IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM COURT OF APPEAL (CIVIL DIVISION)
Neutral citation [2025] EWCA Civ 553

B E T W E E N:

(1) APPLE RETAIL UK LTD
(2) APPLE DISTRIBUTION INTERNATIONAL LTD
(3) APPLE INC.

(collectively "**Apple**")
Appellants/Defendants

AND

(1) OPTIS CELLULAR TECHNOLOGY LLC
(2) OPTIS WIRELESS TECHNOLOGYY LLC
(3) UNWIRED PLANET INTERNATIONAL LTD

(collectively "**Optis**")
Respondents/Claimants

SUBMISSIONS OF THE FAIR STANDARDS ALLIANCE

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1. The Fair Standards Alliance a.s.b.l. (the "**FSA**") provides these submissions in accordance with Rule 24 of the Supreme Court Rules 2024, in support of its application for permission to intervene in the above appeal. The FSA has had regard to paragraphs 4.45 to 4.57 of Practice Direction 4 in preparing these submissions. These are also the written submissions of the FSA if such permission is granted.

2. Ahead of preparing these submissions, the FSA has had the benefit of reading Apple's Précis of Factual Background and Chronology, and Grounds of Appeal.

3. Definitions used in Apple's Grounds of Appeal are adopted in the submissions below, unless otherwise specified.

THE FSA AND ITS INTEREST IN THE APPEAL

Overview of the FSA and its Members

4. The FSA is an international business association created in 2015 to strengthen the voice of innovative technology companies of all sizes to ensure that licensing of standard essential patents ("**SEPs**") is done on a fair, reasonable and non-discriminatory ("**FRAND**") basis. The FSA's mission is "*To contribute to building a balanced framework for sustainable licensing of standard essential patents that fosters creativity, innovation and job creation in*

Europe and beyond"[1]. The FSA advocates for an open and collaborative approach to the licensing of SEPs that are needed for the creation of the next generation of wireless technology products, and its activities include advocacy towards the European Union, international organisations, and national governments around the world, including the United Kingdom, in relation to SEPs.

5. Members of the FSA ("**FSA Members**") are diverse, from small and medium-sized enterprises to multinationals, across multiple industries and sectors, and include SEP owners and SEP implementers. Current FSA Members include: Abax, airties, Amazon, Apple, Aumovio, BMW, Bury, Cisco, Dell, Deutsche Telekom, Emporia, Fairphone, Ford, Google, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper Networks, Kamstrup, Landis + Gyr, Lenovo, Mercedes Benz, Microsoft, Netflix, Nordic Semiconductor, Sagemcom, Semtech, Sequans, Sky, Stellantis, Telit, Tesla, Thales SA, Toyota, Tunstall, ublox, Valeo, Volkswagen, AB Volvo, and Xiaomi. Whilst Apple is an FSA member, which the FSA brought to the Court's attention in its Rule 16 and Rule 24 submissions, this intervention is made by the FSA on behalf of itself as an organisation. This is because of the interests of the FSA and its membership more broadly, rather than due to any instigation by Apple. The decision to seek to intervene in this case was taken by the FSA through its normal decision-making channels. Apple has made no financial contribution to the costs of such intervention and nor has it been involved in writing this intervention. As noted above and explained further below, the outcome of this appeal will have a real-world impact beyond the smartphone industry or any individual FSA member, including for companies operating in the UK that are making, buying, or selling connected products such as smart meters, EV chargers, and medical devices.

6. FSA Members are active in a wide variety of sectors, including automotive, telecommunications, energy, broadcasting, healthcare, semiconductors, consumer electronics and more. They are also active in a variety of geographies. FSA Members contribute significantly to innovation in the UK, Europe and globally. Annually, the aggregate turnover of FSA Members is more than £2 trillion, and in aggregate FSA Members invest more than £150 billion in R&D and innovation annually - some dedicate as much as a third of their annual revenues to R&D.

