

InterDigital v Lenovo UK FRAND decision

Rapid reaction: what you need to know

On 16 March 2023, the High Court of England and Wales (the Court) handed down its judgment following the FRAND trial in *InterDigital v Lenovo*. This is the second judgment containing a substantive FRAND determination issued by the English Courts. The Court re-emphasised its readiness to set the terms of a global FRAND licence, either in the form of a “precise” range, or a single rate [317]. In this case, the rate determined was \$0.175 per device, or a lump sum of \$138.7M.

The findings in the judgment will require further analysis. Below is our initial reaction to the Court’s approach:

- Comparators remain the most important basis for establishing a FRAND rate - the judgment includes practical suggestions for increased transparency in lump sum licences.
- An objective approach to the unpacking of licences is preferred.
- A FRAND injunction is likely to be awarded once liability has been established, and before any FRAND trial – subject to appeals on this point, future defendants will need to give an undertaking to take a Court-determined licence before the FRAND trial.
- Whether a licensor/licensee was “unwilling” before litigation is of limited relevance, and can be cured by committing to take a FRAND licence on terms determined by the court).
- The Judge’s suggestions for streamlining FRAND disputes in the UK, including case management and early disclosure proposals, are welcome.

The following are the key findings. (Paragraph references are in [square brackets].)

FRAND Licence

Determination of a FRAND rate

- Neither InterDigital nor Lenovo’s offers were FRAND or within the FRAND range [946].
- Based on the comparables approach, a rate of \$0.175 per device was FRAND [813].
- Based on Lenovo’s sales data this equates to a lump sum of \$138.7M [814].
- This is a blended rate for all sales, including all past sales [423].
- Interest, if any, will be determined in due course [552].

Key principles behind determination of the rate (see [556]-[560])

- Limitation periods have no role in the relationship of “willing licensor” and “willing licensee”; according to the judgment this means (1) Lenovo must pay for all past sales [529]; and (2) there is no justification for discounting past sales [556].

FRAND Licence

- The only discounts consistent with FRAND are those which relate directly to the time value of money [558]. Large volume discounts that may have been given in certain prior agreements resulted in discrimination against smaller licensees and should not be considered [557].
- The analysis should be objective, and the subjective views of the licensor must be set aside [560].

Approach to comparable licences

- The price of the phone (or tablet/computer) that infringes the SEPs is irrelevant to the royalties payable on that device [247].
- Of the 72 InterDigital licences available, 20 were relied upon by InterDigital and 7 by Lenovo [573 and 574].
- The Court relied on only a single comparable licence (LG 2017) [811].
- The Court considered the similarity of Lenovo to the relevant licence counterparties to be a relevant factor. The other licences did not assist because of the difference in situation with Lenovo [811].
- An adjustment ratio of 0.728 was used to reflect the differences between the comparable licence (LG 2017) and Lenovo. This was to reflect the split between Developed and Emerging Markets [807].
- The relevant comparable was analysed on a time period basis to reflect the changing facts over time [803].

The ‘top-down cross-check’

- The Court found that there was “no value” in InterDigital’s top-down cross-check “in any of its guises” [945].
- The main reason for this was that InterDigital had contended that the cross-check supported the rates in its ‘5G Extended Offer’. Since the comparables analysis undertaken by the Court did not provide any support for those rates, and the Court found those rates to be non-FRAND, the results of the comparables analysis were a “solid reason” for dismissing InterDigital’s top-down cross-check [881].
- The Court also concluded that the hedonic price regression analysis relied on by InterDigital, which was a key part of its top-down cross-check, suffered from a number of substantive and procedural shortcomings [878].

Disputes in other jurisdictions

- Judicial statements in other cases as to the appropriate aggregate royalty figures for a particular generation of technology can be useful guidelines [244(vi)].
 - The judge referred to the expert reports on Chinese and US law which were provided by the parties. The judge concluded that these did not give rise to any disputes that the Court needed to decide for the purposes of the judgment [239].
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Relief available to the patentee

Willing Licensor / Licensee

- InterDigital was an unwilling licensor since it had consistently sought supra-FRAND rates [928].
- Willingness cannot be determined without an assessment of FRAND rates [278].
- Prior to litigation, Lenovo did delay on occasions and, to that extent, did not act as a willing licensee. However, as the Court found that InterDigital's offer was not FRAND, Lenovo was justified in seeking more information and in not accepting InterDigital's offers. To this extent Lenovo was a willing licensee [931 and 932].
- After litigation, both sides were unwilling. InterDigital by continuing to offer non-FRAND rates and Lenovo by failing to undertake to take a FRAND licence once liability had been established [934].
- Lenovo did not, by its conduct in negotiations, disqualify itself from benefiting from the FRAND undertaking [942].
- Shortly after judgment was handed down in draft, Lenovo undertook to the court to take a FRAND licence on terms determined by the court [957].
- It is not FRAND, nor is a licensor acting as a willing licensor, if it refuses to provide the information necessary for a willing licensee to evaluate an offer which has been made, including as to third party licences [202].

Injunctive Relief in the UK

- A FRAND injunction should be granted at the latest once liability at first instance is established. A willing licensee would commit to take a licence on FRAND terms to be set by the English Court, [940 and 941].
- InterDigital was not entitled to an unqualified injunction – the Court considered the notion that InterDigital would be entitled to one was “*unreal*”, unless Lenovo unequivocally refused to take a FRAND licence [11].
- On the facts, it was reasonable for Lenovo to have rejected all offers made by InterDigital. Even if Lenovo had not acted as a willing licensee, the Court considered they retain the ability to have a “change of heart” until they are put to an election [538 and 943].

For more information about this important decision, contact any of the Bristows team. Bristows will continue to follow this case on our dedicated [FRAND tracker](#), as well as through articles on the [CLIP Board](#), [Bristows Inquisitive Minds](#), and elsewhere.