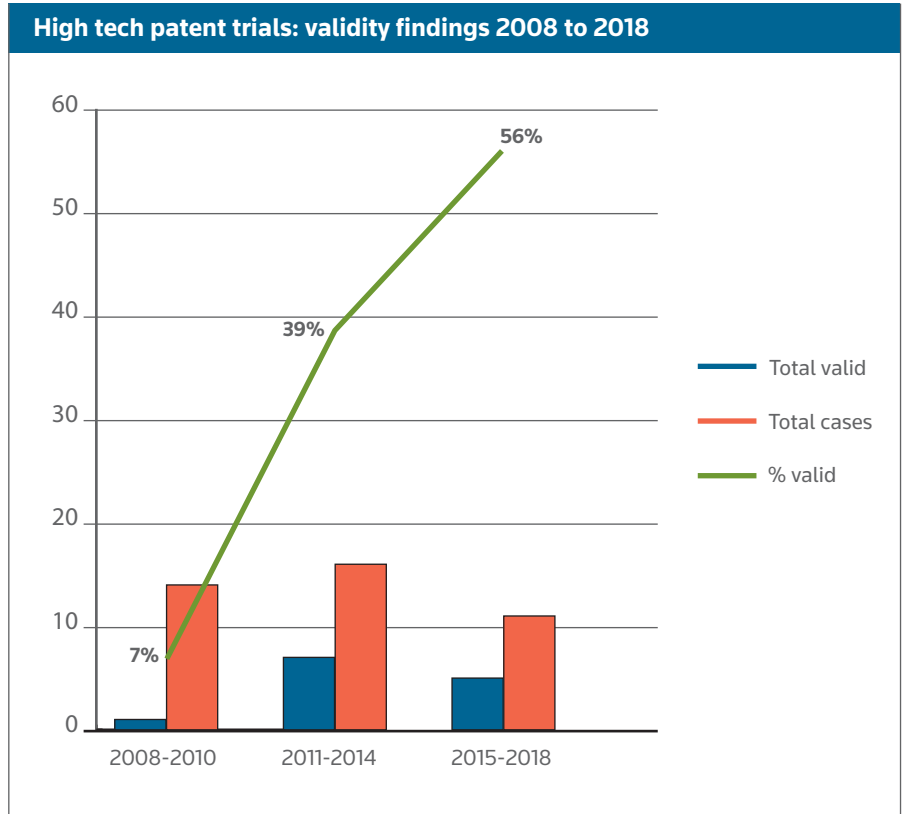
databases such as ETSI do not include all the patents in each declared family, and do not contain the necessary bibliographic patent information to perform calculations on expiry dates or ownership.

Recognising that not all SEP families are of equal value, economists use more sophisticated proxies for value. Courts, with one exception in China for *Huawei v Samsung*, have so far limited their portfolio valuation methods to a count of unique SEP families in the portfolio in question.

**Forward citations.** One proxy is forward citations, which requires a measure of the number of citations (that is, documents that cite a patent) received by each patent family in the portfolio. In order to be accurate, this kind of measure requires sophisticated normalisation techniques, adjusting for the age of a patent or the country that it was filed in. Age normalisation is necessary because a patent will attract forward citations over its life. Without normalising for age, an older patent might appear more valuable because it has had a longer time period to attract citations.

Jurisdiction normalisation is necessary because a patent filed in some countries, most notably the US, will attract more citations than the same patent filed in another country. It is also necessary to eliminate self-citations. A self-citation occurs where a company cites one of its own patents. Some companies have a policy of doing this and, unless corrected for it, may inflate the apparent value of their portfolio. However, not all citations to another patent belonging to the same company are self-citations. A party needs to be able to differentiate citations in a patent that arise from the examiner, which would be a genuine third-party citation, from those that arise at the instigation of the patent owner.

**Contributions to standard.** A second proxy that courts may need to consider is the SEP owner's technology contributions to a standard. The US court in *TCL v Ericsson* rejected this with the observation that contributions are not patents. However, it is relatively uncontroversial that if two parties each hold a large patent portfolio, the party which has contributed significantly to the development of the standard is likely to have the more valuable portfolio than the party which has not. Therefore, as a proxy for value, contribution counting deserves consideration and may be no more inaccurate than any



other proxy. The Chinese court used it in *Huawei v Samsung*.

