Appeal Nos. UKSC/2025/0144 & UKSC/2025/0145

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N:

(1) OPTIS CELLULAR TECHNOLOGY LLC
(2) OPTIS WIRELESS TECHNOLOGY LLC
(3) UNWIRED PLANET INTERNATIONAL LIMITED
("Optis")

Respondents

and

(1) APPLE RETAIL UK LIMITED
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE INC
("Apple")

Appellants

and

(1) ACER INCORPORATED
(2) ACER U.K. LIMITED
(collectively "Acer")

Interveners

WRITTEN SUBMISSIONS OF ACER

I. INTRODUCTION

1. These are the written submissions of Acer, following its receipt of permission on 26 April 2026 to intervene in writing in the above appeal under Rule 24(1)(c) of the Supreme Court Rules 2024.

2. On 31 October 2025, Apple was granted permission to appeal to the Supreme Court from the judgment of the Court of Appeal in *Optis v Apple* [2025] EWCA Civ 553. Ground 4 of this appeal concerns the important legal question of whether, in a F/RAND licence, royalties must be paid on past sales back to the date of first sale, irrespective of the principles of limitation and/or industry practice.

3. This was an issue that Apple conceded in the Court of Appeal (see [80]), in light of the Court of Appeal's two recent decisions in *InterDigital v Lenovo* [2024] EWCA Civ 743; [2024] RPC 24 and *Panasonic v Xiaomi* [2024] EWCA Civ 1143; [2025] RPC 2.

4. Acer says that it is wrong to exclude the impact of limitation periods in determining F/RAND royalties under a Court settled licence, just as it would be inappropriate for a SEP owner to insist on obtaining payment for sales the subject of limitation in a commercial negotiation. Either way, the SEP owner would be seeking to obtain compensation for something to which it is not entitled.

5. Alternatively, if a Court is to order that it is F/RAND for a full past release to be paid (beyond relevant limitation periods) there would need to be clear evidence that there was a settled commercial practice for this to be done. The Court of Appeal in *InterDigital* spoke in terms of a need for evidence of a settled industry practice to apply limitation periods. This is the wrong away around. Limitation periods should be assumed to apply, unless there is a settled industry practice *not* to do so. That accords with the public policy interests that lie behind limitation periods, of which all willing licensors and willing licensees will be aware (or ought to be aware).

6. To the extent that the Court of Appeal has endorsed a general rule that a SEP owner is entitled to full recovery of royalties on past sales (irrespective of the applicable standard or industry context), this would wrongly prevent implementers from adducing any evidence on this issue so that the terms of each fair and reasonable licence can be determined on their own facts. This is contrary to this Court's guidance in *Unwired Planet v Huawei Technologies Ltd* [2021] 1 All ER 1141 ("***UP SC***") that "[i]*t is to be expected that commercial practice in the relevant market is likely to be highly relevant to an assessment of what terms are fair and reasonable*" ([62]).

7. Finally, although part of the reasoning of the Court of Appeal in *InterDigital* relied on specific ETSI guidance notes, there is a great danger of a determination that limitation periods have no part to play being applied indiscriminately to other areas of standardised technology outside the confines of the ETSI IPR policy and cellular standardised technology in which the finding was made. This is particularly the case in other industries outside of the cellular industry where different considerations arise. Complex, multi-use computers such as laptops

incorporate a wide array of technologies, which are subject to a plethora of standards, patents and IPR policies[1].

II. ACER'S INTEREST

8. Acer seeks to assist the Court from the perspective of substantial implementers of standardised technology outside the field of the cellular standards. It seeks to assist the Court on the wider significance of a rule or approach governing royalties on past sales for implementers and for the operation of the F/RAND system more broadly.

9. First, Acer is a large multinational company engaged in a range of business activities in the technology sector. It designs, manufactures, markets, and supplies electronic devices, such as branded laptops, desktops, tablet computers and smartphones. For the past 20 years, the Acer group has consistently ranked in the top 6 personal computer companies in the world by sales volume, and presently accounts for approximately 6.9% of worldwide sales.[2]

10. Acer is therefore a substantial implementer of standardised technology and a regular participant in markets in which FRAND and/or RAND licensing issues arise. As a substantial participant in the electronics industry, it is well placed to assist the Court on the practical implications for implementers and the operation of the FRAND licensing of the rule adopted by the Court of Appeal on Ground 4.

