Why global FRAND rate-setting must require SEP owner consent

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- **Courts may set global FRAND rates where both parties consent, using comparable licences.**
- **Where only SEP owners seek rate-setting, courts should first assess FRAND compliance, reserving rate guidance as a secondary step.**
- **Courts should not set rates at implementers' request alone, as this lacks enforceability, risks conflicting rulings and undermines property rights.**

In late 2025, Sun Patent Trust and Ericsson, each an owner of standard essential patents, filed applications in the Unified Patent Court (UPC) asking the court to set fair, reasonable and non-discriminatory (FRAND) global royalty rates in *Sun Patent Trust v vivo* and *Ericsson v Transsion*, respectively.

Most recently, on 16 March 2026, the UPC Court of Appeal affirmed the Paris Local Division's ruling on vivo's preliminary objection against Sun Patent Trust in *Sun Patent*

Trust v vivo, which deferred the admissibility of Sun Patent Trust's request for the court to set FRAND rates to the main proceeding as an ancillary claim to the main infringement claim. The UPC has yet to rule on the question of FRAND jurisdiction in *Ericsson v Transsion*. If the UPC courts proceed to set global FRAND rates in these two cases, the UPC will become another rate-setting forum from which SEP owners and implementers may choose from, in addition to the UK and Chinese courts. This, in turn, would present the UPC with the opportunity to incorporate appropriate guardrails around rate-setting practices for global SEP licenses based on the *Huawei-ZTE* framework, which it has applied in numerous cases.

However, court-determined global FRAND royalty rates should be the exception, not the norm. Recent cases illustrate three scenarios in which courts may be asked to set global FRAND rates. Importantly, these scenarios are differentiated by consent.

In the first and best-case scenario, both parties consent to the court determining a FRAND rate. In the second scenario, the SEP owner asks the court to set a global royalty rate, but the implementer does not consent.

On the flip side, in the third scenario, the implementer asks the court to set a global royalty rate, but the SEP owner does not consent. Crucial differences exist between these scenarios, especially between scenarios two and three. These differences dictate the approach the UPC should take in response to requests from parties to set global FRAND royalty rates.

Mutual consent

In scenario one, both parties consent to the court setting a global FRAND rate. Under this scenario, the court can and should help the parties resolve their dispute and determine a fair rate.

The court should make its determination primarily using the "comparable licences" approach, relying on prior royalty rates that the implicated SEP owners and implementers have agreed to in actual, arm's-length negotiations with other counterparties.

Courts should first examine licences granted by the SEP owner for the same patent portfolio, as an exact parallel, or if no exact parallels exist, licences granted to implementers for similar patent portfolios.

When there are no exact parallels, courts should also consider factors to help assess the relative quality and degree of similarity of the different patent portfolios, and take into account other material terms such as licence scope, term and termination rights, payment structure and related provisions, the potential impact of future acquisitions and divestitures and the transferability of licence rights.

To date, mutual consent is rare in applications for court determinations of global FRAND rates. Nonetheless, parties could mutually agree to use litigation, or other

forms of dispute resolution, as a means to resolve an impasse in SEP licensing negotiations.

Looking ahead, SEP owners and implementers alike may turn to courts, arbitrators or mediators to serve as neutral third parties in an effort to bridge any pricing gap, especially if courts become increasingly experienced at setting global FRAND rates and issue clear guidance on their methods of rate-setting.

SEP owner consent only

In scenario two, the SEP owner asks the court to set a FRAND rate, but the implementer does not consent. As a threshold question, the court should determine whether the parties have fulfilled their obligations under a FRAND regime. The FRAND-compliance examination involves a two-part test – whether the patent owner has made a FRAND offer and whether the implementer has acted in good faith as a willing licensee.

If the SEP owner has made a FRAND-compliant offer, then the court should defer to the SEP owner's offer. There is no need for the court to set another FRAND rate if one has already been offered by the SEP owner. In this case, the implementer would not have a valid FRAND defence, and the SEP owner should be entitled to all the usual remedies of any regular patent infringement case, including injunctive relief.

If the SEP owner has not made a FRAND-compliant offer but has otherwise complied with the *Huawei-ZTE* framework, and the implementer has acted as a willing licensee, then the court should provide guidance for the SEP owner to cure the deficiencies in its offer. This guidance could include, at the SEP owner's request, a ruling on what terms (or range of terms) would be FRAND for a licence to the implementer.

If the SEP owner then offers a licence on terms consistent with the court's ruling, the implementer must accept the offer or face an injunction. If the SEP owner fails to offer a licence on terms consistent with the court's ruling, the SEP owner is not entitled to any relief and the court should dismiss the SEP owner's case.

Conversely, if the implementer has not acted as a willing licensee by expressing a willingness to conclude a licence on FRAND terms, thus depriving the SEP owner of the opportunity to make a good-faith licence offer, then the implementer has no FRAND defence and the court should treat the case like any other patent infringement case.