7. FSA Members implement technologies developed by standard-setting organisations such as the European Telecommunications Standards Institute (ETSI), the Institute of Electrical and Electronics Engineers (IEEE), the International Telecommunication Union Telecommunication Standardization Sector (ITU-T), and the Internet Engineering Task Force (IETF) to name just a few. Such technologies include, but are not limited to, cellular telecommunication technologies (such as 2G-5G), Wireless Local Area Network (LAN) (Wi-

[1] https://fair-standards.org/about-us-2/

Fi), video coding technologies (such as AVC and, HEVC), LAN Switching, and Internet Protocol (IP) Routing and power over ethernet. These standards mostly incorporate patented technologies that are subject to FRAND obligations[2]. In an increasingly connected world, standardised technologies are increasingly required to access global markets and, across all of these industries, FSA Members are reliant on access to such technologies on FRAND terms in order to develop products, bring innovations to the market and compete effectively.

Interest of the FSA and FSA Members in the Appeal

8. The longstanding experience of FSA Members is that an inability to negotiate or obtain SEP licences on FRAND terms can have a material and negative impact on a company's ability to innovate, launch new products and operate across its global markets (including the UK), irrespective of whether it is an SME or a larger multinational corporation.

9. FSA Members collectively hold more than 600,000 granted or pending patents, including tens of thousands of SEPs. This results from their strong support of standardisation across several decades, having participated in hundreds of standardisation activities around the world, including the development of connectivity standards, such as cellular and Wi-Fi. As many FSA Members are both owners of SEPs and potential licensees of SEPs of other entities, the FSA and FSA Members have a strong and direct interest in the proper functioning of FRAND licensing and ensuring balanced outcomes. Further, with this jurisdiction providing a popular forum, FSA Members may consider commencing UK rate-setting actions in an effort to resolve their FRAND disputes, and in any event will be faced with the impact of UK rate-setting judgments in their negotiations of FRAND licence terms.[3] FSA Members therefore have a direct interest in how the FRAND case law develops in the UK, which will very likely affect their SEP/ FRAND licence negotiations and litigation strategies.

10. The FSA itself has a longstanding institutional interest in FRAND licensing. It consistently seeks to promote key principles, including fairness and transparency in licensing, on a global level, through published position papers, engagement with regulators and competition authorities, and other avenues,[4] relating to the licensing of FRAND-encumbered SEPs. Accordingly, FSA has demonstrated its interest in this appeal from the outset, making submissions under Rule 16 on 31 October 2025 in support of Apple's application for permission to appeal.

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2 Note that some standardisation bodies impose fair reasonable and non-discriminatory (FRAND) licensing obligations, while others refer only to reasonable and non-discriminatory (RAND) obligations. It is generally understood in the industry that the two terms have the same meaning. These submissions use the term FRAND tor refer to both obligations, as appropriate in the context.

3 See paragraph 28 of Apple's Grounds of Appeal

4 https://fair-standards.org/key-principles/.

11. The FSA understands that a key objective of the UK Supreme Court in its *Unwired Planet* decision[5] (when concluding that the English Courts can determine global FRAND licensing terms with respect to standardised technologies) was that the parties and courts should look to and draw on commercial practice when setting those terms. In *UPSC*, the Supreme Court acknowledged that, when considering what terms are FRAND, the role of the court is to assess what terms would be agreed between a willing licensor and a willing licensee. The Supreme Court noted that "*[i]n deciding that a worldwide licence was FRAND Birss J had regard to practice in the telecommunications industry*" (paragraph 48). The Supreme Court confirmed that this was the correct approach – namely, when considering what terms willing licensors and willing licensees would agree, the court should have regard to industry practice:

> *"62. The IPR Policy is intended to have international effect, as its context makes clear. This is underlined by the fact that the undertaking required of the owner of an alleged SEP extends not only to the family of patents (subject only to reservations entered pursuant to clause 6.2 of the IPR Policy) but also to associated undertakings, as stated in the declaration forms in the IPR Policy. In imposing those requirements and more generally in its requirement that the SEP owner makes an irrevocable undertaking to license its technology,* ***ETSI appears to be attempting to mirror commercial practice in the telecommunications industry*** *… [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 for these purposes*** *… **[i]n our view the courts below were correct to infer that in framing its IPR Policy ETSI intended that parties and courts should look to and draw on commercial practice in the real world**".*

12. FSA Members have significant experience of commercial practice in negotiating and entering into licensing arrangements across a range of standardised technologies. Three areas of that experience are particularly pertinent in the context of Apple's appeal. The first is experience of the extent to which comparable licences are available, used, and actually comparable in the negotiation context. The second is the impact UK judgments have on real-world negotiations and the need for consistency and predictability in that context. Both points are relevant to Apple's Grounds 1 and 2. The third is how parties deal with the issue of royalties for sales made before the licence is signed, which is relevant to Apple's Ground 4.