11. Secondly, as a manufacturer of personal computing devices, Acer manufactures devices which use other standardised technologies which are not at issue in the present proceedings but which are likely to be affected by the outcome because they are standardised technologies where F/RAND commitments are given by patentees[3]. These are technologies such as video compression and Wi-Fi, where RAND commitments are given by patentees to the International Telecommunication Union Telecommunication Standardization Sector ("**ITU-T**") and the Institute of Electrical and Electronics Engineers ("**IEEE**") respectively (rather than ETSI as is the case for the cellular technology at issue in these proceedings).

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[1] Biddle, Brad, White, Andrew and Woods, Sean, How Many Standards in a Laptop? (And Other Empirical Questions) September 10, 2010. Available at SSRN: http://ssrn.com/abstract=1619440.
[2] https://www.statista.com/statistics/267018/qlobal-market-share-helcl-bv-pc-vendors/.
[3] It is not thought that any relevant distinction arises between FRAND (Fair, Reasonable and Non-Discriminatory) and RAND (Reasonable and Non-Discriminatory).

12. Acer is currently engaged in a RAND dispute concerning video coding standards under the ITU-T with Nokia.[4] Therefore, the issues raised by this appeal are not academic from Acer's perspective. These are issues which Acer is actively considering in the context of that dispute. Although the present appeal arises in the context of cellular SEPs and the ETSI regime, the Court's judgment is likely to have significance across FRAND and RAND disputes more generally. In *Acer, ASUS and Hisense v Nokia* [2025] EWHC 3331, Mellor J observed, at [40], that "*the ETSI undertaking has, at its heart, the same wording ('prepared to grant') as in the ITU-T Licensing Declaration and it would appear that many of the Swiss law concepts I have to address in this case have counterparts in French law*". Mellor J proceeded to determine that the obligation imposed on a SEP owner who declares a patent to be essential to an ITU-T standard has the same meaning as under the ETSI standard ([111]-[126]).

13. Having said that, nobody has suggested that other standards, such as those of the ITU-T, include the same guidance notes on which the Court of Appeal in *InterDigital* relied in respect of the ETSI IPR Policy.

III. ACER'S SUBMISSIONS

14. The question is not whether royalties may in principle be payable in respect of past sales. It is whether the scope of this payment requires payment back to first sale, irrespective of applicable limitation periods, commercial practice, or the circumstances of the relevant market.

15. The current approach of the English courts is that "*limitation provisions under national law ha[ve] no role to play in the determination of what terms were FRAND, and thus royalties should be paid in respect of the whole period during which the implementer has been exploiting the SEP holder's portfolio*" (per Arnold LJ in *Panasonic*, at [23], see also *InterDigital* at [170]-[206], in particular [186] and [206] per Arnold LJ).

16. Accordingly, limitation periods which would apply to the recovery of damages for patent infringement in the jurisdictions covered by a FRAND licence – generally all countries of the world – are irrelevant and are in effect disapplied when setting a payment for the "past release" in a licence. The remarkable consequence is that (in this jurisdiction) licence fees can be recovered in respect of "infringements" which may have occurred in the UK and foreign

[4] Claim No. HP-2025-000030. This dispute is in the process of being stayed in favour of arbitration, pursuant to the Court of Appeal's judgment in [2026] EWCA Civ 564.

countries which would never be recoverable at all in those countries (or anywhere) and which parties in the real world would not anticipate.

17. As a potential counter to the above, at [198] of *InterDigital,* Arnold LJ said that if a party could establish in evidence that there is a settled industry practice of releasing past sales then this could be "relevant" to what is FRAND. However, at [197], the Court had already appeared to endorse InterDigital's case that "non-FRAND" factors in negotiations ought to be ignored and that to the extent limitation periods have been applied in industry, this resulted from SEP owners being forced to accept them (i.e. due to non-FRAND factors). It remains very unclear as to the extent to which an implementer in such a case can legitimately put forward evidence of industry practice without it being met by the riposte that this practice reflects "non-F/RAND" factors which should be ignored in the Court settled licence.