Finally, if the SEP owner has not complied with its obligations under the *Huawei-ZTE* framework, it should not be entitled to relief from the court until it has fulfilled those obligations. For example, an SEP owner that has not made a sufficiently clear licence offer to the implementer should not be allowed to have a court formulate a FRAND-compliant licence offer on its behalf. If courts were to assist SEP owners in such cases,

those courts may soon find themselves inundated with cases asking them to do the hard work that is the responsibility of SEP owners.

Implementer consent only

In scenario three, the implementer asks the court to set a FRAND rate, but the SEP owner does not consent. This fact pattern has become commonplace in the UK and has attracted much attention regarding the appropriate course of action. In such cases, unlike scenario two, the court should refrain from setting a FRAND rate at all times since it lacks the authority to do so without the SEP owner's consent. There are key distinctions between the rights and obligations of SEP owners and implementers mandating this result.

SEP owners have no means of relief from violation of their patent rights other than through patent infringement litigation. They are property owners of SEPs and therefore have a fundamental right grounded in property law to set the terms of their licences, so long as the terms are FRAND-compliant. As property owners, they are entitled to ask the court for assistance to abate infringement.

Absent a violation of competition law, they should not be compelled to accept a court-determined rate. Simply seeking a determination of infringement and an injunction is not and cannot be, in and of itself, a violation of competition law (ie, there must be actual evidence of unfair competition beyond the failure to offer a FRAND licence). Otherwise, courts are effectively declaring compulsory licences.

Such compulsory licenses undermine the contractual and voluntary nature of FRAND undertakings, which require SEP owners to offer licences on FRAND terms, but do not compel them to accept court-determined terms.

On the other hand, implementers are protected against an SEP owner's violation of its FRAND commitment through contract law. They have the ability to raise a FRAND contract defence by acting in good faith as a willing licensee, which protects them against liability beyond the requirement to pay a FRAND licensing rate. If an SEP owner has not satisfied its contractual obligation under the FRAND regime by complying with the *Huawei-ZTE* framework, nothing prevents implementers from continuing to utilise the SEPs until the SEP owner mends its ways.

Therefore, the SEP owner stands to lose in any dispute where it is found not to have acted properly under the FRAND regime, and is highly incentivised to act quickly in making a FRAND-compliant offer. It does not need compulsion from the court as an incentive. Put another way, if the SEP owner insists on non-FRAND terms, it effectively forfeits its right to relief. This is economically self-destructive, and thus an unattractive course of action for any SEP owner.

Critics argue that SEP owners effectively consent to a court setting a global FRAND rate by seeking an injunction in that court. This is not true. An SEP owner's attempt to

protect its rights by filing a patent infringement claim and seeking an injunction should not be deemed a relinquishment of the power to set its own rate. A jurisdiction that accepts this implied consent argument will induce SEP owners to bring their patent infringement claims to other jurisdictions where no such consent is inferred.

Similar concerns apply to interim licence declarations issued at the request of SEP implementers over the objection of SEP owners. As illustrated by recent cases in the UK, interim licences present a highly contentious issue and can cause backlash against the credibility of courts imposing them.

Interim license declarations made without the consent of SEP owners have proved more disruptive than productive. In cases such as *Ericsson v Lenovo* and *ZTE v Samsung*, when SEP owners refused to offer interim licences and continued to seek injunctive relief elsewhere in the face of interim licence declarations, UK courts declared them “unwilling licensors”.

Such declarations encroach on the rights of other jurisdictions to adjudicate concurrent claims filed in their courts and violate longstanding rules of comity.

Courts in other jurisdictions have countered the UK courts’ propensity to issue interim licence declarations by issuing “anti-interim licence injunctions” rendering such declarations moot. Notably, the UPC Mannheim Local Division recently announced that EU member states will not recognise UK interim licence declarations, which are against the public order of the European Union.

Without recognition by other jurisdictions, global FRAND rates and interim licences dictated by UK courts are effectively relegated to the status of advisory opinions.

With these dynamics in mind, no court should purport to impose an interim licence, or final licence, unless the SEP owner has expressly consented.

Why courts must treat scenarios two and three differently

There are crucial differences between scenarios two and three that warrant differential treatment.

In particular, courts should consider their ability to enforce a court-determined rate; each party’s legal basis for seeking a court-determined rate in competing jurisdictions; and the importance of making a FRAND-compliance determination as a threshold question prior to any rate determination.

A. Presence or lack of enforcement mechanism

In scenario two, the court has the ability to enforce its determination of a FRAND rate, global or otherwise, through an injunction. The court is not ordering the implementer to accept the licence but rather is enjoining the implementer from selling infringing products in that jurisdiction. The court can and should issue an injunction if the

implementer refuses to accept a licence after a FRAND rate has been offered by the SEP owner (on terms determined by the court or otherwise) and the SEP has been found to be valid and infringed.

