

Comparable licences in FRAND negotiations: a principled starting point for valuation

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On 1 May 2025, the UK Court of Appeal handed down its **judgment** in *Optis v Apple*, relying on the comparable licences approach to determine FRAND rates. In reaching its decision, the court focused on comparable licences for both the implementer and the innovator.

Indeed, the Court of Appeal found that, while factors other than comparable licences can be considered to determine FRAND rates, they are very unlikely to move a decision away from reliance on comparable licences.

The *Optis* approach

In *Optis*, the implementer (Apple) and the innovator (Optis) disagreed over the licence fee due from the implementer to the innovator for the use of patents declared essential to certain standards. The lower court had decided that the licence fee to be paid by the implementer was an annual lump sum of \$5.13 million per year for 11 years, resulting in a total of \$56.43 million.

The Court of Appeal, in contrast, determined that a \$502 million lump sum licence fee, along with interest, was appropriate.

In analysing the lower court's approach, the Court of Appeal found that the lower court should not have "reject[ed expert] evidence wholesale as he did" regarding comparable licences.

Further, the lower court erred in using its own method of determining the FRAND rate, which was to "take a simple average" of a number of licence rates, a method which had "no precedent or basis in the evidence before him nor can it be justified in principle". In doing so, the lower court used "less good comparables to modify a result from better ones", the appeal court determined.

Instead, the Court of Appeal found that the correct approach to determine FRAND rates is to "identify[] the best comparable or comparables, excluding others and working from there". The starting point should be the innovator's comparables.

In the *Optis* case – involving a FRAND licence for handsets – a licence by the innovator of the "same portfolio albeit to a different handset manufacturer is likely to be the place to start to identify the best comparable". Licences entered into by the implementer could also be considered, as they are "capable of being useful comparables", depending on the "relationship between the patent portfolio being licensed and the [innovator's] portfolio".

However, the Court of Appeal cautioned that the comparability of implementers' licences also depends on "the issue of portfolio quality", which involves the consideration of multiple factors, such as differences in the strength of patent portfolios, as well as the way in which patents are licensed.

Importantly, the court noted that the so-called "top-down" approach to setting a licence fee, where a court first determines the aggregate royalty for licence rights to the patents reading on a standard, and then allocates portions of the royalty to licensors based on each licensor's "proportional" contributions to the standard, has severe challenges.

In particular, the Court of Appeal observed that a "serious difficulty" with the top-down approach was "how to find the starting point for the [aggregate royalty] itself". This approach is especially challenging when used as a baseline; it should be used (if at all) only as a cross-check when comparables can be used in the first instance.

Similarly, the Court of Appeal noted that the "bottom-up" approach, where a court first assesses royalty rates for individual patents within a portfolio, suffers from

analogous informational challenges and can be relied upon (if at all) only as a cross-check.

Comparable licences

In reaching its decision, the Court of Appeal emphasised the use of comparable licences as the primary reference point for determining FRAND rates. This approach not only vacated the incorrect decision reached by the lower court but also provides a path forward in resolving FRAND disputes.

The starting point in any FRAND analysis should be the licensor's comparable licences. Such licences accurately reflect how the innovator values its patents, and how others in the market have agreed to compensate the innovator for use of its patents.

Even when only one such licence is deemed comparable, it should be given significant weight: in *Optis*, for instance, the innovator relied heavily on one licence as its comparable, an approach that the Court of Appeal agreed with.

While the licensee's comparable licences can also be taken into account, such data is inherently harder to interpret due to inevitable variations in portfolio quality and strength (between the innovator's patents and the patents included in the implementer's other licences), among other things, causing an added difficulty in "unpacking" such licences.

In determining comparables, other courts have also looked to factors such as geographic scope, exclusivity, payment structure and competitive circumstances.

As noted by the *Optis* court, it would be a mistake to modify a result based on valid comparables by applying other much less reliable factors such as "top-down" analysis.

The "top-down" approach, like the "bottom-up" method, faces significant informational hurdles and inevitably leads to substantial under-valuation. Given their severe limitations, the "top-down" and "bottom-up" approaches should be used, if at all, only as a check and not to override the analysis applied using comparable licences. These other approaches can be used to test whether the royalty outcome lies within a plausible range, but not as a primary valuation mechanism.

Further, it stands to reason that the persuasive value of comparable licences increases with their number and consistency. When multiple licensees have accepted similar licensing terms for the same portfolio and the same kind of products, those agreements become increasingly conclusive evidence of fair and reasonable terms (including royalty rate).

At some point, it becomes useless to look further to determine the FRAND rate; as the *Optis* court noted, once there is an exact parallel (whether based on one

comparable licence or a set of comparable licences), it would be a mistake to modify it.

As the *Optis* court observed, quoting from *Smith Kline & French Laboratories Ltd's (Cimetidine) Patents* [1990]: “[t]he object of the comparability exercise, in this as in any other branch of the law, is to find the closest possible parallel. **If there is an exact parallel, there is no point in looking any further.** If there are slight differences, an allowance may be made. **But once you have found your comparables, whether one or more, which enable you to arrive at the appropriate figure, it would surely be erroneous to modify that figure by reference to other cases which are not truly comparable at all**, so as to bring the case into line with a predetermined range” [emphasis added].

Consider, for example, a case where the same patent portfolio has been licensed on identical terms to a dozen or more manufacturers of the same kinds of licensed products. An unlicensed implementer seeking preferential treatment would be required to justify convincingly why it should receive more favourable terms than the many others who have accepted licences at the established comparable rate, and how those more favorable terms would comport with the “non-discriminatory” part of the FRAND commitment.

It is difficult to imagine the exceptional set of circumstances in which an implementer could meet this burden.

Conclusion

As the *Optis* court observed, negotiations are adversarial in nature, and aggressive negotiating positions are not *per se* unlawful. Indeed, the FRAND regime is meant to mitigate such behavior.

To further this objective, other courts should look to the approach taken by the *Optis* court – use innovators’ comparable licences (when they exist) as a starting point, and take other factors and approaches into account where necessary but without discounting or deviating from the valuations reached by comparable licences.

Anchoring FRAND determinations in real-world licensing practices ensures both fairness and predictability, while preserving the integrity of the negotiation process and the value of innovations.

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