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FRAND IS OUR FRIEND



Maria Zamkova
Fenix Legal

A fair, reasonable and non-discriminatory (FRAND) licensing agreement (also sometimes known as RAND) is "a licensing obligation that is often required by standards organisations for members that participate in the standard-setting process", according to Wikipedia.

"Fair" describes terms which are not anti-competitive and would not be considered unlawful if imposed by a dominant firm in the market. "Reasonable" refers to the licensing rates, considering both the importance of avoiding a significant increase in cost to the relevant industry as well as giving the licensor a reasonable and adequate compensation. "Non-discriminatory" is an obligation to treat all licensees in a similar way.

Not everyone on the market accepts FRAND. The Free Software Foundation for example states that "FRAND is a FRAUD" as it discriminates against free software, "which is neither fair nor reasonable".

Other objections against FRAND point to some uncertainties, such as: a) 'per-copy fees' as being too hard to estimate in a reasonable way, especially if a distributor wants to offer the software free of charge to its customer as part of a combined agreement; b) the term "reasonable" related to the price is still not defined in a clear way; c) an agreement applying only to complete implementations limits the available number of implementations; and d) restrictions to make copies also automatically exclude common software distribution models.

However, there is continuous work on creating both a decent case law practice and internationally accepted policies for FRAND.

The World Intellectual Property Office's (WIPO) Arbitration and Mediation Center makes available tailored model submission agreements that parties may refer to in a dispute concerning the determination of FRAND terms. These are created in cooperation with leading patent law, standardisation and arbitration experts from a number of countries, as well as the European Telecommunications Standards Institute.

In 2015, the Joint Research Centre (JRC) of the European Commission published a science and policy report on FRAND licensing terms with the subtitle "Research Analysis of Controversial Concepts". The JRC described the evolution of complex technologies (referring especially to the increase in patent litigation in the smartphone industry), the multifunctional integration of different technologies and the development of specific services and applications that go beyond initial purpose functions such as communication, resulting in difficulties of identifying an agreed interpretation of FRAND licensing principles.

FRAND in Sweden

The Swedish Competition Authority has also dealt with this issue in its "Tees and Cans" series. The authority held a conference in Stockholm in November 2010, noting that as developed nations have moved further away from traditional manufacturing-based economies and towards more knowledge-based ones, standard-setting has grown in importance.

"ERICSSON HAS A PRACTICE OF ASSESSING BUSINESS POSSIBILITIES INSTEAD OF TAKING COURT ACTIONS AS WELL AS SHOWING ITS LEGAL STRENGTH WHEN IT COMES TO CLEAR INFRINGEMENTS."

The conference concluded that innovation is a risky business. "Licensing may be an easier path to entry in technology markets than business models based on both innovating and manufacturing, and may thus stimulate competition", said director-general Dan Sjöblom.

Swedish company Ericsson is well-known for being at the forefront of developing and promoting FRAND. Ericsson has signed more than 100 licensing agreements to assist other companies in bringing new and innovative products and services to market, and thereby opening up new services and products for end users.

Ericsson says "Our commitments to FRAND principles give everyone fair access to standards, thus spurring competition and promoting a balanced technological ecosystem". Ericsson has a practice of assessing business possibilities instead of taking court actions as well as showing its legal strength when it comes to clear infringements. A recent example of the business view was in December 2015 when the company and Apple ended their patent lawsuits, which spanned four countries, by signing a cooperative cross-licensing agreement.

Patent protection gives the owner of the exclusive right a monopoly for a limited period while providing the basis for the development of new technologies among other market players. However, it is important to have in mind that software and patent protection are not free of charge. FRAND is therefore a fantastic opportunity to make it easier to develop global standards to keep the price down for the final customer as well as open up new technology.

In other words FRAND is not fraud, it's our friend. ■

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Sweden: FRAND is our friend

20-05-2016

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