18. Acer agrees with the submissions made in Apple's Written Case at [95]-[135]. Acer contends that the Court of Appeal's conclusions are wrong in law and principle for five additional reasons.

(1) <u>F/RAND should be determined in accordance with settled commercial practices in a particular field (UPSC [62]-[63]</u>.

19. The first reason is that settled commercial practice is the touchstone of what willing licensors and willing licensees would do and would agree. Acer says that to disapply limitation periods should require good evidence of a settled practice to disapply the same. Limitation periods should not be deemed to have been disapplied implicitly, without express provision: *Lendlease Construction (Europe) Ltd v Aecom Ltd* [2023] EWHC 2620 (TCC) at [112]-[119] per Eyre J. The starting point should be that limitation periods apply, as is the starting point in all other areas of law and commerce.

20. If on the evidence of a particular case that starting point is also reflected in the commercial practice in a field and that willing licensors and willing licensees apply limitation periods (usually 6 years for developed markets and 3 years for developing markets or China) then this should be the approach taken by the Court for the Court settled licence. A party should be able to adduce evidence of the licensing practice so that the licence determined by the Court is not inconsistent with this practice.

(2) <u>The Application of limitation periods is not a "non-F/RAND" practice</u>

21. The second reason is that it is wrong for settled commercial practices applying limitation periods to be brushed aside as a "non-F/RAND" factor for the Court to ignore (*InterDigital* at [187] and [193]).

22. As was explained in UPSC the F/RAND commitment is intended to act as a contractual modification to the general law of patents to achieve a fair balance between the interests of SEP owners and implementers by giving implementers access to the technology protected by SEPs and giving the SEP owners fair rewards through the licence to use their monopoly right. It operates as a contractual derogation from a SEP owner's right under the general law to obtain an injunction to prevent infringement (*UPSC* at [14]). Acer says that this purpose does not mean that SEP owners *also* get the right to obtain compensation for past acts which would not be permitted by the general law. The contractual modification is not that a SEP owner suddenly obtains rights of compensation that the general law (by way of limitation) would not permit. As set out above, if the ETSI Undertaking (or any other undertaking) was to disapply limitation periods, that would need to be expressly set out in the contractual undertaking.

23. F/RAND licences are negotiated in the knowledge that limitation periods prevent a patentee from claiming from sales earlier than the limitation period and licensors and licensees negotiate accordingly. This is not an acceptance borne out of a patentee being "forced" to accept this state of affairs (the wording of the Court at [197] of *InterDigital*). It is an acceptance borne out of knowledge that a patentee is not *entitled* to relief beyond the relevant limitation periods.

24. There is nothing "non-F/RAND" about a party relying on limitation in the context of licensing negotiations. There is a reasonable expectation in all commercial fields that parties should not sit on their rights. The Court of Appeal's conclusion was that this expectation should be disapplied in this context to prevent creating "*an incentive for implementers to delay*" ([193]). The Court of Appeal's blanket assumption that delay is attributable to an implementer's hold-out was misplaced. Apple's Written Case at [104]-[107] addresses the point that the underlying assumption that it is commercially realistic for implementers to have to seek out SEP licensors is wrong.

25. As explained below, there can be many reasons why claims for licensing royalties have gone stale and have expired due to the application of limitation periods. The reasons may have

nothing to do with "hold-out" but instead arise because it suited the SEP owners' businesses not to assert its patents for many years , the SEP owner has divested its portfolio to a non-practicing licensing entity, or the industry has developed or changed course. Indeed, it is hard to see how "hold out" could ever prevent a SEP owner from ensuring that the limitation periods cease to run.

26. None of this affects the point that claims that have gone stale and are quite properly beyond the reach of the rights owner. Giving an undertaking to grant licences on F/RAND terms does not absolve a SEP owner from doing what every other rights owner must do: bring a claim within the limitation period or risk losing the right.