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[5] *Unwired Planet v Huawei* [2020] UKSC 37

FSA'S SUBMISSIONS ON THE APPEAL – APPLE APPEAL GROUNDS 1 AND 2

13. The FSA addresses Apple's appeal Grounds 1 and 2 together.

Comparable Licences

14. Following the *Unwired Planet v Huawei* litigation, the UK has become a well-respected forum for resolving FRAND disputes, both because it is prepared to determine FRAND licence terms on a global basis without the agreement of both parties, and because it offers a largely transparent[6] and evidence-based approach to assessing FRAND. For example, in recent years, the following companies have commenced FRAND rate-setting actions in the UK: Acer, Amazon, AsusTek, Hisense, InterDigital, Lenovo, MediaTek, Nokia, Optis, Paramount, Philips, Tesla, TP-Link, Unwired Planet, Warner Bros, and Xiaomi.

15. A key tool that the UK courts have used (e.g. in *Unwired Planet v Huawei* and in *InterDigital v Lenovo*) is the "Comparable Licences" approach to assess FRAND. However, from the Main HC Judgment and the CA Judgment, this appears to have been a difficult case to adjudicate because of the lack of useful comparables – this does not appear to be a case like *InterDigital v Lenovo* where an "*awesome comparable*" was available[7]. In the CA Judgment, the "*best comparables*" were described as "*not [being] similarly situated*" and affected by "*degrees of hold up and hold out*" ([145]). While FSA's ability to comment on the Courts' comparables analysis in this case is limited given that the Main HC Judgment is so heavily redacted, this case appears to demonstrate some of the limitations and uncertainties that can arise from the Comparables Licences approach.

16. The FSA accepts that, as a matter of general practice, the Comparable Licences approach should be the preferred method for the English courts to adopt when there are sufficient and appropriate comparables available. However, the English courts need to be cognisant of two key issues that arise in the context of a Comparable Licences approach. The first is the need to ensure that there is a clear and predictable approach to FRAND rate-setting in circumstances where there is no "awesome comparable", and potentially no licences that are sufficiently similarly situated at all. The second is the importance of understanding the role that comparable licences play in real-world licence negotiations, especially given the emphasis placed on "industry practice" when the UK's rate-setting jurisdiction was established in the *Unwired Planet* case.

When are licences not comparable?

17. There are a number of reasons why there may not be any true comparables in a particular case. These include:

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6 Subject to confidentiality constraints around commercially sensitive aspects of comparable licences and licensing practices.

7 *InterDigital v Lenovo* [2023] EWHC 539 (Pat), paragraph 387.

(a) Early Disputes: Where a licensee is among the first to engage in negotiations with a SEP holder in respect of a particular technology, there may be no meaningful "comparables" at all. It is therefore of significance that parties understand how the English courts will address FRAND rate setting in those circumstances.

(b) Early Sign-Up Strategies: The emphasis placed on comparable licences in litigation appears to have led some SEP holders to focus on first signing up certain licensees at favourable rates to the SEP holder (which happens, for example, where the licensee does not have requisite financial or human resources to properly assess a licensing offer). The strategy of many SEP holders is to target smaller licensees that may not have the budget to seek a court determined FRAND rate, and then to use those rates as evidence of FRAND rates in future assertions. In other words, the SEP holder will try to leverage the favourable rate in negotiations or litigation against larger licensees despite its existing licences not being truly comparable.

(c) Transaction Cost Impact: The transaction costs of negotiating - and potentially litigating - for FRAND terms mean that some companies (for example those with lower sales volumes) are frequently forced to accept above-FRAND rates. Due to their low volumes, the savings associated from obtaining FRAND terms are dwarfed by the cost of challenging the licensor's rates as non-FRAND. Conversely, it may be economically feasible for companies with larger sales volumes to contest unreasonable demands because, for these companies, the costs of accepting above-FRAND terms will dwarf the litigation costs. However, the economic circumstances that enable large companies to contest above FRAND rates do not necessarily afford them leverage in negotiations because generally larger prospective licensees (such as Apple) have more sales revenue and economic activity (e.g. from manufacturing) at risk of being stopped by injunctive pressure, and so – even if they wished to do so (which is not accepted) - they do not necessarily have the ability to hold out and drive down prices (contrary to the Court of Appeal's findings about Apple and its licences).

