

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

and others

Respondents

(collectively, “Optis”)

and

(1) APPLE RETAIL UK LIMITED

and others

Appellants

(collectively, “Apple”)

WRITTEN CASE OF QUALCOMM INCORPORATED

This Written Case generally adopts the abbreviations and definitions in the Grounds and in the Statement of Facts and Issues (“SFI”), using the SFI’s shorthand for the principal judgments (including “Unwired SC”, “Unwired CA”, “Unwired HC” and “CA Judgment”). In this Written Case, Apple’s written case is referred to as “Apple WC”.

INTRODUCTION

1. Although this dispute and the licence determined by it are specific to the parties and their particular circumstances, Grounds 1 and 2 of Apple’s appeal raise fundamental issues about the underlying purpose and intent of the ETSI IPR Policy and the FRAND undertaking.
2. Qualcomm has been engaged in FRAND licensing for over three decades, has expertise in the processes of Standards Development Organisations (“SDOs”), including the cellular standard-setting process, and has devoted over \$100 billion to researching and developing cellular technologies. Qualcomm has seen firsthand how FRAND, properly applied, preserves and protects incentives to invent and innovate, which, in turn, have propelled the extraordinary success of the entire cellular industry. Qualcomm submits that the appeal, if allowed on Grounds 1 and 2, would not only depart from widely accepted principles adopted by the industry as a whole, but also disturb the careful balance struck by the ETSI IPR Policy as it was deliberately framed in 1994. There is a serious risk of adverse consequences for innovation if established industry practice were to be overturned.
3. Qualcomm’s intervention therefore addresses three aspects of the central question on this appeal, as they relate to the proper approach that courts should follow when evaluating whether a SEP-holder has complied with its commitment to offer FRAND royalty terms. *First*, the ETSI IPR Policy does not mandate how FRAND terms should be negotiated. *Second*, the most reliable approach for determining FRAND terms for global portfolio licences of standard essential patents (“SEPs”) is to compare the offered terms to the terms of past licences to that same portfolio of patents. Such licences are market-based evidence that establish the bounds of fair and reasonable compensation that implementers have determined appropriate for the use of the exact innovations covered by the at-issue licence. The “top-down approach”, which would require courts to attempt to determine the total value of all SEPs held by all non-party SEP-owners and then use unreliable methods (such as patent counting) to apportion some of that nominal total value to the particular licensor, is contrary to established patent valuation methodologies and inconsistent with how SEP licences are negotiated in practice. *Third*, there is a range of licensing terms that are FRAND in any particular set of circumstances. A SEP-holder discharges its FRAND commitment by offering the licensee any FRAND terms, including if the offered terms are more favourable to the SEP-holder than other hypothetical

FRAND terms. If a court was to find that a SEP-holder has discharged its contractual FRAND commitment, then there would be no need or basis for the court to impose any alternative licensing terms. Only in the particular circumstances in which the court's function is to declare the terms of a FRAND licence, either pursuant to an agreement among the parties or because it has determined that no FRAND offer was made, might a court need to develop its own FRAND licensing terms to resolve the case. However this Court resolves the present appeal — in which it was common ground that the function of the trial at first instance was to declare the terms of a FRAND licence — it should be clear that the situation is separate and distinct from the situation in which there is a dispute between parties as to whether or not a FRAND offer was made during negotiations before trial. In the latter situation, the court should begin by determining if the SEP-holder has complied with its FRAND commitment, as such determination ordinarily will avoid the need for the court to determine for itself what other terms are or might be FRAND.