27. Indeed, in saying that limitation periods have no role to play in F/RAND licensing or reflect "non-F/RAND factors", the Courts (with respect) have lost sight of the purpose of a patent licence, which is to render lawful that which would otherwise be unlawful and so avoid the consequences that would otherwise flow from infringement. There is no need for a licence for acts undertaken beyond the relevant limitation periods, for the very reason that no consequences flow from such acts. A licensee who does not agree to pay for acts the subject of limitation is not "unwilling". That licensee is merely reflecting the fact that a licence is no longer needed in respect of those stale acts. It is not F/RAND for such a licensee to have to pay for those acts regardless.

(3) <u>Different industries require a different approach</u>

28. The third reason is that, even if the Court of Appeal was correct to say that limitation periods have no part to play in assessing what is due under the ETSI IPR Policy, the same is not true of other standardised technologies.

29. The technology that is of particular relevance to Acer is video codec technology, the standards for which are operated by the ITU-T in Switzerland. These concern video compression technology whereby video data streams are encoded (compressed) for transmission and then decoded to be watched by a user. A device such as a laptop can both encode and decode (for instance for video conferencing) or just decode (for instance to watch streamed video content).

30. Acer says that the approach of the Court of Appeal to limitation periods should not be applied indiscriminately to other standards, such as the video codec standards.

31. **First,** the only material identified by the Court of Appeal as supporting such an approach for the ETSI IPR Policy was the "ETSI Guide and FAQs page" ([187]). Even as regards ETSI IPR, such reliance was misplaced: the "Background" section makes clear that the Guide is only intended to help understand and implement the IPR policy and that its predecessor guide "[…] *did not have the same official status as the ETSI Statutes, the Rules of Procedure or the Technical Working Procedures*". An unofficial guide cannot sensibly be used as the vehicle to remove a party's national rights or to affect the parties' contractual relationship. In any event, as set out in Apple's Written Case at [103], since 25 April 2015, the relevant statements have been absent from the FAQs page. There is nothing to suggest that ETSI had limitation periods in mind when writing this very general guidance (which is a "best practice" type guidance but nothing to do with limitation periods being overridden).

32. Even if the "ETSI Guide and FAQ's page is relevant to interpret ETSI IPR policy, it is not a guide to the approach for other F/RAND policies such as the ITU-T (video codec technology) or the IEEE (wi-fi technology) or WPC (wireless power technology) which do not have the same guidance and are not governed by the same law as ETSI (ITU-T being under Swiss law and the IEEE and WPC both being under US law).

33. **Second,** in the context of a given standard, a potential licensee may have reasonable grounds for believing that the SEPs in issue would not be asserted and there is no principled reason why the SEP holder should be compensated for sales made long in the past when its commercial aims and licensing strategy were different.

34. This is illustrated in the context of video coding standards under the ITU-T, a context in which Acer is currently in dispute with Nokia. Unlike the cellular SEPs at issue in the Appeal, the vast majority of video codec SEPs are licensed through patent pools (over 90% of the SEPs for the H.264 standard and c.89% for the SEPs in the H.265 standard). Other parties are also currently in dispute before the English Court as regards video codec SEPs. Acer understands that the issue of royalties for past sales also arise in these cases (namely *Amazon v InterDigital* and *& Warner Bros. & Paramount v Nokia*).

35. Video codec standards have a particular history that is different to cellular standards. For many years, the SEP owners outside the video codec pools did not assert their video codec rights. There are a number of rational reasons for this behaviour. A number of SEP owners were implementers with a defensive patent posture but later exited the relevant business and became non-practising entities seeking to enforce their SEPs. For example, although the H.264

standard was approved by the ITU-T in 2003, Nokia is not said to have concluded its first H.264 licence until February 2014[5] after its handset business was sold to Microsoft in 2013.[6]

36. The SEP owners outside the pools stood by while the industry became locked into the H.264 and H.265 standards, the industry expecting a reasonable aggregate royalty burden to be administered via the pools. Further, even within pool licensing, the royalty value was taken for encoding or decoding video streams rather than the act of streaming itself.

