

Global developments in FRAND

Introduction to latest developments

Introduction to FRAND: some terminology

United States: Ted Stevenson

- TCL v Ericsson
- FC v Qualcomm, Ericsson v HTC

Across the pond: Richard Vary, Bird & Bird

- Unwired Planet.... What's happening?
- Sisvel v Haier: "willingness"
- Anti-anti suit injunctions

Terminology

The language of FRAND

FRAND: Fair, reasonable and non-discriminatory

- Origins: 1994 ETSI IPR Policy Art 6.1. Other SDOs: TIA, ATIS, IEEE

"Declared essential"

- A shorthand. "Information statements and licensing declarations"

Comparable licences analysis

- Determining FRAND based on what others similarly situated have paid in similar transactions

"Top-down"

- Shares of the pie



ETSI Rules of Procedure, 3 April 2019

IPR INFORMATION STATEMENT AND LICENSING DECLARATION

IPR HOLDER / ORGANISATION ("Declarant")
Legal Name: Nokia Technologies Oy

CONTACT DETAILS FOR LICENSING INFORMATION:
Name and Title: Mr. Kalle Mollanen, Manager, Patenting
Department: IPR
Address: Kangaspuu 3, FI-02010 Espoo, Finland
Telephone: +35830030222 Fax:
Email: kalle.mollanen@nokia.com URL:

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In accordance with Clause 4.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby informs ETSI (the Declarant) and/or its AFFILIATES (present below that the IPR(s) disclosed in the attached IPR Information Statement Annex may be or may become ESSENTIAL in relation to at least the ETSI Work Item(s), STANDARD(S) and/or TECHNICAL SPECIFICATION(S) identified in the attached IPR Information Statement Annex.
The Declarant and/or its AFFILIATES (check one box only):
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 This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate (check box if applicable):
 The Declarant and/or its AFFILIATES are not prepared to make the above IPR Licensing Declaration (reasons may be explained in writing in the attached IPR Licensing Declaration Annex).

The creation, validity and performance of this IPR information statement and licensing declaration shall be governed by the laws of France.
Terms in ALL CAPS on this form have the meaning provided in Clause 15 of the ETSI IPR Policy.

SIGNATURE: *Kalle Mollanen* *Ari Aarnio*
By signing this IPR Information Statement and Licensing Declaration form, you represent that you have the authority to bind the Declarant and/or its AFFILIATES to the representations and commitments provided in this form.

Name of authorized person: Mr. Kalle Mollanen
Title of authorized person: Manager, Patenting Ari Aarnio, Senior Manager
Place, Date: Espoo, Finland, 30/01/2020

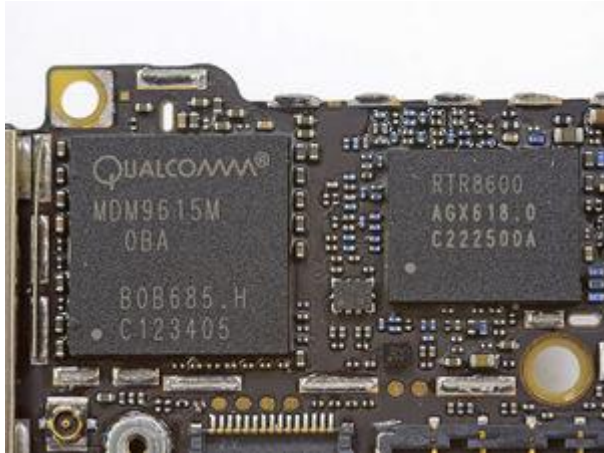
Please return this form duly signed to: ETSI Director General
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FTC v Qualcomm/Ericsson v HTC

What is the royalty base?



FTC v Qualcomm

District court ruled “Qualcomm’s use of the handset device as the royalty base is inconsistent with Federal Circuit law on the patent rule of apportionment.”

District court confined its analysis to two paragraphs and did not consider any evidence of French law or the intent of ETSI as drafter of the IPR policy.

District court found Qualcomm royalties, which ranged from 3.25% - 5%, to be in excess of FRAND.

HTC v. Ericsson

District court treated FRAND as an issue of contract interpretation and took evidence of the intent of ETSI in 1994, finding: “as a matter of French law, the FRAND commitment embodied in the ETSI IPR policy does not require a FRAND license to be based on the SSPPU.” “The ETSI IPR policy neither requires nor precludes a license with a royalty based on the SSPPU. Rather, whether a license meets the requirements of FRAND will depend on the particular facts of the case, as there is no prescribed methodology for calculating a FRAND license.”

District court found SSPPU inapplicable because cellular industry does not license based on the SSPPU, and the cost or profit margin on a baseband processor is not indicative of the value of the programming it encodes.

District court held royalties of \$2.50 per unit, or 1% of phone price (with \$1 floor and \$4 cap) to be consistent with FRAND

TCL v Ericsson

District court held a bench trial and considered two methodologies in determining the range of rates that would be FRAND:

Top down (0.28% to 0.75%) based on different starting assumptions

Comparable licenses (0.32% to 0.84%)

The Court found Ericsson's offers to TCL (both of which were over 1%) were above the FRAND range. So, the Court set the royalty rate within the range it had found (0.45% US, 0.31% ROW). This rate was also used to calculate the release payment due from TCL to Ericsson for past unlicensed sales.

The Federal Circuit reversed, holding a jury determination of FRAND was necessary because the release payment was similar in nature to damages. Case is currently awaiting jury trial scheduling.

Unwired Planet v Huawei

The UK approach

3 issues before Supreme Court

- 1) Does court have jurisdiction to determine a global rate?
- 2) Is "non-discrimination" hard-edged?
- 3) Should Unwired Planet have followed steps in CJEU's decision *Huawei v ZTE* before suing?

Sisvel v Haier

Bundesgerichtsohf

- Huawei v ZTE guidelines: Art 102 decisive
- a willing licensee must be willing to take a license on whatever terms are FRAND
- Is an agreement entered after a "healthy intervention" by a foreign state a comparable?
- Can an infringer who waits be in a better position than other users who ask before being sued?

AASI

Anti-Anti suit injunction

ASI: an order by a court that a party withdraw a case filed in another court

AASI: an order by a court that a party withdraw an ASI filed in another court

Nokia v Daimler and Continental: Germany

IPCom v Lenovo: London and Paris