(d) Licences Impacted by Hold-Up: Licences that are impacted by hold-up are inevitably problematic in terms of comparability. An example of this is the CA's reliance on the Optis-Google Licence in this case. It appears that the CA was keen to include the only remaining Optis licence[8] (i.e. Optis-Google) as a comparable to avoid having to value Optis' portfolio solely by reference to Apple licences (which were directed at third party portfolios). This was despite the CA acknowledging that: (i) the companies were not "*similarly situated*" ([145]), (ii) the licence was likely

[8] In the Main HC Judgment, the Judge dismissed all *ad valorem* Optis licences as comparables and Optis did not appeal this finding ([78])

affected by hold-up ([145]), and (iii) the rate agreed was too high to be FRAND ([110] & [139]). Given these findings, and the differences between Google's and Apple's businesses, it is surprising, and it is submitted wrong, that the CA relied so heavily on the Optis-Google licence as a benchmark for determining a FRAND rate for the Optis-Apple licence.

(e) Licences Impacted by Injunction or Exclusion Threat: Litigation that seeks injunctive or exclusionary relief can exert enormous pressure on an implementer to sign a licence quickly, even at supra-FRAND rates. If an implementer is faced with the threat of an injunction (which can result from being found to infringe a single patent) that could stop it from selling its products in a key market. If that implementer is offered the option to sign a patent licence at a high royalty rate (i.e., above-FRAND), then in these circumstances the implementer may have no choice but to sign the licence at the high rate so as to continue doing business in that key market. This is an issue that is likely to have impacted some of the comparable licences relied on in this case,[9] but it is unclear to what extent the Judge or the CA considered this issue[10]. It was well-known among FSA Members that the Ericsson and Nokia licences with Apple would have been signed under some litigation pressure:

(i) For example, on 26 February 2015, Ericsson sued Apple in the US before the ITC and the EDTX asserting 41 patents[11], and extended its litigation campaign against Apple into the UK, the Netherlands and Germany[12], before the parties settled their dispute resulting in the Apple-Ericsson 2015 licence.

> On February 26, Ericsson (NASDAQ: ERIC) filed two complaints with the International Trade Commission (ITC) and seven complaints in the United States District Court for the Eastern District of Texas against Apple asserting 41 patents covering many aspects of Apple's iPhones and iPads. The patents include standard essential patents related to the 2G and 4G/LTE standards as well as other patents that are critical to features and functionality of Apple devices such as the design of semiconductor components, user interface software, location services and applications, as well as the iOS operating system. Ericsson seeks exclusion orders in the ITC proceedings and damages and injunctions in the District Court actions.

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9 The CA elevated the Apple-Ericsson/Nokia/InterDigital/Sisvel licences for consideration above the other Apple licences because they produced the highest implied rates for the Optis portfolio and so implicitly were least likely to have been affected by Apple's hold-out.

10 The Main HC Judgment is heavily redacted, and the CA Judgment makes no mention of the circumstances leading up to the conclusion of these licences. By contrast, It is noteworthy that, according to public record, it does not appear that either the Huawei 2014 or LGE 2017 licences were negotiated under the threat of litigation pressure. It is not clear from the Main HC Judgment or CA Judgment whether this factor was taken into account when considering whether these licences would be good comparables.

11 Ericsson, Press Release, *Ericsson Sues Apple for Patent Infringement To Defend Fair Licensing System* (27 February 2015)
(Source: https://mb.cision.com/Main/15448/2245415/661474.pdf)

12 Guardian, Article, *Ericsson takes Apple fight over iPhone and iPads to Europe* (8 May 2015)
(Source: Ericsson takes Apple fight over iPhone and iPads to Europe | Apple | The Guardian)

(ii) Further, on 22 December 2016, Nokia announced that it had sued Apple in 11 countries asserting a total of 40 patents (countries included: Germany, Finland, UK, Italy, Stockholm, Sweden, Spain, Netherlands, France, Hong Kong, Japan, and the US in the EDTX and ITC)[13]:

Nokia expands patent litigation against Apple in Asia, Europe and the US

Nokia Corporation
Stock Exchange Release
December 22, 2016 at 18:32 (CET +1)

Nokia expands patent litigation against Apple in Asia, Europe and the US

Espoo, Finland - Nokia has filed further complaints alleging that Apple products infringe a number of Nokia patents, expanding its litigation originally announced on December 21.