37. Yet now, many years later, SEP owners are seeking to extract far higher rates for decoding, significant royalty value for streaming as well as suggesting that additional sums may be due for encoding the bitstream too. There is no reason why such royalties in such a changed industry (even if it is correct that royalties are due) should date back to a time when royalties were not taken for such activities and there was no reasonable expectation that they would be so taken.

38. The same applies to the suggestion that implementers in industries that use video codec technology should have been putting money aside from day one of implementing the relevant standards (*InterDigital* at [187]). Not only was this based on the ETSI Guide (see [34]-[35] of *InterDitigal*) which does not apply outside of the ETSI IPR Policy, but it cannot be fair in an industry such as video codec where it was not even known that money should be set aside (either because it was thought that licensing would be via the pools at the pool rates or it was not known that additional money would be sought at all – e.g. for streaming or encoding[7]). There are even questions under accounting standards whether it would be possible to put money aside for such uncertain contingencies.

39. Permitting a SEP owner who (or whose predecessor) has not participated in a market practice, and has delayed for many years before asserting its rights, nonetheless to recover royalties in respect of all past sales for acts and at rates which it *now* says are due, risks materially increasing the effective aggregate royalty burden ex post facto. Even if that would be F/RAND today (because potentially of changes in the industry and industry practices that are accepted by the Court) it does not mean it would be F/RAND to apply that back beyond even

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[5] *Nokia v Apple*, Civil Action No. 2:16-cv-1440, Nokia's Complaint, [36].
[6] https://news.microsoft.com/en-nz/2014/05/01/microsoftofficiallyw/.
[7] Until January 2025, Access Advance and MPEG LA, the two patent pools which together licence c.89% of the SEPs under the H.265 video codec standard (which was approved in 2013) did not charge any royalties for use of the standard for the commercial encoding of content.

the relevant limitation period. Where a SEP owner seeks to assert its rights several years after a standard has been developed, it should be open to an implementer to adduce evidence to this effect and argue that it would not be fair or reasonable for such a SEP holder to recover for all past sales.

40. Therefore, even if it is correct that royalties should be paid from the first use in the context of cellular SEPs (which Acer says is wrong), since different considerations as to the payment of past royalties may arise depending on the technology involved, it cannot be said that the same is true in respect of other standardised technologies governed by other F/RAND obligations.

(4) <u>Public policy considerations</u>

41. The fourth reason concerns public policy. Court of Appeal's approach is contrary to well-established public policy under English law. The "*aim of the statutes of limitation is to prevent citizens from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so on*": *Ashe v National Westminster Bank plc* [2008] 1 WLR 710, p.714F at [12] per Mummery LJ.

42. This is not an esoteric aspect of English public policy but rather has been recognised, for example, by (i) the European Court of Human Rights[8], (ii) the United States Supreme Court[9], and (iii) other major jurisdictions, such as Canada, China and India.[10]

43. A rule that requires royalties on past sales invariably to run back to first sale, irrespective of delay in the SEP owner's assertion and irrespective of any applicable limitation period, undermines this policy. It permits recovery by reference to acts long in the past in circumstances where the law would ordinarily attach weight to certainty and finality. This Court's judgment in *UP SC* does not disclose any intention to set up a system under which a global F/RAND determination would invariably enable a SEP owner to recover more than those royalties to which it had an enforceable legal entitlement in each relevant jurisdiction and in respect of which the implementer requires a licence to avoid the consequences of

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[8] Applications 22083/93 & 22095/93 *Stubbings v United Kingdom* (1997) 23 E.H.R.R. 213, p.233 at [49].
[9] *Rotella v. Wood*, 528 U.S. 549 (2000), p.555 per Justice Souter.
[10] See the Canadian Supreme Court in *Canadian Imperial Bank of Commerce v. Green* [2015] 3 SCR 801 at [57] per Côté J; the Supreme People's Court of the People's Republic of China's Interpretation on Several Issues Concerning the Application of the General Part of the PRC Civil Code promulgated on 24 February 2022, Articles 35 - 38; and the Indian Supreme Court's decision in *Arif Azim Co. Ltd. v. Aptech Ltd*. 2024 INSC 155 at [44] per Pardiwala J.

infringement. At the very least, the Court should be permitted to take this fundamental principle into account when determining what terms are fair and reasonable.

