



Neutral Citation Number: [2021] EWHC 89 (Pat)

Case No: HP-2019-000032

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
PATENTS COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 19th January 2021

Before:

MR. JUSTICE BIRSS

Remotely via Microsoft Teams

Between:

- (1) **INTERDIGITAL TECHNOLOGY CORPORATION**
(a company incorporated under the laws of the State of Delaware)
(2) **INTERDIGITAL PATENT HOLDINGS, INC.**
(a company incorporated under the laws of the State of Delaware)
(3) **INTERDIGITAL, INC.**
(a company incorporated under the laws of the State of
Pennsylvania)
(4) **INTERDIGITAL HOLDINGS, INC.**
(a company incorporated under the laws of the State of Delaware)
- and -

Claimants

- (1) **LENOVO GROUP LIMITED**
(a company incorporated under the law of Hong Kong, China)
(2) **LENOVO (UNITED STATES) INC.**
(a company incorporated under the law of the State of Delaware)
(3) **LENOVO TECHNOLOGY (UNITED KINGDOM) LIMITED**
(4) **MOTOROLA MOBILITY LLC**
(a company incorporated under the law of the State of Delaware)
(5) **MOTOROLA MOBILITY UK LIMITED**

Defendants

MR. JAMES WHYTE and MR. EDMUND EUSTACE (instructed by **Gowling WLG LLP**)
for the Claimants

MR. JAMES SEGAN QC, MR. RAVI MEHTA and MR. WILLIAM DUNCAN (instructed
by **Kirkland & Ellis International LLP**) **for the Defendants**

Approved Judgment

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MR. JUSTICE BIRSS:

1. This is an application relating to disclosure in a FRAND case concerning standard essential patents. InterDigital have a portfolio of patents declared to be essential to various telecommunication standards and Lenovo are an implementer generally entitled to a licence on FRAND terms. The issue is about the terms of that FRAND licence.
2. The particular situation that arises is as follows. The parties agree that two of the issues for disclosure in these proceedings relate to whether a particular offer made by InterDigital is or is not FRAND. The offer was an offer made in January 2020. Issue 2A for disclosure relates to the parties' cases that various comparable licences can be relied on to assist in determining whether the terms in the January 2020 licence offer are FRAND. I will come back to that. Then Issue 2B is whether a top-down approach can be applied to determine whether terms in that licence offer are FRAND. The disclosure application relates to Issue 2A, comparables.
3. This case is unlike the *Unwired Planet v Huawei* [2017] RPC 19 litigation because there are licences available which license the very portfolio in issue in the case, whereas in *Unwired Planet*, Unwired Planet's portfolio was a subset of Ericsson's portfolio and most of the licences that were available in that case were Ericsson licences rather than Unwired Planet licences.
4. Approximately 55 licences have been disclosed by InterDigital. Of that number 17 are relied on by InterDigital as being the comparables which it relies on in its pleading to support the case it wishes to bring. A further 6 have been relied on by Lenovo in its pleadings to the contrary, on the footing that Lenovo denies the 17 are comparable and contends that the 6 licences are properly comparable and support its case on what should be FRAND.
5. The first issue that I have to resolve arises from the fact that, inevitably, licences are complex. Just to take one example, one sometimes sees in a licence an *ad valorem* royalty rate, in other words a rate which is a percentage of sale price. Of course one cannot know what that amounts to in economic terms necessarily without having a view about the sale price of the item in question. One also sometimes sees royalty floors and royalty caps. Thus simply looking at a percentage may give one a misleading impression because the way the caps and the floors may be set could mean that the percentage never in fact applies. For example for certain goods, given their selling price, the result of applying the percentage rate may produce a figure higher than a cap and so it turns out that as applied to the relevant goods, the actual royalty due is determined by the cap rather than the percentage. That is a simple example and there are many more complicated ones. There are settlement agreements to deal with. There can be lump sums.
6. Matters of this kind were all addressed in *Unwired Planet*. In terms of the taxonomy of the points we are dealing with, I am not sure that any of the kinds of complexity that have been raised on this application are any different from the points that were in that case. In other words the case is no more or less complicated, but that is not the issue. What is true is that one needs to grapple with those aspects of licences in order to understand them. The term "unpacking" has been used in previous cases to

characterise that process. It is clear that in order to carry out unpacking, one does need some data to work on and that is what this first issue is all about.