Across actions in 11 countries, there are now 40 patents in suit, which cover technologies such as display, user interface, software, antenna, chipsets and video coding. Cases have now been filed in:

- Regional Court, Dusseldorf, Germany - 8 patents *
- Regional Court, Mannheim, Germany - 4 patents *
- Regional Court, Munich, Germany - 2 patents *
- Market Court, Helsinki, Finland - 3 patents
- High Court, London, UK - 3 patents
- Court of Turin, Italy - 4 patents
- Patent and Market Court, Stockholm, Sweden - 3 patents
- Commercial Courts, Barcelona, Spain - 1 patent
- District Court, The Hague, Netherlands - 3 patents
- High Court, Paris, France - 1 patent
- High Court, Hong Kong - 1 patent
- Tokyo District Court, Japan - 2 patents
- US District Court, Eastern District of Texas - 18 patents *
- International Trade Commission, US - 8 patents

(f) Lack of Comparability of Licensee Business: Often a licence that otherwise appears to have been entered into by willing parties without being impacted by the above issues, may nonetheless prove not to be particularly useful due to differences in the nature of the licensees' respective businesses, in terms of goods and services, the need for the licence to address other technologies (both standardised and non-standardised), or for other reasons.

18. The FSA accepts that to some extent these issues can be addressed through proper unpacking, analysis and adjustment of licence terms to make the licenses "more" comparable. However, it is important for the Court to be aware of some of these limitations to the Comparable Licences approach.

The Role of Comparable Licences in Real-World Negotiations

19. Given the focus on "industry practice" in *Unwired Planet*, it is also important to bear in mind the reality that, while selective details of some existing licences may be shared by a SEP holder during negotiations with a prospective licensee (usually in summary form and anonymised), industry practice is that, outside litigation, SEP holders rarely, if ever, disclose their existing licences, and never disclose all of them. This can often be due to legitimate concerns about confidentiality restrictions, but the lack of transparency provides the SEP holder with a strategic advantage in the negotiations. This leaves the putative licensee unable to independently verify or assess the identity of the counterparties or the terms upon

[13] Nokia, Press Release, *Nokia expands patent litigation against Apple in Asia, Europe and the US* (22 December 2016) (Source: https://web.archive.org/web/20161226222116/http:/www.nokia.com/en_int/news/releases/2016/12/22/nokia-expands-patent-litigation-against-apple-in-asia-europe-and-the-us)

which others have taken a license to the relevant SEP portfolio, nor to determine the comparability of those licence terms to the putative licensee's own situation.

20. As such, a putative licensee often needs to assess a potential licence value using other approaches, such as trying to obtain information from public sources (including court judgments), making an assessment by reference to its own existing licences, and/or looking to patent pool licensing rates (which do not necessarily reflect FRAND rates in any case).

21. To some extent the UK can alleviate this problem by supporting disclosure of the SEP holder's licences during litigation, and potentially through pre-action disclosure (likely the first opportunity for the implementer to have visibility of such licences). The value of this approach was recognised was Mr Justice Mellor in *InterDigital v Lenovo*[14]:

> "*Sixth, I have discussed above the problems caused by Lenovo not having access to adequate information from InterDigital on comparable licences until a confidentiality regime was established in the course of this litigation. The ETSI IPR Policy offers no solution to this problem, which must occur frequently. One possible solution is for the parties to start an action, agree to early disclosure of potentially comparable licences under a Court-monitored confidentiality regime and to agree a stay of the action to allow the parties to negotiate on the basis of the information then available. If those negotiations do not succeed after a limited time, then the action may continue.*"

22. However, this approach only helps to the extent that the licences available for early disclosure would form the basis of a sensible and appropriate comparables analysis. It therefore remains important for licensees (and parties more broadly) to understand on a consistent basis how the Comparable Licences approach will be applied, and to what extent alternative or additional approaches are considered to be valid and viable for assessment of FRAND licence terms.