(5) Comity Considerations

44. Finally, there is comity. The current approach is contrary to comity and constitutes jurisdictional overreach. Mellor J stressed that "[t]*he development of the correct approach to setting global FRAND terms is an international endeavour*" (*InterDigital v Lenovo* [2023] EWHC 1583 (Pat), [166]). English courts have recognised the importance, in such an exercise, of sensitivity to relevant foreign laws and the ways in which foreign courts would approach the determination of a FRAND rate.[11]

45. In the Foreign Limitation Periods Act 1984 ("**FLPA 1984**"), Parliament signalled to the courts the importance of applying foreign limitation periods, by stipulating that such periods must be applied "*where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter*" (see section 1). In *Alseran and others v Ministry of Defence* [2019] QB 1251, Leggatt J (as he then was), observed that ([827]): "[a]*n English court should […] be very slow to substitute its own view for the solution adopted by a foreign legislature*." As set out in paragraph 42 above, the public policy on which limitation periods are based has widespread support around the world. It is notable that in some (mainly civil law) countries, an accrued limitation defence does not merely bar the remedy but rather extinguishes the underlying right.

46. Of particular relevance, in *SCA Hygiene v First Quality Baby Products* 580 U.S. 328 (2017), the US Supreme Court held that allowing judges to apply a different limitation period to US patent infringement claims from the statutory period, by applying an overlapping doctrine of laches, "*would give judges a "legislation overriding" role that is beyond the Judiciary's power*" because "*courts are not at liberty to jettison Congress' judgment on the timeliness of suit*". Yet that is exactly what the current approach of the English courts requires: the limitation period for US patent infringement is treated as irrelevant and overridden by what the English Court of Appeal regards as FRAND.

[11] See e.g. *InterDigital v Lenovo* [2020] EWHC 1318 (Pat) at [10], [13] per Birss J (as he then was); *Nokia v Oppo* [2023] EWHC 1912 (Pat) at [158] per Meade J.

47. The current approach of the English courts treats the limitation periods for patent infringement of other nations as irrelevant and overridden by what the English Court of Appeal regards as FRAND. So far as Acer is aware, England and Wales is the only major forum for global F/RAND determinations in which such an approach has been adopted.

48. Acer is not aware of any equivalent rule in the United States or Germany. To the contrary, in the United States, the Federal Circuit has treated a FRAND release payment for past unlicensed sales as substantively equivalent to compensation for past patent infringement: *TCL v Ericsson*, 943 F.3d 1360, pp.21-24. Such recovery sits against the background of 35 U.S Code § 286, which provides that "no recovery shall be had" for infringement more than six years before suit. In Germany, patent infringement claims, including claims in respect of SEPs, remain subject to the statutory limitation regime of three years under § 141 of the German Patent Act and § 195 of the German Civil Code, subject only to the specific residual enrichment-based claim preserved by § 852 of the German Civil Code, which has a limitation period of ten years. Neither jurisdiction appears to have adopted a rule by which limitation periods are disregarded altogether when valuing a past release under a FRAND licence.

49. It is not an answer to say that all the English Court is doing is settling the terms of the F/RAND licence that is needed to avoid infringement in the UK. If (as is usual in F/RAND cases) the scope of the licence is global, then the Court is in reality holding that the F/RAND terms of a licence to the UK SEPs requires the implementer to pay for past royalties under, say, US patents which a US court would not require the implementer to pay. The scope and payment terms of the licence are no longer commensurate with the acts in respect of which a licence is needed. The same would be true of Chinese patents where the limitation period is shorter still. Acer submits that there is no proper justification for such an approach to a global licence.

IV. CONCLUSION

50. In light of the above, the Court is respectfully requested to find that Ground 4 of the appeal is allowed.

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