Comparable Agreements and the "Top-Down" Approach to FRAND Royalties Determination[1]

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Executive Summary by 4iP Council

Haris Tsilikas published the article "Comparable Agreements and the "Top-Down" Approach to FRAND Royalties Determination", which outlines some of the emerging patterns in global SEP litigation, focusing on the judicial determination of FRAND rates. The author contends that comparable licensing agreements, i.e. licensing agreements signed with similarly situated parties, provide the most reliable evidence on how markets price SEPs. Courts aiming to simulate efficient market outcomes have good reasons to look at real-life agreements for guidance in setting rates in accordance with FRAND principles. Furthermore, Haris Tsilikas argues that the top-down valuation approach requires reliable data-inputs regarding the aggregate royalty rate for a particular standard, and then an apportionment of this royalty to a particular SEP holder based on data relating to the relative value of its SEP portfolio. Such data is impossible to obtain; it is also unnecessary: courts can rely on actually observed market rates for SEPs, without having to engage in highly speculative assessments.

Comparable licensing agreements

These agreements go a long way in addressing the information challenge faced by courts determining a reasonable royalty rate. Recourse to comparable agreements allows courts to benefit from the resources and expertise invested by private parties in collecting information necessary for a proper evaluation of a patent portfolio. Moreover, comparable licensing agreements provide for the most informative evidence regarding a SEP owner's compliance with its non-discrimination obligations. Courts can gain a more or less clear picture of observed market rates and conditions and reach an informed decision on whether the proposed licensing terms in a specific case would be discriminatory. More importantly, reliance on comparable agreements reduces the risk of distortions in the operation of the price mechanism for standardized technologies. Courts relying on real-life transactions can better simulate market outcomes and set FRAND rates that reflect actual supply-and-demand conditions in markets for standards.

Top-down

There is no reliable data on the aggregate royalty rates for all SEPs reading on any given standard. Relying on pronouncements by stakeholders, is hardly satisfactory. Such pronouncements, made years in advance of the commercialization of a standard and before the commercial value of standardized technologies can be inferred by data on consumers' willingness to pay for those technologies (and the features they enable) are inherently unreliable, as recognized by Birss J. in *Unwired Planet v Huawei.* Furthermore, the apportionment according to the principle of numerical proportionality appears problematic in

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[1] Tsilikas, Haris. "Comparable Agreements and the "Top-Down" Approach to FRAND Royalties Determination", CPI Competition Policy International, July 2020. Available at https://www.competitionpolicyinternational.com/comparable-agreements-and-the-top-down-approach-to-frand-royalties-determination/

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several respects. An initial hurdle is to estimate the aggregate number of declared patent families reading on a given standard. However, these declarations cannot be relied upon to provide an accurate picture of the actual number of SEPs for any particular standard. Third, even if one were to assume an accurate estimation of the aggregate royalty rate, apportionment to a particular SEP holder is an exercise fraught with difficulties. It essentially calls for courts to render judgment on the relative value of the portfolio of the plaintiff in a given case, that is, on the value of the plaintiff's portfolio and the combined value of the portfolios of all other SEP holders. Judge Selna, in *TCL v Ericsson*, tried to bypass the task by assuming each SEP to be of equal value. This assumption is, plainly, unrealistic. SEPs and SEP portfolios are not equally valuable.