The Courts' Approach to Top-Down Analysis

23. In particular, it is important for courts to adopt a clear and consistent approach to whether and how they take into account the implied aggregate royalty burden imposed by any approach to calculating royalty rates. Such burden needs to be (i) reasonable and bearable from the implementer perspective (otherwise adoption of the standardised technology becomes non-viable), (ii) consistent within a particular technology (valuing the 4G cellular stack at $6 in *Interdigital v Lenovo* (CoA), but at $40 in this case, is self-evidently problematic), and (iii) agnostic of product value (so that makers of basic level devices are not priced out by an aggregate rate calculated by reference to far more expensive full-feature devices).

[14] [2023] EWHC 539 (Pat)

24. The Main HC Judgment placed assessment of the royalty stack at the centre of the royalty assessment, with the stack being valued by reference to Apple's comparable licences on the basis that Apple had licensed a significant proportion of the stack. By contrast, the CA first relied upon comparable licences to arrive at three "*realistic options*" of dollar per unit amounts in between the closest "comparables", before using estimates of the royalty stack to assess the appropriateness of the resulting aggregate royalty against the value of a Google phone. This guided the CA's judgment as to which of the three options was the appropriate FRAND rate ([144-145]).

25. In previous cases (e.g. *Unwired Planet v Huawei* and *InterDigital v Lenovo*), the stack / top-down approach has been used as a "cross-check", but in *Optis v Apple*, this is the first time that the Court has used the "stack" to derive and finalise a FRAND rate. This approach is unprecedented and reflects the lack of appropriate comparables available in this case. It is submitted that courts should strive to adopt a clear and consistent framework in determining whether, and in what manner, the implied aggregate royalty burden imposed by their chosen approach for calculating royalty rates is taken into account in the FRAND analysis, both where there are and are not good comparables available.

26. The Court should also be aware of various limitations in terms of valuing the "stack":

(a) Public Statements on "stack" valuation are unreliable: Although many licensors publish statements estimating the aggregate royalty burden (ARB) or "stack"[15], it has been recognised that "*the[se] statements … have little value in arriving at a benchmark rate today for a number of reasons … [t]he claims are obviously self-serving*"[16]. These statements often provide no principle or evidence to support them. They also do not represent implementer viewpoints - "*putting weight on these statements do[es] not take into account what implementers and SEP holders have actually been content to agree*"; "*[c]ompared to public statements, comparable licences are concrete data points*"[17]. They also do not represent what parties have agreed "*in the intervening years*"[18].

(b) Problem of Over-Declaration: There can be no certainty or accuracy about the number of SEPs relevant to a particular standard due to endemic over-declaration of patents. For some standards (e.g. cellular standards), it has been recognised that companies tend to over-declare patents as being essential and that this is a "*major problem*"[19], while for other standards (e.g. video coding standards) there is

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15 Examples of these statements can be found in paragraph 264 of *UPHC*. Similar statements can be found in paragraph D on page 131 of *Samsung v Apple* (16 May 2014) (Japan, IP High Court).

16 Birss J (as he then was) at paragraph 269 of *UPHC*

17 Paragraph 270, *UPHC*

18 Ibid.

19 Paragraphs 324-329, *UPHC*

no obligation to declare all essential patents, or blanket declarations are given as in the case of 802.11 (Wi-Fi), which equally causes challenges in estimating the stack.

(c) Licensors Disagree on Share of Stack: The proportion of essential versus declared patents differ from licensor to licensor, meaning that, even if it were possible to estimate the total stack of declared patents, it would be difficult to appropriately allocate the stack across SEP holders since SEP holders disagree on their relative shares of the total stack. Due to the difficulty of assessing essentiality and validity, as well as the over-declaration problem, there can be no certainty or accuracy estimating stack share.

