Direction of UK courts on “interim” SEP licences spells doom for innovation-based standards

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Establishing global royalty rates for standard essential patents is among the most vexing and important challenges facing both innovators and implementers of innovation-based standards. UK courts have been a focal point for global SEP rate setting, at times seeming to willingly take the challenge despite the risks of jurisdictional overreach and tipping the delicate commercial balance between innovators and implementers.

Now, however, the issue of implementers seeking “interim licences” has brought the UK courts to the brink of doing irreparable harm. Granting implementers short-term licences to SEPs will visit massive damage upon innovators.

UK case law developments

The issue of interim licences for SEP implementers first gained attention last year when a UK court granted a short-term SEP licence in favor of an implementer. In *Panasonic v Xiaomi*, the Court of Appeal **found** that a willing innovator would enter into a short-term FRAND licence with an implementor, and went on to set the terms, including the period and the rate, of that license. The court stated that “an implementor is entitled to a licence from the first day it implements a standard provided it is willing to take a licence on FRAND terms” and that the implementor is “entitled to a licence which is continuous and not subject to interruption by injunctions obtained by the SEP holder”.

Building on last year’s decision, a just-decided appeal in *Lenovo v Ericsson* features the UK Court of Appeal **backing** an implementer’s request for a short-term cross licence covering cellular SEPs. Despite more than 15 years of negotiations, the parties had not been able to agree on the terms of a cross licence on FRAND terms to enable them to use each other’s SEPs; thus, neither party had entered into a licence agreement for the other’s SEPs and neither party paid any royalties to the other. Both parties have sought injunctions and similar orders that attempt to restrain the exploitation of each other’s SEPs in a number of jurisdictions.

In the current case, Lenovo, the implementer, argued that the court should grant a declaration that a willing licensor (Ericsson in this case) would not enforce its injunctive rights and would enter into a short-term cross licence pending the outcome of the proceedings in the UK and other countries. In terms of jurisdiction, the implementer argued that the UK court is “the only court globally that is certainly going to undertake a FRAND determination for a cross-licence” and that the innovator’s refusal to accept a short-term licence pending the outcome of cases in other jurisdictions showed that it was seeking to use the injunctive threat to obtain higher rates than what the UK court might award.

Further, the implementer argued that the question of determining what is FRAND for an interim licence is a much more limited task than determining what is FRAND for a final licence, reasoning that the terms of the short-term licence would be subject to later adjustment by the court. A refusal by a willing licensor to enter into a short-term licence, according to the implementer, constitutes a breach of the FRAND commitment.

On February 28, 2025, the Court of Appeal agreed with the implementer, finding that a "willing licensor" would enter into a short-term cross-licence with the implementer and setting the rate for the short-term licence, subject to the Patent Court's determination of the final licence.

Adverse implications of an interim licence

The UK court's new practice of forcing SEP owners to grant interim licences to implementers carries a number of negative implications for SEP licensing worldwide.

First, as exemplified by the instant case, it overextends the basis on which a court is justified in taking jurisdiction in the first place. The implementer's request here is made on the basis of a French-law governed contractual obligation (under ETSI's clause 6.1) to which the implementor is only one of many third-party beneficiaries, and seeks to have the worldwide licensing terms decided by a single national court. It does not stem from this contractual obligation that UK courts are meant to be the global enforcers of FRAND commitments, nor that they would have the final say on such commitments—in fact, it is hard to imagine a more tenuous basis from which to request what amounts to a compulsory licence.

Second, indeed, an interim licence imposed by a court amounts to compulsory licensing of property sited in other countries. The court in the current case stated that "[t]he only role for an injunction in the [SEP] regime is to enforce the SEP holder's entitlement to [a] financial remedy", effectively equating a FRAND commitment to a compulsory licensing regime.

The grant of such relief eliminates a fundamental aspect of a property right created by the laws of other countries. FRAND commitments have never been understood to create a compulsory licensing regime. Courts in other countries, notably Germany, have found the FRAND commitment to create an obligation (on the part of both innovator and implementer) to negotiate in good faith toward a FRAND licence. That is very different from an actual, compulsory licence with terms determined by a court, as German courts have also recognised. Indeed, the entire *Huawei-ZTE* framework established by the German courts focuses on the negotiating process required by a FRAND commitment and does not hold that the FRAND commitment is a licence with terms to be determined by a court when the parties cannot agree.