4. These conclusions follow from the fundamental twofold purpose of the FRAND commitments created by the ETSI IPR Policy: (i) to promote the widespread dissemination and adoption of technologies embodied by cellular SEPs by ensuring that such technologies *are accessible* to implementers, and (ii) to ensure that SEP-holders may obtain *fair and reasonable compensation* for the use of their inventions. Indeed, this Court recognised this in *Unwired SC* at §7, holding that the ETSI IPR Policy ensures that innovators are “fairly rewarded for the use of their SEPs in the implementation of the standards”.
5. An error in Apple's case is the notion that the FRAND commitment is intended *to limit the total compensation* that implementers must pay *all* innovators for cellular SEPs (what Apple calls the “Stack”) (see Apple WC§§5-6). It is understandable that Apple, like any implementer, might seek to keep its own aggregate costs as low as possible. The Court of Appeal found at §122-123 that Apple's licensing negotiations have been characterised by hold-out and deployment of its considerable bargaining strength to depress royalty rates: the so-called “Apple Framework” is part of that long-running, multi-faceted effort to “Reduce Apple's Net Royalty”, “Reshape FRAND” and “Devalue SEPs”.¹ Care is therefore needed when assessing

¹ See Qualcomm Opening Statement Demonstrative Exhibit, *Apple Inc. v. Qualcomm Inc.*, 3:17-CV-00108 (S.D. Cal.), available at <https://appleinsider.com/articles/19/04/24/apples-will-to-hurt-qualcomm-financially-illustrated-by->

Apple's assertions about the policy underlying the ETSI regime.

6. Nor is Apple's Framework supported by the text, history or decades-long implementation of the ETSI IPR Policy, which creates voluntary contractual commitments that must be assessed by their terms and the expressed intent of the parties to such undertakings (the SEP owner and the relevant standards organisation). Apple does not engage with that contractual framework, but instead asks the Court to adopt a broad generic "FRAND" obligation that goes well beyond the facts of this case such that it applies not just in the context of cellular SEPs but to every standard. That attempted oversimplification, however, has been repeatedly rejected as incompatible with the ETSI IPR Policy. Indeed, when implementers have proposed making the "aggregate royalty burden" or "top down" methodology part of the FRAND commitment, ETSI members rejected it not only in 1992-1994 but again in 2006. Proponents of top-down approaches have generally relied on mechanistic patent-counting as a solution, which erroneously treats all patents as having equal economic value contrary to the widely acknowledged fact that some patents are much more valuable than others. If these principles were accepted, patent owners that contribute inventions to standards would no longer be "fairly rewarded," which would result in imperilling incentives to innovate.

THE ETSI IPR POLICY AND THE PURPOSE OF THE FRAND COMMITMENT

7. Cellular standards are developed through a collaborative process convened by 3GPP, a consortium of SDOs, most prominently among them ETSI. ETSI members include companies, universities and other organisations from around the world, representing interests and expertise across the cellular ecosystem, and comprise both innovators and implementers. The ETSI IPR Policy, which provides the language of the applicable FRAND commitment, is designed to enable the technological progress that results from the standards-development process and to ensure widespread adoption of the resulting innovations.² The ETSI IPR Policy expressly provides that it "seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs" and that "IPR holders . . . should

qualcomms-opening-statement (describing Apple internal documents produced in litigation that set out its strategy to "Reduce Apple's Net Royalty," "Reshap[e] FRAND" and "Devalue SEPs").

² Other regional SDOs participating in 3GPP maintain IPR Policies that are separate from but similar to ETSI's, and the 3GPP's Working Procedures require that all participating SDOs maintain "compatible" IPR Policies to ensure a consistent and harmonious licensing approach for cellular SEPs. 3GPP Working Procedures, Article 6.

be adequately and fairly rewarded for the use of their IPRs”.³

8. To meet these ends, the ETSI IPR Policy requires Members to use “reasonable endeavours” to inform ETSI of “ESSENTIAL IPRs”.⁴ If ESSENTIAL IPRs are disclosed, ETSI requests the SEP owner give an undertaking “that it is prepared to grant irrevocable licences on” FRAND terms, subject to certain conditions provided by the ETSI IPR Policy.⁵ A FRAND undertaking is thus a voluntary contractual commitment made by a SEP-holder. Companies that manufacture devices implementing cellular standards may seek to enforce the FRAND undertaking as third-party beneficiaries under regular contract principles. Because a FRAND obligation arises from a voluntary contract, the scope of the FRAND commitment must be defined based on the terms of the contract and the expressed intent of the parties to that contract—here, the SEP-holder and ETSI.⁶ Any attempt to define FRAND commitments without considering the relevant contract and the intent of the parties to that contract is in error.
9. Fundamentally, the ETSI IPR Policy was *not* designed *to limit* SEP-holders’ rights under patent law to obtain reasonable compensation for the use of their technologies. Instead, the ETSI IPR Policy was carefully constructed *to ensure* that SEP-holders are able to obtain such compensation because that is what fuels further investment and innovation, the lifeblood of the standard-development process.⁷ As the European Commission warned standards organisations at the time the ETSI IPR Policy was being drafted and debated, “the incentive to develop new products and processes on which to base future standardization will be lost if the standard-making process is carried out without due regard for intellectual property rights.”⁸
10. For this reason, ETSI has rejected proposed IPR Policy provisions that had the purpose and effect of restricting SEP-holders’ ability to seek compensation. For example, the 1992 ETSI

