



FRAND: busy UK Courts, and the European Commission's Initiative on a New Framework for Standard-Essential Patents (SEPs)

Litigation over the Fair, Reasonable And Non-Discriminatory ('FRAND') terms involved in licensing telecoms patents again kept the UK Patents Court busy in 2022. The year kicked off with a trial to determine FRAND terms for InterDigital's cellular SEP portfolio in *InterDigital v Lenovo*, and a 5-week trial to determine the same for Optis's portfolio in *Optis v Apple* over the summer followed the fourth and final technical trial between the parties. *Philips v Xiaomi*, *IP Bridge v Huawei*, and *Ericsson v Apple* all settled to clear the Court's diary, whilst jurisdictional challenges and technical trials kept litigators busy in *Nokia v OnePlus*, *InterDigital v OnePlus*, *Philips v Oppo* and *Kigen v Thales*.

Both the UK Intellectual Property Office (IPO) and The European Commission launched calls for views, to both of which the IP Federation responded. This article focuses on the European Commission's initiative, which sought views on a new framework for SEPs. At the heart of the initiative is the aim of addressing inefficient licensing, hold up (e.g., behaviour by a SEP owner to extract licensing royalties which are excessive and therefore not FRAND, thereby abusing its monopoly rights), hold out (e.g., where a SEP owner claims that a potential SEP licensee resists or delays taking a licence to a SEP portfolio), and forum shopping (when litigants look to have disputes heard in jurisdictions they consider most favourable to them). A lack of transparency was said to be a major factor in hampering SEP licensing, which the Commission said in turn slows the pace of innovation in a world that is increasingly reliant on the numerous technologies underpinned by SEPs. By calling for feedback from industry participants (which was received in May 2022), the Commission intends to develop guiding principles and processes to better industry understanding of the underlying SEPs themselves, which it hopes will enhance the efficiency of SEP negotiations, licensing, and enforcement and improve the competitiveness of EU businesses.

The IP Federation was among the 74 respondents to the Commission's consultation. As was highlighted to the Commission, the IP Federation's members comprise the spectrum of innovative and influential companies: those who are predominantly users of SEPs (licensees); those who are owners of SEPs, and key contributors to standards (licensors); and those who appreciate the permeation of SEPs into industries that may not, yet, be affected. With this spectrum, consensus on some 60 questions posed by the Commission was understandably difficult. The IP Federation did, however, set out various factors that should be taken into account in the initiative, all of which were in line with the aims of the Commission's initiative: encouraging innovation within an IPR system that is effective for large and small companies; maintaining open debate and consultation; increasing transparency of licensing practices, whilst observing necessary confidentiality issues; and improving the quality and neutrality of information available on patent essentiality.

The Commission's feedback is expected in the second half of 2023. In the meantime, the Commission has published a summary of the consultation responses. Responses were predictably divided between potential SEP licensees and SEP licensors, but some interesting points emerge. Respondents estimated that the costs of SEP exposure, per product, amounted to an average of €230,000, where such SEP costs and risks are shared throughout the supply chain. Around 70% of potential SEP licensees take a licence without litigation, with negotiations taking on average, 3 years and 3 months. Information availability and asymmetry regarding SEPs, their owners, checks on their essentiality, the standards to which they are said to be essential, and licence rates and terms that cover those SEPs, were key items the respondents are concerned with.

The FRAND landscape will continue to develop considerably over the course of the next year in the UK and Europe.

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