7. Lenovo contends that what should happen is that InterDigital should disclose full royalty reports for all the licences in issue, that is to say the 23 (17+6), for all the relevant periods in which they are in force, which goes back, I do not think quite ten years, but certainly back to 2012, or possibly a bit further. Those are quarterly reports. That is the information which Lenovo contend should be disclosed and which will allow a proper unpacking of the various licences.
8. InterDigital resists disclosure, contending that publicly available information about the nature of the markets, and the particular market shares and prices and goods sold by the various companies, will allow one to unpack the licences to a degree sufficient to deal with in this case, and therefore it would be disproportionate to require the royalty reports to be disclosed. One reason particularly relied on by InterDigital as to why it would be disproportionate is that the royalty reports themselves involve third party confidential information. It is information which third parties are anxious to keep private, bearing in mind it goes to the heart of their commercial business. At least one licensee within the 23 has already indicated to InterDigital that it will strongly resist disclosure of this information if it is sought.
9. The procedure that has been adopted in this case, as has been adopted in other cases, to deal with potential third party confidentiality, means that at this hearing I am not determining that question, but that is obviously a factor I can take into account in making a decision at this stage. The third party interest bears on the question of proportionality.
10. Another point that InterDigital takes is they say the royalty reports are not in principle the right information anyway, because they relate to what happened after the event and do not allow one to judge what the parties thought the value of what they were entering into was at the time they entered into it. There is a fundamental dispute between Lenovo and InterDigital on that. Lenovo says that is not the right approach, or not the only right approach, and that the information about what actually happened is, itself, also important in having a bearing on determining in an objective way the value of the licence is in dispute.
11. Neither party addressed me in any detail on the principles to be applied in dealing with this disclosure application. I do not think they are controversial, essentially it is a case management discretion, having regard to the overriding objective. A critical factor in deciding whether a particular kind of disclosure should be granted is always proportionality.
12. A very important factor in the consideration of proportionality in this case is the very large sums of money which are at stake in these proceedings. I bear in mind that InterDigital contends that the right answer here will be a licence of global scope, either with a global blended rate applicable as one rate around the world (InterDigital's primary case) or with rates for different territories around the world. It will be applicable to Lenovo's technology which has used the relevant standards. Given that Lenovo is a major international undertaking this will inevitably lead to very large sums of money being due, and that is not in dispute.

13. Before I deal with the specifics, an important general point is to consider the nature of the evidence in a FRAND case and the role of that evidence in determining what is FRAND. The thing that concerns me is that it is easy to be beguiled by submissions which refer to accuracy, because one can fall into a trap. Parties seeking disclosure in these cases often submit that something will allow one to carry out an “accurate” or “more accurate” analysis of certain evidence such as a licence. However blanket statements of that sort fail to focus on what, in my judgment, is critical in a FRAND case. The information sought is to be deployed to make an estimate, for example of what the “true” royalty due under a licence is, as opposed to what one might have assumed by taking it at face value. That in turn will play a part in coming to an estimate of the overall value of the portfolio. However one always needs to examine how big an alleged improvement in the accuracy of these estimates is likely to be in return for the consequences of taking the relevant step. In other words one needs to take into account the value of that improvement in the accuracy (if that is what it is said to be for), and also its cost. And I do not just mean in terms of money, I mean in terms of time and trouble in the proceedings and everything else. That is what examining proportionality requires. The fact that these things (the value and the cost) are not readily quantifiable does not mean this exercise cannot usefully be done in qualitative terms.
14. The point is that in the present case it is perfectly apparent that to a very large degree, unpacking of licences can be done using public information. That does not mean that it will be perfect, far from it, but as I have said one also needs to be careful about what one thinks perfection represents. Each licence is being used as part of a suite of multiple comparables by the parties. Ultimately this is not a trial of a simple matter of primary fact such as whether something did or did not happen. Nor is it even a trial of the question, as a matter of fact, of what the “true” value of any given existing licence actually is, which is an unanswerable question. Given that there already will be evidence from which to infer the value of the licensed portfolio, which may be based on unpacking individual licences using publicly available information, the royalty reports will not turn that value from what one could call a “mere” estimate into a “true” or “precise” statement of the value. The end result of unpacking using royalty reports will still be a set of data points, with varying degrees of consistency, controversy and imperfections, from which to make assessment of the value of the portfolio.
15. Striving for a “more precise” estimate of the value attributed to any given licence does not matter a great deal, provided one does have an estimate of its value and provided one has a view, as a matter of judgment, about the quality of that estimate. That is what the court will be considering when taking the evidence into account. The court will be faced, at trial, with a large variety of data points of different quality, often pointing in different directions. The quality of the evidence itself and the quality of the estimate will be important factors. To take a specific example, one of the licences relied on by InterDigital is a licence to a company called Innovius. If, as Lenovo contend, it cannot be understood at all without a certain other piece of information, then that, in itself, will not prevent the case from being decided properly or fairly. On the contrary it will simply mean that that licence, if Lenovo’s case on it is accepted, will not be something which is taken into significant account, or any account at all, in the overall consideration of what a fair FRAND rate, either for the globe or for a particular territory, will be.