³ ETSI IPR Policy, §§ 3.1, 3.2.

⁴ ETSI IPR Policy, § 4.1.

⁵ ETSI IPR Policy, § 6.1.

⁶ See generally Roger G. Brooks & Damien Gerardin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, International Journal of IT Standards and Standardization Research (2011). Undertakings under the ETSI IPR Policy are governed by French contract law, but the authors observe that interpreting contracts according to the parties’ intent is a common feature of civil law and common law jurisdictions.

⁷ See ETSI IPR Policy, § 3.2 (“IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS”).

⁸ Communication of the Commission ‘Intellectual Property Rights and Standardization’ (Oct. 27, 1992) COM (92) 445 final, § 1.1.1.

General Assembly debated a package of proposed restrictions that would have, among other things, required SEP-holders to declare, in advance, the maximum royalty rates on which they would license their cellular SEPs.⁹ A letter submitted by ANSI, which accredits American SDOs in a variety of industries, warned:

If holders of IPRs are deprived of the ability freely to determine the terms and conditions upon which they will (or will not) make their IPRs available to others, the incentive for investing in innovative research and development will be significantly compromised. Furthermore, the incentive for leaders in the development of technological advancements to participate in the ETSI standardization process will be dramatically undermined.¹⁰

11. By the July 1994 General Assembly, ETSI ultimately rejected compensation-restrictive provisions after important members threatened to withdraw from ETSI.¹¹ Months later, the General Assembly adopted the current ETSI IPR Policy and incorporated the basic “fair, reasonable and non-discriminatory” provision found in the policy to this day.¹² Since that time, implementors’ efforts to persuade ETSI to add restrictions on innovators’ rights to compensation have repeatedly failed. In 2006, certain cellular implementors proposed adopting requirements concerning “aggregated reasonable terms” and “proportionality”. Indeed, Apple itself has advocated unsuccessfully that SEP owners should follow its top-down methodology.¹³ Under these proposals, FRAND terms would have been evaluated by first establishing the aggregate reasonable royalty attributable to all SEPs and then by determining the proportion of such value attributable to an individual SEP-holder’s portfolio. ETSI’s rejection of these proposals re-confirms that the ETSI IPR Policy was *not* intended to dictate how FRAND terms should be negotiated or determined. ETSI’s Board, acting on behalf of its members that represent the spectrum of interests from innovators to implementors, instead has long made clear that “[s]pecific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI.”¹⁴

12. This history bears on the issues presently before the Court. Under French law, the context for

⁹ Letter from ANSI to ETSI (Mar. 17, 1992), ETSI/GA12(92)TD3 4.

¹⁰ ETSI/GA12(92)TD3 4, above.

¹¹ Revised Minutes of the 20th Meeting of the ETSI General Assembly (on IPR) (July 22, 1994), ETSI/GA20(94)22 Rev.1.

¹² General Assembly Chairman’s Proposal for an ETSI Interim IPR Policy (Nov. 22-23 1994), ETSI/GA21(94)3 § 6.1.

¹³ Ltr. from Apple, Inc. to ETSI Director-General (Nov. 11, 2011).

