

A Critical Review of FRAND Development in China

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Technical standards have become a core component for a variety of information-communication-technology (ICT) products. Currently most standard-setting organizations require their members license standard-essential patents (SEPs) under fair, reasonable, and non-discriminatory (FRAND) terms. SEPs cover inventions that are necessary to comply with a technical standard, and they are particularly important in the telecommunications industry. FRAND obligation of SEPs holders have become one of the central issues in Chinese patent law since the Guangdong High Court's decision of Huawei v. IDC issued on February 4, 2013. In this case, after comparing IDC's licensing rate to Apple, Samsung, and Huawei, the Guangdong High Court upheld the Shenzhen Intermediate People's Court's decision regarding IDC's violation of FRAND obligation and the determination of licensing rate as 0.019%. This court decision also highlighted the fact that IDC is a non-practicing entity (NPE) should be considered in the determination of the FRAND rate.

Because of the giant size of the Chinese licensor market as well as the country's growing high-tech industry, Chinese courts' decision regarding FRAND rate will have a huge impact on multinational enterprises building their business models on standards or SEPs. This paper provides a critical review of the Huawei v. IDC decision and the Administration Regulations of National Standards Involving Patents released by China's State Intellectual Property Office (SIPO) and the National Standardization Administration on 3 January, 2013. Although the Chinese courts and SIPO have endeavored to shape an unprejudiced standard to define the FRAND obligation and the appropriate royalty rate, this paper argues that there are a number of flaws in the Huawei v. IDC decision and the Chinese Administration Regulations of National Standards Involving Patents.