On the contrary, in scenario three, if the court purports to set a global FRAND rate at the implementer's request without the SEP owner's consent, such determination is merely an advisory opinion. The court does not have the power to impose an injunction on the SEP owner and does not have any other meaningful mechanism to compel the SEP owner to offer a global license at a FRAND rate set by the court.

At most, the court could declare the patent owner's SEPs in that court's jurisdiction to be unenforceable against the implementer unless and until the SEP owner offers the implementer a licence on FRAND terms. But it should be recognised that there is a range of FRAND terms, and the SEP owner generally may choose any FRAND terms within the range – it is not obligated to offer the specific FRAND terms that the implementer would prefer (or has offered).

By the same logic, the SEP owner has no obligation to offer a licence on terms the court has determined without the SEP owner's consent. The UPC, for one, has already expressly refused to recognise the rate determined by UK courts in the context of an interim licence, and it may very well take a similar approach with respect to a purportedly final global FRAND rate, in each case determined without the SEP owner's consent.

B. Competing jurisdictions

In scenario two, the SEP owner is seeking to enforce a property right created and existing under the laws of the particular jurisdiction in which it filed the patent infringement claim, which can be enforced only by courts (or other applicable governmental bodies) within that jurisdiction. This empowers the court to make a FRAND rate determination (at the SEP owner's request), which is supported by the SEP owner's assertion of its property right in that jurisdiction.

The court cannot force the implementer to accept a licence at the rate set by the court; however, it can enjoin the implementer from selling infringing products in the court's jurisdiction if the implementer refuses to accept such a licence, and such an injunction would not encroach upon property rights in other jurisdictions.

In scenario three, the implementer is seeking to enforce a contractual obligation of the SEP owner pursuant to the FRAND commitment, typically arising under the laws of another jurisdiction, of which the implementer is just one of many third-party beneficiaries. Without express consent from the property owner, any court tasked with setting prices for property rights created in other jurisdictions – solely at the request of a third-party beneficiary of a contractual commitment made by the property owner in another jurisdiction – would typically not be well-placed (or even have authority) to do so, including in the context of SEP licensing.

Moreover, the possibility of conflicting rate determinations (for the same SEPs) from different jurisdictions is ripe.

Consider the scenario where a UK court sets a global rate (at the request of one implementer) and a Chinese court sets a global rate (at the request of another implementer) which is one-tenth the rate set by the UK court, for the same SEP owner, the same SEPs, and the same kind of licensed products.

How could the SEP owner comply with both rulings and also comply with the "non-discriminatory" part of FRAND?

C. Threshold question of FRAND compliance

In scenario two, the initial step is to determine whether the SEP owner (as the party seeking relief) has fulfilled its obligations under the FRAND regime, including whether it has made a FRAND-compliant offer to the implementer. This is especially important in cases where the SEP owner asks the court to take this initial step, as Sun Patent Trust has recently done.

Depending on the outcome, it might not, and often will not, be necessary to reach the FRAND rate-determination step. In scenario three, there is no first step to determine FRAND compliance; that has certainly been the practice in the UK cases. The implementer bringing such an action may be perfectly content for the court to skip over the threshold question of whether the SEP owner has made a FRAND offer, as a means to avoid the court evaluating whether the implementer has acted as a willing licensee or in the hope that the court will set a FRAND rate more to the implementer's liking, even if the SEP owner's offer was also FRAND. But that does not justify omitting such a crucial inquiry.

Even if the SEP owner or the implementer has not requested it, the court should make a FRAND-compliance determination *suasponte* before attempting to set a SEP licence rate. This is a critical threshold question that the court must address prior to any rate-setting determination.

The court's analysis and ruling on this threshold question will inform the parties' understanding of deficiencies in the existing offer, if any, and can be used as a framework to advance settlements and avoid requiring the court to determine a global FRAND rate on behalf of the parties. Courts are inherently ill-equipped to set prices and are far too likely to set rates too high or too low, in either case with adverse consequences.

Conclusion

SEP licensing is fundamentally a commercial arrangement. Parties to a commercial transaction should have the autonomy to negotiate commercially viable terms and rates in the manner they see fit.

Courts are trusted to settle legal disputes and not set commercial terms of contracts. They are best advised to assist with the exercise of rate determination for an SEP licence only in the narrowest circumstances where both parties mutually seek the court's assistance, or if the SEP owner, as the rightful property owner of its SEPs, seeks the court's assistance with that determination.

SEP implementers cannot be entitled to the same treatment as SEP owners, as implementers have no property right in the underlying SEPs. While implementers can require SEP owners to fulfill their contractual obligations under FRAND commitments, they cannot unilaterally empower courts to make a rate determination.

Given the nature of the parties' respective and fundamentally different rights and obligations under the FRAND regime, a court should undertake the difficult task of setting a global FRAND rate only when the SEP owner has consented.

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