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LICENSING OF SEPs ON FAIR, REASONABLE AND NON-DISCRIMINATORY (FRAND) TERMS

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STANDARDS-SETTING AT A GLANCE

- Standards development process- inclusion of patent-encumbered technology
- Licensing of patents essential to the standard on FRAND terms
- Increased market power- possibility of “hold-up”
- Lack of precise definition of FRAND

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FRAND IN THE SEP CONTEXT

FRAND

- AS A PART OF LICENSING OBLIGATIONS AT SSOs
- AS A PART OF LICENSING DISPUTES

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LICENSING OBLIGATIONS AT SSOs

- FRAND- common feature of SSO IPR policies
- IEEE IPR policy changes of 2015
- Definition of ”Reasonable Rate”
- Apportionment based on the value of smallest saleable Compliant Implementation
- Favourable BRL from the Antirust Division, US DOJ
- Challenges to the amended policy

FRAND IN LICENSING DISPUTES

Position in the US-

- *Microsoft* v. *Motorola*
- *In re Innovatio*
- *Ericsson* v. *D-Link*
- *CSIRO* v. *Cisco*
- *TCL* v. *Ericsson*

Position in the EU-

- *Unwired Planet* v. *Huawei*

APPROPRIATE ROYALTY BASE

- SSPPU or EMVR?
- Courts in the US divided
- EMVR the governing rule in the UK

WHAT IS “FAIR”, “REASONABLE” & “NON-DISCRIMINATORY” IN FRAND?

FAIR-

- No attempts in the US- RAND instead of FRAND
- Fairness not touched upon in *Unwired* either
- Rawl’s Theory of “Justice as Fairness”
- Equal distribution of goods unless unequal distribution is to the advantage of everyone, especially those who stand to have the least
- Social and economic inequalities justified only in cases where the least advantaged stand to benefit from such provisions
- Burden to be borne equally by innovators and implementers

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REASONABLE

- Ex-ante v. ex-post
- US- value of technology prior to incorporation in the standard
- UK- royalty should reflect the patented technology's value to the standard
- Choice of the royalty base

NON-DISCRIMINATORY

- Reference royalty rate for comparable licenses
- New licensees might be charged a higher or lower rate
- Rates negotiated ex-ante should continue ex post
- Harm to competitor- reflection of (non) discrimination

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WAY FORWARD

- Purpose of FRAND- balancing the interests of innovators and implementers
- Lack of common ground on FRAND between courts and SSOs
- Need for SSOs to step up and bring clarity to their IPR policies
- Competition agencies could lend a helping hand

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