(d) Inconsistent approach to ASP: The percentage of the stack attributable to a specific licensor may then be applied to the average selling price (ASP) of the product(s) being sold under the licence, although this may be only one variable and there may be situations where the aggregate royalty is capped and no ASP is used at all. Where an ASP is used, the Courts have not been consistent as to what ASP to use. In *InterDigital v Lenovo*, for example, (i) InterDigital made an *ad valorem* offer to Lenovo where the ASP was subject to a cap of $200 ([20]), (ii) the valuation experts and Mr Justice Mellor agreed that wholesale, rather than retail, prices should be used ([34]), and (iii) InterDigital's expert used an ASP of $220 (based on an industry average from 46 handset prices, rather than the price of a specific brand/model mobile phone) for his top-down analysis ([847(ii)]). By contrast, in the CA Judgment, the CA appears to have considered the average retail price of a Google phone ($470) and an Apple phone ($675) globally (although this is not said explicitly), both of which are much higher than the industry average ASP (taking the $220 used in *InterDigital*).

27. The "stack" was a key reference point for the Judge and the CA in *Optis v Apple*, given the lack of "comparables" available to the Courts. However, the stack approach was different at first instance and on appeal, and in both cases was more central to the analysis than in previous judgments. The FSA would welcome clear guidance that could be consistently applied as to when and how the courts should approach rate-setting in circumstances where there are no / few appropriate comparables.

The Need for Predictability

28. Apple's appeal raises important issues about the importance of the English courts setting out a clear and consistent methodology for determining FRAND licensing terms. A key concern is to ensure a predictable and consistent approach. In the field of SEP/FRAND licensing, judgments from well-respected courts have wide-spread application. For example, it is common in negotiations for parties to refer to these judgments as reference

points for the negotiation, e.g. to set out an approved method for calculating a FRAND rate or value for the "stack".

29. The different approaches and outcomes between the first instance and Court of Appeal decisions in these proceedings demonstrate the need for the Supreme Court to consider and set forth the principles that the English courts should apply when setting global FRAND licence terms. A further and significant example is that the total 4G cellular stack was valued at $6 in *Interdigital v Lenovo* (CoA), but at almost $40 by the Court of Appeal in these proceedings, as well as the inconsistent treatment of the Apple/InterDigital licence between the two cases. This reinforces the need for higher court guidance to ensure a more consistent and predictable approach.

30. Significant judgments from national courts that impact on the outcome of a FRAND dispute are closely followed by those companies (such as FSA Members) that regularly engage in negotiation of FRAND licence terms (as indicated above with respect to the impact of *Interdigital v Lenovo* (CoA) on the issue of past sales). In the experience of FSA Members, such judgments can be relied on in negotiations with an eye to how the dispute may be resolved if the parties are unable to agree terms during the negotiation. For this reason, it is important to ensure that the English courts have a clearly articulated and consistent methodology that provides consistent and predictable outcomes. This will engender confidence in their decisions, both in the context of their impact on subsequent negotiations, and in ensuring the English court remains a trusted forum for resolution of FRAND licensing disputes.

FSA'S SUBMISSIONS ON THE APPEAL – APPLE APPEAL GROUND 4

Industry Practice Concerning Royalties for Past Sales

31. The experience of FSA Members is that in real-world negotiations parties limit the consideration for past sales for multiple reasons, including:

(a) The fact that as a matter of law past damages would be subject to relevant damages limitation periods and the parties to negotiations (SEP holders and licensees) would generally look to statutory limitation periods depending on where the sales took place.

(b) The staleness of evidence going back beyond that period (in terms of being able to provide details such as regarding revenues and relevant product functionality where applicable).

(c) The desire for SEP holders to focus value on the forward-looking payment and therefore present higher licensing rates.

(d) The fact that prices charged for products sold in the past cannot now be increased to reflect the additional production costs represented by royalties for those past sales (although this applies to all past sales, limiting the past period limits the number of products impacted).

(e) The significant and sometimes long-term uncertainty that would otherwise arise waiting for (sometimes unknown) SEP holders (in the face of tens of thousands of declared SEPs) to choose to make themselves and their licensing terms known. Indeed, it was not until the English court decision in *Interdigital v Lenovo* (CoA) that parties started contemplating in licensing negotiations that royalties might go beyond limitation periods.

(f) The fact that SEP holders are fully aware of limitation periods and know that they need to start proceedings in order to deal with limitation periods.