¹⁴ ETSI Guide on IPRs, § 4.1.

the ETSI IPR Policy is admissible when considering the construction of the FRAND undertaking (as this Court noted in *Unwired SC* at § 8). That context shows that the terms “fair” and “reasonable” were deliberately chosen for their breadth and flexibility. The lack of specificity is not a defect to be corrected, but a virtue that accommodates case-by-case negotiations in light of commercial practicalities. As the European Commission warned ETSI during the development of the IPR Policy, “[i]t is not feasible or appropriate to be more specific as to what constitutes ‘fairness’ or ‘reasonableness’ since these are subjective factors determined by the circumstances surrounding the negotiation.”¹⁵ “The basic principle of the ETSI IPR regime remains FRAND with no specific preference for any licensing model.”¹⁶

13. It is true that the European Commission made statements in 2017 and 2023 concerning how it believed that *all* FRAND commitments—whether under ETSI’s IPR Policy or that of a non-cellular SDO—should be interpreted (see *Apple WC* §§ 69-70). But the Commission withdrew its 2023 statement because there was “no foreseeable agreement” on applying the Commission’s proposed approach to FRAND commitments generally.¹⁷ In any event, these statements, published long after the development of the IPR Policy, could not substitute for the intent of those who developed the policy or the innovators who voluntarily undertook FRAND commitments.

14. Nor have the English courts determined that FRAND commitments support or require any top-down or one-size-fits-all approach to valuing SEPs. While this Court stated in *Unwired Planet* at § 114 that one purpose of the FRAND commitment was to make available a “single royalty price list available to all”, the Court was explaining that the FRAND commitment—particularly the non-discrimination component—seeks to ensure that each particular licensor makes similar offers to *its own SEPs* available to similarly situated licensees. It did not suggest there is any “single royalty price list” covering *all* cellular SEPs across the industry.¹⁸ This was not a point about an aggregate stack or overall royalty burden. And the Court explained that the Non-Discrimination commitment is “general” rather than “hard-edged” because

¹⁵ COM(92) 445 final, above, § 4.3.3.

¹⁶ ETSI Guide on IPRs, Background.

¹⁷ Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(25) 45 final.

¹⁸ *Unwired SC*, § 114.

differential pricing is “the norm as a matter of licensing practice and may promote objectives which the ETSI regime is intended to promote (such as innovation and consumer welfare)”.¹⁹

15. Further, the ETSI IPR Policy does not require that SEP-holders offer flat-dollar royalties measured against a hypothetical “basic smartphone” costing a small fraction of the many premium smartphones sold worldwide (see Apple WC § 5). Indeed, *ad valorem* pricing—royalties expressed as a percentage of the actual sales price of each end device—is widespread in the cellular industry and in patent licensing generally.²⁰ Qualcomm, for example, has long offered FRAND licences using *ad valorem* royalty rates, with a cap that puts a ceiling on the royalty for any given device.²¹ *Ad valorem* pricing reflects the fact that cellular technologies drive consumer demand for cellular phones with more features, and thus help OEMs sell such phones. Products with premium features benefit more from the enhanced bandwidth, speed and reliability enabled by advanced cellular standards. Consumers will then seek, for example: larger and higher-quality phone displays (*e.g.*, to watch high-resolution video content), better cameras (*e.g.*, to livestream or rapidly share video content they create) and longer battery life (to engage in all of these activities for longer before recharging). The flexible FRAND framework of the ETSI IPR Policy allows for royalty pricing that aligns the benefits of the licensed inventions with the value that is provided to the licensed devices and in turn enjoyed by consumers. A contrary rule that requires breaking the connection between the licensed inventions and the value delivered and instead insists that every OEM pay the same flat-dollar royalty on a given portfolio of cellular SEPs—no matter the prices of the phones each sells—would affect OEM’s incentives to sell products with a diversity of feature sets and price points to the detriment of the industry, and, ultimately, consumers.

THE BEST EVIDENCE OF PORTFOLIO VALUE IS SAME-PORTFOLIO LICENCES

16. In the proceedings below, Marcus Smith J averaged licence rates derived from multiple SEP

¹⁹ *Unwired SC*, § 124.