16. If the material sought was necessary for the court to come to a just conclusion of any sort, then that would be a very different matter, but it is not. That illustrates an important factor which relates to this kind of disclosure and makes it different from disclosure in some other contexts, such as when considering primary liability.
17. Thinking about the way forward, I accept that it is necessary to be able to unpack licences, but however, as I have said already, it is plain that this can be done to a significant extent using public information. There are sources such as IDC (International Data Corporation), IHS and Strategy Analytics. I do not doubt that there are gaps in that information so that one can always say that if there had been more information then one could produce a better estimate, but I have not been persuaded on any of the evidence on this application that any of the gaps are so significant as to make impossible the task of producing a fair estimate with a view about its quality, for use in these proceedings.
18. I do accept that royalty reports are likely to lead to estimates which could be described as being better in some ways than the estimates one can produce from publicly available information. However I do not accept, and nor is there any evidence that I can see, that it is necessarily so that the improvement produced by using royalty reports instead of public data is so great as to undermine the utility of using public data sources in order to carry out these tasks.
19. It is true, as Mr. Segan has pointed out to me, that Lenovo made it clear from the very outset that what they regarded as the proper exercise to be performed in unpacking these licences required the royalty reports. However, what is also the case, as InterDigital have pointed out, is that (as one might expect) Lenovo were able to carry out an exercise in unpacking the licences using public information, albeit it was one which Lenovo contends was not a proper exercise. That illustrates the issue that the court is grappling with on this application.
20. As Mr. Segan rightly submitted, the royalty reports information would not be difficult to produce. InterDigital is a licensing company and the royalty reports it received would be extremely straightforward to produce, and they would not be particularly bulky. Financial data itself can be produced in a convenient fashion. However, what concerns me about it is the fact that the content of the reports is unquestionably information which third parties would have an interest in, and as I have said, InterDigital, in Ms. Brodie's evidence, have explained that at least one licensee has already indicated that they would strongly object to its disclosure.
21. Mr. Segan explained that it is accepted by Lenovo that this information would be held in these proceedings under a confidentiality arrangement in the tightest confidentiality ring, which is described in these proceedings as LEO, that is legal eyes only. In other words, Lenovo are accepting that they themselves will not see this information. That is also a factor that I take into account. However the fact that it can be done, does not mean it should be done. There is a significant value in terms of open justice in producing a decision in this case based on information which is publicly available. If that can be done properly, as I believe it can, then that is something of significance.
22. Nor do I agree with the point made by InterDigital that one can simply say that the only thing which is relevant is negotiations, and other things that took place before the licence was entered into, and so what has actually happened afterwards is always and

necessarily irrelevant. As Mr. Segan pointed out, one of the tasks that the court is trying to assess is an objective value of the property being licensed. In principle that can be assisted by a reference to the level of royalties that were paid afterwards. I will not decide this issue on the basis that I accept InterDigital's case, run as a point of principle, that that sort of information is incapable of having relevance. That is not right.