**Jurisdiction-weighted counting.** A third proxy is jurisdiction-weighted patent counting. There are two reasons behind weighting by jurisdiction. First Patent departments operate to a budget, which must cover renewal fees. Portfolio managers therefore apply some intelligence in deciding how widely to file a patent. If the invention is considered particularly valuable, the department may file and maintain protection across a wide range of countries. A more peripheral invention may be maintained in only one or two countries. Secondly, the value of a patent family is, in part, dictated by how widely it is in force. A patent family that covers a wide range of countries will be more valuable in a global licensing negotiation than a family that covers only the US. Consequently, some economists have started to consider jurisdiction-weighted patent counting as a proxy for portfolio value (<http://fs2.american.edu/wgp/www/PatFamValue.pdf>; [www.sciencedirect.com/science/article/abs/pii/S0048733313001297](http://www.sciencedirect.com/science/article/abs/pii/S0048733313001297)).

### Essentiality studies

A further factor that will add sophistication to a dispute resolution forum for FRAND is the use of third-party essentiality studies. In *Unwired Planet* and *TCL v Ericsson*, both implementers commissioned a sampling

exercise by the expert Professor Ding (*Case 8:14-cv-00341-JVS-DFM Document 1889 Filed 02/22/18*). Professor Ding's study is now the fifth published study into essentiality of SEPs. Others have been conducted by:

- PA Consulting ([www.paconsulting.com/our-experience/ite-essential-ipr-report-and-database](http://www.paconsulting.com/our-experience/ite-essential-ipr-report-and-database)).
- Article One ([http://newsletters.articleonepartners.com/news\\_f1317eac-ee13-5a66-d0f5-38ea99a4c1eeLTE-Standard-Essential-Patents-Now-and-in-the-Future.pdf](http://newsletters.articleonepartners.com/news_f1317eac-ee13-5a66-d0f5-38ea99a4c1eeLTE-Standard-Essential-Patents-Now-and-in-the-Future.pdf)).
- iRunway ([www.i-runway.com/images/pdf/iRunway%20-%20Patent%20&%20Landscape%20Analysis%20of%204G-LTE.pdf](http://www.i-runway.com/images/pdf/iRunway%20-%20Patent%20&%20Landscape%20Analysis%20of%204G-LTE.pdf)).
- Fairfield Resources International ([www.frlicense.com/wcdma1.pdf](http://www.frlicense.com/wcdma1.pdf)).

All of these studies have been criticised: reasons include bias alleged by the reviewers, inadequate subject-matter expertise or not enough time spent per patent. The difficulty of looking at only one study is that there is no way to test whether the criticisms have merit. If the underlying data from these studies is compared, it will be possible to see whether correlations will emerge, or

## High Court patent judgments 2018

Case	Dispute	Judge	Result
<i>L'Oreal Societe Anonyme v RN Ventures Ltd</i> [2018] EWHC 173	Electronic facial skin care devices (heard under the shorter trial scheme).	Mr Justice Henry Carr.	Valid and infringed.
<i>Cantel Medical (UK) Ltd v ARC Medical Design</i> [2018] EWHC 345	European patent and UK patent to a cover for colonoscope shaft.	His Honour Judge Hacon.	Valid and infringed (as amended).
<i>Anan Kasei Co Ltd and another v Molycorp Chemicals &amp; Oxides (Europe) Ltd</i> [2018] EWHC 843	Patent for vehicle exhausts.	Roger Wyand QC.	Invalid and not infringed.
<i>Bose Corporation v Freebit AS</i> [2018] EWHC 889	Patent for an improved earpiece "in ear" device.	Roger Wyand QC.	Valid and infringed.
<i>Koninklijke Philips v Asustek Computer Incorporation and others</i> [2018] EWHC 1224	First of three trials for standard essential patents (SEPs) for Universal Mobile Telecommunications System (UMTS), in particular for High Speed Packet Access (HSPA).	Mr Justice Arnold.	Valid and infringed.
<i>Liqwd Inc and another v L'Oréal (UK) Ltd and another</i> [2018] EWHC 1845	Patent concerning method for providing breached hair.	Mr Justice Birss.	Claim 11 (as amended) valid and infringed.
<i>Koninklijke Philips v Asustek Computer Incorporation and others</i> [2018] EWHC 1732	Second of three trials for SEPs for UMTS, in particular for HSPA.	Mr Justice Arnold.	Invalid for obviousness.
<i>Koninklijke Philips v Asustek Computer Incorporation and others</i> [2018] EWHC 1826	Third of three trials for SEPs for UMTS, in particular for HSPA.	Mr Justice Arnold.	Valid and infringed.
<i>Chugai Pharmaceutical v UCB and others</i> [2018] EWHC 2264	Claim construction of a US patent for tocilizumab for rheumatoid arthritis.	Mr Justice Birss.	Not infringed.
<i>Clearswift Ltd v Glasswall (IP) Ltd</i> [2018] EWHC 2442	Validity of a patent concerned with malware protection.	David Stone.	Invalidity attack dismissed.