²⁰ See *Federal Trade Commission v. Qualcomm, Inc.*, 969 F.3d 974, 999 (9th Cir. 2020) (holding in the context of a U.S. antitrust case against Qualcomm that “[s]ophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial products’ sales price,” and thus “[t]here is nothing inherently wrong with using the market value of the entire product.”). The court quoted the decision of the patent specialist Court of Appeals for the Federal Circuit in *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1349 (Fed. Cir. 2018).

²¹ See Qualcomm’s 5G Handset Licensing Program, available at <https://www.qualcomm.com/content/dam/qcomm-martech/dm-assets/documents/qualcomm-5g-handset-licensing-program.pdf>.

portfolios of widely varying size, quality and commercial context. Apple explains that, rather than submitting “individual comparables” that could prove the value of Optis’s portfolio directly as part of a “*conventional* comparables approach”, Apple relied on its own inbound licences covering portfolios of SEPs other than Optis’s (see Apple WC § 35). Rather than seeking to determine directly the value of Optis’s portfolio, Apple’s stated purpose was to determine the “aggregate price for the Stack” and then “allocat[e] a share to the licensor” based on the proportion of all patents declared potentially essential to cellular standards that are owned by the licensor (see Apple WC § 36). In essence, the position is that the results of Apple’s licensing negotiations with certain other third-party SEP owners, which the Court of Appeal found at §§ 122-123 was characterised by hold-out by Apple and its relative bargaining strength, should be used in deriving a cap on the royalties owed to innovators in the cellular industry as a whole, instead of focusing the valuation exercise on the innovator’s portfolio.

17. That methodology has no basis in the history or purpose of the FRAND commitment and is inconsistent with the real-world practice of negotiating licences based on the value of the SEPs that are actually being licensed, as the Court of Appeal recognised. The ETSI IPR Policy is intended to ensure that SEP-holders will receive fair and adequate compensation for *their* inventions, consistent with the purposes of the ETSI IPR Policy, rather than having their compensation limited by a nominal Stack value and the assumed values of others’ inventions. Indeed, licences for the same SEP portfolios at issue will often be the best (and perhaps the only) evidence of the portfolio’s value because such licences establish the commercially reasonable value for those SEPs.

18. This principle is well established as a matter of general UK patent law. In *Smith Kline & French Laboratories Ltd’s (Cimetidine) Patents* [1990] RPC 203 at 239, the Court of Appeal was asked to determine the appropriate royalty for a compulsory patent licence—a question that required identifying the best comparable from among a range of available licences. Lloyd LJ held that:

The object of the comparability exercise, in this as in any other branch of the law, is to find the closest possible parallel. If there is an exact parallel, there is no point in looking any further. If there are slight differences, an allowance may be made. But once you have found your comparables, whether one or more, which enable you to arrive at the appropriate figure it would surely be erroneous to modify that figure by reference to other cases which are not truly comparable at all...

19. The “closest possible parallel” will, in most cases, involve licences for the same intellectual property, even if they involve different licensees. This is a straightforward application of the *Cimetidine* principle: the subject matter being licensed is the same, and the only variable is the identity and circumstances of the licensee. In this case, the Court of Appeal at § 90 correctly applied this principle in concluding that “a licence by the SEP-holder of the same portfolio albeit to a different handset manufacturer is likely to be the place to start to identify the best comparable.”
20. Courts and commentators worldwide have recognised that royalties received by the patentee for the licensing of the patents in suit are the “most influential factor” in determining a reasonable royalty.²² Under United States patent law, for example, a reasonable royalty for any patent “may be based upon an established royalty, if there is one, or if not, upon the supposed result of hypothetical negotiations between the plaintiff and defendant.”²³ The first (and potentially dispositive) factor in determining a reasonable royalty is thus “[t]he royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.”²⁴ “Actual licenses to the patented technology are highly probative as to what constitutes a reasonable royalty for those patent rights because such actual licenses most clearly reflect the economic value of the patented technology in the marketplace.”²⁵ Indeed, the United States Court of Appeals for the Federal Circuit—which hears and decides all patent appeals in the U.S.—has held that courts must “exercise vigilance when considering past licenses to technologies other than the patent in suit”, because they lack an “economic or other link to the technology in question”.²⁶
21. Indian courts also have applied these principles. In *TLM Ericsson (Publ) v. Lava International Pvt Ltd*, 2024:DHC:2698 at § 741, the Delhi High Court held that “comparable licenses provide for FRAND rates that have been negotiated between parties in similar circumstances, which makes the comparable licensing agreements highly reliable for determination of

²² *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 989 F. Supp. 547, 607 (D. Del. 1997); Chisum on Patents, § 20.07.

