

Licensing of Standard Essential Patents (SEPs) on Fair, Reasonable and Non-Discriminatory (FRAND) Terms

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Licensing commitments are an integral part of the standards development process. Once patents essential to the development of a standard have been disclosed by patent holders, the next logical step for standards-setting organisations (SSOs) is to secure commitments from patent holders to license these patents on fair, reasonable and non-discriminatory (FRAND) terms. The basic purpose behind making standard essential patent (SEP) licenses available on a non-discriminatory basis is to assure market participants and technology implementers that they shall not be disadvantaged by the fixation of higher royalties in comparison to their competitors, while at the same time guaranteeing patent holders adequate returns on their investment in research and development (R&D).

In order to determine a FRAND royalty rate, the usual course is to determine a reasonable rate and fix the royalty base, the latter of which is either the smallest saleable patent practising unit (SSPPU) or the end market value (EMVR) of the product implementing the standard. While most judgments involving licensing of SEPs in the U.S. and EU have held SSPPU to be the accurate representation of the value of the patented technology, the usual market practice involves EMVR as the correct royalty base for fixing FRAND royalties. *Microsoft v. Motorola* was the first major judicial decision concerning FRAND, wherein the court determined a RAND royalty rate and a range. What followed in quick succession were a series of judgements involving licensing of SEPs on FRAND terms, with each of them advocating for either of SSPPU or EMVR as the appropriate royalty base and using different comparable licenses to arrive at a single FRAND royalty rate. The major turning point came in the form of the U.K. High Court's decision in the *Unwired Planet v. Huawei* case. This was the first time a court in the U.K. had carried out an elaborate determination of FRAND royalty rate. However, the factors taken into consideration for the determination of FRAND royalties were in stark contrast to the ones adopted by courts in the U.S., giving rise to a debate on which of the two approaches were better suited to the determination of FRAND.

Against this background the author would bring out a brief analysis of what is meant by fair, reasonable and non-discriminatory and state the correct approach for the calculation of FRAND royalties.