23. Turning to the specifics, I will consider the three reasons why Lenovo contend they wish to be provided with the information. The first is to assess the comparability of the licences themselves. I do not believe that that is a significant reason for needing this information. That can be done without it. The second is to assess the relevance or otherwise of headline *ad valorem* rates. I agree with Lenovo that it is necessary to assess the relevance of rates of that kind, see the example I gave at the beginning and there are more detailed examples that Mr. Segan gave. They are good points, but the answer to them is that that exercise can be carried out to a sufficient degree of reliability and at appropriate cost, it seems to me, based on publicly available information.
24. The third aspect is to confirm that lump sum payments have actually been made. That is a separate point. I do not accept that that should be disclosed. There has been no pleading that the licences are shams and, if they are not shams, there is no reason why it is necessary to confirm that lump sum payments have been made. A different point is that one can see in the agreements that lump sums are sometimes split over time and of course that timing is of some relevance since one is taking into account net present values, but that is a matter which can be taken into account already.
25. A further set of points taken by Lenovo are submissions that the data produced publicly cannot answer certain questions, and I now deal with those.
26. First of all it is said that publicly available data does not allow one to assess cellular-enabled PCs and laptops, which is obviously important given the nature of Lenovo's business. I do not accept that. I was shown passages from the evidence of Ms. Brodie which indicated that IDC's information does cover cellular-enabled PCs and laptops and, therefore, I do not accept there is any particular reason why that should cause any problems.
27. It is true, this is the second point, that the amount of publicly available information in the evidence as it stands today relating to certain contract manufacturer licensees appears to be lacking. They are Pegatron, Wistron and Quanta and in relation to Quanta there seems to be no information at all. However it is not clear to me how hard people have really looked, given that these points arose late in the day. When I say that, I appreciate that Lenovo have made it clear they have always wanted royalty information but I accept Mr. Whyte's submissions that all the specific points about alleged limits of public information have arisen late and that is why Ms. Brodie's evidence has come in late. However the worst that would happen, taking Quanta as an example, is that if no information which allows one to unpack the Quanta licence in any relevant way that matters can be produced, then InterDigital's reliance on Quanta will fail (assuming unpacking is needed). In terms of Pegatron and Wistron, there clearly is some information available. Again, it may not cover everything that Lenovo say they want, but it is not clear to me that sensible estimates cannot be made, even based on that information, and other data, to produce numbers of some value.

28. The point on Innovius is a very specific point about the terms of the Innovius licence. I have been shown the terms of the Innovius licence by Mr. Whyte. This shows that the licence is drafted in such a way that if Innovius grant a sub-licence, then it would be a sub-licence on all products sold by the sub-licensee, whose identity is confidential. On that basis the point made by Lenovo that one needs to see the sub-licence to know what products are sub-licensed is not a good point. However again, if it turns out that it is impossible to place any sensible reliance on the Innovius material as a result of the absence of this information, then again InterDigital's reliance on Innovius will not succeed.
29. The point on Fujitsu is about options in a licence. I do not accept as a point of principle that it is always and necessarily so that in order to understand such a licence one needs to know which options a licensee has actually exercised. Maybe if the whole case was based only on the Fujitsu licence and nothing else, that might be a different matter, but the Fujitsu licence is simply just one of the licences in issue. This point, in my judgment, does not justify the difficulties of producing royalty payment data.
30. Therefore I will not order disclosure of the royalty reports. It would be disproportionate.

(For continuation of proceedings: please see separate transcript)

Judgment on InterDigital's request for a schedule of licences to which Lenovo is a party

31. I am not going to make the order sought by InterDigital. I am not satisfied that any disclosure, in this sense, of licences from Lenovo to which Lenovo is a party, is proportionate in the context of this case, bearing in mind that it would inevitably engage third party confidentiality. The reason why emerges from an analysis of the issues to which these licences are said to be potentially relevant.
32. One category of issues is points which I will call small, without necessarily meaning that they never matter. I am referring to the issues encompassed by footnote 23 of InterDigital's skeleton. It refers to a number of clauses of the offered licence whose FRAND status is in issue. The clauses are things like definitions of "confidential information" and the like. Mr. Whyte quite fairly made the point that he was not suggesting that they should be trawling through licences to identify those points. I am pleased to hear that. I am quite certain that it would not be proportionate to order disclosure of any further licences in this case on the basis of their having relevance to those issues. That is because there is no reason why the 55 licences which are already in the case, albeit from InterDigital, would be unlikely to be sufficiently probative for the court to be able to resolve the issues raised by those particular small points, also bearing in mind the rest of the evidence that will be available.
33. I now turn to what are in fact the more important issues. These are the major debates on the drafting of the licence. They can be summarised based on paragraph 42 of the defendants' Amended Statement of Case on FRAND. They are the principal arguments whereby the defendant contends that the claimants' offer in January 2020 is not FRAND.
34. The first one is related to rates, at paragraph 42.1, and divides into three subpoints.