²³ *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc).

²⁴ *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). The patent valuation methodology identified by this trial court is now an accepted feature of American patent law and is commonly known as the “*Georgia-Pacific* factors”.

²⁵ *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 79 (Fed. Cir. 2012).

²⁶ *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870, 872 (Fed. Cir. 2010).

royalties for a prospective licensee.” While noting that some UK courts had described the “top-down” approach as a potentially useful “cross-check” on the rates determined through examining comparable licences, the Delhi High Court determined that “Lava’s contention for the adoption of top-down methodology as a viable alternative to comparable licensing approach, lacks a foundational base.”²⁷

22. Of course, the fact that same-portfolio licences are most probative does not mean that a court should automatically adopt the precise rate and other terms provided by same-SEP licences without assessing whether adjustments need to be made in light of the parties’ respective circumstances and objectives. The Court of Appeal acknowledged this fact when it distinguished between comparability and reliability. Same-portfolio licences are comparable, but to ensure that comparable licences are reliably used, a court may consider how the licences have been affected by circumstances specific to them—what the Court of Appeal called “unpacking”. For example, royalties can also be affected by the value of cross-licences granted back by the licensee or by the exchange of other consideration as part of a larger deal. Unpacking accounts for such differences.
23. In practice, licensing negotiations are focused on the specific portfolio being licensed—not on SEPs held by other SEP owners. This can be seen from the information that the parties exchange during negotiations. A SEP-holder may provide the prospective licensee with a list of *its* declared SEPs, along with claim charts demonstrating how *its patents* read onto the standard.²⁸ The prospective licensee may respond with counter-charts or technical arguments challenging essentiality or validity. Both sides often invest significant time and resources evaluating the patents at issue. Moreover, there is no basis to assert that negotiating parties focus on the aggregate value that court decisions “implied[ly]” assign to the “Stack” (see Apple WC § 74) and the notion is contrary to Qualcomm’s experience in the real world of licensing negotiations.
24. Rather than looking at what licensees have actually paid for the specific patents at issue, the top-down approach works backwards: it arbitrarily sets the total royalty burden that an

²⁷ *TLM Ericsson (Publ) v. Lava International Pvt Ltd*, above, §§ 738-740.

²⁸ See Scott M. Flanz, Ayan Roy-Chowdhury, and Joon Chung, *Standard Essential Patents: Life Cycle Overview*, *The Licensing Journal* (Jan. 1, 2026).

implementer believes “should be” paid to *all* SEP-holders, and then applies a formulaic division among individual licensors based on each’s share of the total number of declared SEPs. Not only does this approach beg the question of how a court would determine the total amount owed to all SEP-holders, it necessarily requires the court to pass judgment on the value of patents not before it, and without the participation of non-party SEP owners.

25. The use of an innovator’s share of the “Stack” rests on a fundamental error: it assumes as its premise that all SEPs are equally valuable. As explained below, that is widely acknowledged to be wrong, and exporting such an assumption outside the fact-bound context of this case would grossly undervalue cellular innovations. Indeed, the Organisation for Economic Co-operation and Development has described this approach as “meritless”, describing it as “a simplified approach that places the same value on breakthrough inventions that it does on barely incremental ones. This approach will also trigger patent filing races (and perhaps poor quality patents) because it values quantity, not quality.”²⁹ Apple agrees (see Apple WC § 4) that “there is a powerful incentive to over-declare” patents as potentially essential, but fails to acknowledge that that incentive depends upon the erroneous patent counting exercise it advocates.