32. Limitation periods may or may not be expressly mentioned during negotiations, or in any 'past release' clause in a licence. However, prior to the decision in *Interdigital v Lenovo*, it was a given that parties would prepare their calculations for the appropriate FRAND rate on the basis that limitation periods apply. Since limitation periods differ country-by-country, the practice is usually to assume an average or benchmark limitation period (e.g. 3 or 6 years). In this respect, the experience of FSA Members is consistent with, and similar to, the expert evidence produced in *InterDigital v Lenovo* (e.g. see paragraph 444) and as held by the Judge in the Main HC Judgment (see paragraph 501).

33. Further, in the experience of FSA Members, industry practice – of considering limitation periods when calculating royalties – has existed both before, but also since, the decision in *Interdigital v Lenovo*, noting that the UK is the only jurisdiction where FRAND terms are set on the basis that implementers are required to pay royalties from the date of first use, irrespective of limitation periods. The UK is, therefore, an outlier as compared to other jurisdictions where FRAND terms can be set (e.g. United States, Germany, India, and China).

34. *Interdigital v Lenovo* (CoA) was decided in the context of cellular standards subject to the IPR policy of the ETSI and based on the evidence (or lack thereof) presented in that case. However, the issue of the appropriate approach to valuation of past sales when determining FRAND licence terms arises across all standards, industries and products where there is an obligation to offer and/or license on FRAND licence terms. This includes applications such as connected vehicles, IoT applications, broadcast technologies, healthcare devices, video streaming, Wi-Fi, cellular technologies and the like. As such, the issue of past royalties is an issue of general public importance that should be considered by reference

to broader industry practice across the range of industries and standardised technologies affected, with different approaches across each if necessary and appropriate.

Policy Reasons

35. It is sometimes suggested that if limitation periods are considered when calculating royalties, then this encourages delay and hold-out by implementers, which disadvantages licensors and other implementers who have already signed their licences (e.g. see paragraph 540 of Mr Justice Mellor's judgment in *InterDigital v Lenovo*, and paragraphs 189 & 193-4 of the Court of Appeal's judgment in *InterDigital v Lenovo*). However, to the extent that these disadvantages exist, licensors can protect themselves by not delaying negotiations and seeking licenses earlier before commencing legal proceedings and staying those proceedings whilst negotiations are on-going.

36. Further, when considering the advantages and disadvantages to both sides, it is important not to overlook the advantages that delay offers SEP holders. First, SEP holders often choose to wait until the standard has been widely adopted before asserting their patents against implementers. If the standard is well-adopted, there may be no other technological solutions available if an injunction is granted, which will put more commercial pressure on the implementer to agree a licence on the terms proposed by the SEP holder. Second, as discussed above, SEP holders often choose to approach smaller licensees (sometimes called "minnows") first to show that there is at least part of the market that will accept their high royalty rates, with a view to relying on these licences as "comparables" in any future FRAND litigation. Third, SEP holders may choose to wait until growing companies have reached significant sales volumes before approaching them for a licence and suing for patent infringement. These are all good, strategic reasons to delay a claim, but do not justify the courts stepping in to disapply limitation periods when the SEP holders would be perfectly able to commence litigation on time should they choose to do so. So far as the FSA is aware, there is no other area of UK law where the Courts step in to assist a rights holder that has chosen to delay asserting its rights in this way.

37. As such, and in the experience of FSA Members, any approach adopted by the UK courts to past sales on which royalties should be paid ought to consider the commercial practice of members of the relevant industry in negotiating these licences, rather than proceeding on the basis that such sales must necessarily encompass worldwide sales back to the date of the first sale.

CONCLUSION

38. The Supreme Court's decision on Apple's Grounds of Appeal 1, 2 and 4 will likely have wide-reaching implications both for implementers and SEP holders. In light of these submissions, and considering the Supreme Court's comments in *UPSC* regarding the

significance of commercial practice in the real world, FSA Members submit that Apple's claim that the CA erred in its approach to determining a FRAND rate by failing to take into account existing market levels and industry practice, particularly regarding past sales, and in doing so, failed to comply with the requirements of consistency and predictability in exercising the global rate-setting jurisdiction, is correct. Grounds 1, 2 and 4 of Apple's Appeal should therefore be allowed.

HOGAN LOVELLS INTERNATIONAL LLP

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