35. First is the royalty rates themselves. Although InterDigital does reserve its position, it is not advancing this application for disclosure on the basis that it should be provided in order to obtain information of relevance to royalty rates. In any case I am quite sure that that would not be a sensible approach to disclosure in this case because the portfolios for which these licences apply are entirely different from the ones in issue in this case. Since we already have a wealth of evidence from InterDigital's own licences, it would be wholly disproportionate to require disclosure of Lenovo's licences, or for information of this nature from them to be disclosed, in order to address actual rates.
36. The second subpoint is that Lenovo contends that there should be a mechanism in the licence to give effect, in terms of rates, to the outcome of foreign proceedings, for example in Delaware and in China. That has always been a clear part of Lenovo's case. It may be right or it may be wrong, but I am quite satisfied that disclosure of licences, which I will assume for this purpose were voluntarily entered into, is not going to illuminate the issue of whether it is appropriate in terms of FRAND to put in a mechanism addressing how a court-determined licence should be set up by reference to other parallel proceedings in other countries. I very much doubt a licence entered into as a result of voluntarily negotiation will contain any such provision, and the fact it does not will not tell you anything about whether it is the right thing to do in the circumstances of this case.
37. The same goes for the third sub-point, which is about the adoption of a global blended percentage royalty rate as a concept (regardless of the actual value). Of course licences contain blended percentage royalty rates either for the world or for regions or even countries. That is commonplace, and it could not realistically be gainsaid by either party in these proceedings, but that is not what this sub-point is concerned with. The particular point that Lenovo makes is that if one put in a rate of that kind, it would prevent the court from doing what Lenovo contends is the right thing to do, which is to insert a mechanism for dealing with the outcomes of foreign proceedings and plugging in rates from that. In other words it is closely related to the second sub-point. That reason for not having a blended royalty rate is not going to be assisted by seeing what the terms of other licences are.
38. So, nothing arising in the rates aspect of the disagreements on FRAND justifies disclosure of Lenovo licences.
39. The same conclusion applies to paragraph 42.2, which is a volume discount issue, because it is the same sort of argument as the second and third sub-points already mentioned.
40. The global release point about past sales (42.3) is another point which is in substance a jurisdictional argument. Again it is commonplace that some licences contain releases for past sales and, again, further disclosure is not going to illuminate that issue to any useful degree. To the extent the material that is already in the case will deal with it, there is no reason to have any more, and that is why it would be disproportionate.
41. On the point about new business provisions, 42.4, Lenovo have offered to deal with it in a witness statement. That seems to me to be a proportionate response, including the aspect that Lenovo proposes only to include anonymised data in the statement. When one is dealing with the comparability of licences by reference to provisions such as the rates themselves, the identity of the parties to the licence will be of potential

importance. However I agree with the point made by Mr. Segan that it is very hard to see why the identity of the licensee or licensor in a licence, when its relevance is about non-financial terms such as this one, will have a bearing on comparability. Therefore I accept Lenovo's proposal.

42. Para 42.5 is about the provisions defining how the term of the licence works (e.g. expiry of the last patent in a family in a territory). That is something where one could imagine that looking at other licences could shed some light. However every licence has a term of one sort or another and, as I say, there are already many licences in this case. I cannot see that this requires disclosure in particular from Lenovo, given the number of licences that are already in the proceedings albeit they are all from InterDigital. I also bear in mind proportionality and the fact that disclosure of the licences (or information about them) would engage third party interests, as I dealt with in relation to the royalty reports this morning.
43. That leaves the last one, which is a point on the definition of a licensed patent clause. I cannot believe that disclosure from either party will have a bearing on that issue. It relates to certain exclusions in InterDigital's proposed definitions. I am quite sure the court will be able to resolve those in any event. That is my decision.

(For further proceedings: please see separate transcript)