However, the court in the current case has not only imposed a compulsory licensing regime on the innovator, but also dictated that the innovator must grant multiple FRAND licences, that is, both a short-term "interim" licence and a long-term one, to the implementer.

Third, the decision conflates a court's proper legal role in FRAND disputes, which is to determine whether an offered licence is fair, reasonable, and non-discriminatory, with an improper business role of actually determining the terms of a FRAND licence. It is common for innovators to seek determinations that their SEPs are valid and infringed, and thus they are entitled to damages and injunctions.

If the accused infringer then raises a FRAND defence, the innovator will seek to overcome that defence by showing that it has fulfilled its FRAND commitment. That is not the same as seeking a determination of the FRAND terms of a global licence. While courts can and should determine whether the parties have fulfilled their FRAND obligations before issuing any injunction, that does not require setting the terms of a FRAND licence for the parties.

A FRAND commitment does not equate to a licence and licensors should remain free to negotiate licence terms as they deem appropriate, so long as such licences are fair, reasonable, and non-discriminatory.

Fourth, the grant of such relief by a UK appellate court will make it difficult to obtain injunctive relief for SEP infringement elsewhere, as a worldwide interim licence granted under an order or declaration by one court eliminates any prospect of any injunction in another country, whether preliminary or permanent. And other countries will quickly follow the UK court's practice, granting interim licences to their national champions on whatever terms meet their national development objectives.

Fifth, the practice of granting such interim licences puts courts in the position of rewarding obvious hold-out behavior. The instant case provides an apt example—after more than 15 years of fruitless negotiations, it should now be too late for the implementer to agree to pay some "placeholder" royalties, whether on a delayed timeframe as the implementer proposes or otherwise, to stave off the natural and foreseeable consequences of its deliberate behavior.

There will be no deterrent to hold-out behavior if the implementer can hold out indefinitely, then suddenly declare itself "willing" to take a licence and avoid an injunction. The 4% interest rate compounded annually in the *Lenovo* decision will not serve as any significant deterrent for hold-out behavior—the rate imposed would have to be several multiples of 4% in order to deter hold-out. Courts endorsing such tactics by the implementer are effectively accepting a thinly veiled version of the boy who has killed both his parents throwing himself on the mercy of the court because he is an orphan. A party should not be permitted to benefit from adverse circumstances of its own making.

Sixth, where, as here, the innovator (Ericsson) has not sought to enforce its SEPs in a particular country (the UK), that country's courts should not be setting worldwide licence terms—interim or otherwise—for that innovator's SEPs without the innovator's consent. While the innovator in the case last year (Panasonic) had given its consent and then tried to rescind that consent, no such recission has occurred in the present situation. And indeed, in many such situations the innovator similarly will not have given its consent.

Without the bright line rule of national courts being constrained by the innovator's consent, the SEP licensing system breaks down and it becomes far too easy to have multiple courts in different countries setting worldwide rates for the same SEPs.

Finally, the implementer should not get to choose its jurisdiction to have worldwide rates imposed on the innovator. The innovator is the one that makes the FRAND commitment, is the one that invests considerable time and money into R&D and standards development work long before the first licensable product is sold (and without any assurance any licensable products ever will be sold), and often has to wait years after the first licensable product is sold to receive any financial return on that investment.

The SEP playing field is inherently asymmetric, with the implementer having many advantages from a real-world business standpoint. At a minimum, the innovator should be in control of how, when and where FRAND issues regarding its SEPs are decided.

Conclusion

While there may have been justifications for last year's UK Court of Appeal decision granting an implementer an interim SEP licence, there was no comparable justification for the court to side with the implementer in the *Lenovo v Ericsson* case.

Implementers are becoming increasingly aggressive in their pursuit of short-term licenses. A healthy SEP system relies crucially on parties' freedom to negotiate and imposing a short-term licence on innovators severely disrupts the healthy, balanced functioning of the system, decreasing the possibility of injunctive relief on a worldwide basis.

And if a UK court can do that, courts in other countries will follow suit, devaluing SEPs and damaging innovation-based standards. In the end, consumers worldwide will be the losers in this predictable cascade of events.

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