whether the results are too inconsistent to be useful. If they do correlate, the combination of essentiality data may give a clearer picture of the value of respective SEP portfolios. However, to decide if these studies are useful, future courts will need to consider more than one in the abstract.

### Increased data

This leaves the question of how this increased sophistication fits with a desire to make cases quicker and cheaper. Future cases will undoubtedly need patent portfolio data analysis tools that are able to take all of these factors into account and generate accurate measures for each metric for any company in the industry at any date of interest. Currently, the only tool capable of SEP portfolio analysis across time is Pattern ([www.twobirds.com/en/client-solutions/consulting/pattern](http://www.twobirds.com/en/client-solutions/consulting/pattern)). The use of data analytics

software will reduce the time and cost of these steps.

Having more data will make the court's decision easier, not harder. It is relatively quick and easy for a court to value a personal injury such as a broken leg, or a soft tissue neck injury, because there are so many comparable data that it can use to reach its decision. The large amount of data leaves very little room for argument. It is harder, and therefore slower and more expensive in litigation, to determine damages for an injury where there may be few or no comparable data. That requires much more argument and there is greater room for conflicting expert opinion evidence.

The same will be true of setting FRAND rates: more and better data will make for quicker decisions and give less scope for argument.

### DISPELLING THE MYTH

UK practitioners and judges roll their eyes at the decade-old characterisation of the UK as a patent graveyard. The problem is that, outside the UK, the reputation persists. The old saying that if a UK judge understands the patent it is obvious but if he does not it is insufficient, has staying power, in part, because it is amusing. But reputations can be hard to shift. The patent counsel who watched their patents get revoked 20 years ago are today's general counsel and chief legal officers. They may take a lot of convincing to come back to the UK. It also suits practitioners from other countries to perpetuate the myth that, if you sue in the UK, you will lose.

The best way to dispel the myth is to have a look at some statistics. In high-tech cases,

rates of validity in UK cases have increased from 7% in the early 2000s to over 50% today; more than half of the high-tech patents asserted in the UK are being upheld as valid (see box "" *High-tech patent trials: validity findings 2008-2018*").

The statistics for all patents for 2018 are particularly interesting. There were 12 patent trials in the Patents Court in 2018 involving 13 patents (see box "*High Court patent judgments 2018*"). Three did not involve validity attacks on the patents: one of these was a claim construction, one was a supplementary protection certificate and one was an exhaustion case. Of the ten patents that involved validity and infringement, eight were found valid. Seven of those were also infringed; the eighth did not involve infringement. Three of the ten patents were SEPs, with two out of the three being found valid and infringed. The Court of Appeal demonstrated a tendency to uphold the first instance patent decisions, with only two of the 12 appeals being allowed.

The UK today is clearly not an anti-patent forum as it has sometimes been portrayed. The UK's jurisdiction, confirmed in *Unwired Planet*, to determine global FRAND means that the UK can replace multiple forums in a SEP dispute. The challenge now is to use the shorter trial scheme and the disclosure pilot scheme to make the process very much quicker and cheaper.

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