26. Even if all declared SEPs were actually essential, any assumption that each SEP contributes equal value is plainly incorrect. “It is widely acknowledged that patents have *widely dispersed* values” because while “some are a major improvement . . . others provide only *minor* or *trivial* improvements”.³⁰ Indeed, one analysis estimated that, among electronics patents, the 5% most valuable patents account for 55% of the overall value of electronic patents.³¹ A patent counting methodology “ignores this reality by imposing a nonexistent equality or near equality among patents” and thus overestimates the value of a patent protecting a less important technology while underestimating the value of a patent covering a fundamental technology.³² Patent counting also creates incentives for SEP-holders to over-declare their patents as potentially

²⁹ OECD, *Competition, Patents and Innovation II*, DAF/COMP(2009)22, at 28.

³⁰ David J. Teece, *Patent Counting and the ‘Top-Down’ Approach to Patent Valuations: An Economic and Public Policy Appraisal of Reasonable Royalties*, *Criterion Journal on Innovation* (Vol. 5 2020) at 167.

³¹ Mark Schankerman, *How valuable is patent protection? Estimates by technology field*, *RAND Journal of Economics* (Spring 1998) at 94.

³² Teece, above, at 168.

essential to a standard even if they are not.³³

27. English courts have recognised this concern. In *InterDigital v. Lenovo* [2023] EWHC 539 (“*InterDigital HC*”) at § 817, Mellor J observed that using patent counting to gauge each portfolio’s contribution “results in a lower value being ascribed to highly valuable portfolios, and a higher value being ascribed to portfolios whose contribution to the successful operation of the standard might be more marginal.” Further, “it may be that those SEP licensors with weaker portfolios engage in greater over-declaration”—meaning that patent counting rewards those with less valuable portfolios.³⁴ The Court of Appeal in that case endorsed Mellor J’s assessment: “the comparables analysis is a much more reliable basis for estimating FRAND than InterDigital’s top-down cross-check”.³⁵ Sometimes even a *single* foundational patent may be much more valuable than a large number of less important patents: in *Unwired HC* at § 184, Birss J (as he then was) acknowledged that “in some cases it may be possible to identify a patent as an exceptional sort of keystone invention underpinning the entire technical approach on which a standard is based”.

28. Where different SEPs have fundamentally different values, they should command different FRAND royalties. The point can be illustrated by analogy. How much is a portfolio of 1,000 paintings worth? It is impossible to know without understanding the quality of the paintings. A portfolio containing an original Picasso and 999 average works is worth far more than a portfolio of 1,000 average works—even though both contain 1,000 paintings. The same is true of patent portfolios: a portfolio containing foundational innovations is worth far more than a portfolio containing only incremental improvements. The FRAND royalties for each portfolio should reflect that difference.

29. In resolving SEP licensing disputes, as in any other type of case, courts should strongly favour the most reliable evidence. Because patents are unique assets by their nature—two patents cannot claim the same invention—in *Cimetidine* the court correctly recognised that licences granting rights to the same patents as those in suit before the court are the best measure of

³³ Teece, above, at 173.

³⁴ *InterDigital HC* at § 819.

³⁵ *InterDigital v. Lenovo* [2024] EWCA Civ 743 at § 286.

value. Therefore, when a licensor has concluded arms'-length transactions with sophisticated counterparties, the resulting body of licensing data should generally be viewed as the best, most reliable evidence available and there is no sound economic reason to disregard that evidence in favour of an exercise based on other licensors' different patents.

A SEP-HOLDER DISCHARGES ITS FRAND COMMITMENT BY OFFERING TERMS THAT FALL ANYWHERE IN THE FRAND RANGE

30. The third issue Qualcomm addresses concerns the nature of the FRAND commitment and the court's role in resolving disputes concerning whether there has been compliance with the FRAND commitment. Because the FRAND obligation constitutes a contractual undertaking, unless it is common ground that the court's role is specifically to declare the terms of a FRAND licence, the court's *first* and *threshold* task should be to determine whether the SEP-holder has complied with its FRAND obligation by offering licensing terms that are FRAND.³⁶ In making this determination, the court should bear in mind that, in any particular set of circumstances, there may be (and often are) multiple sets of terms that are FRAND. Consequently, the SEP-holder complies with its contractual undertaking by offering any FRAND terms, even if the court could conceive of other FRAND terms that are more favourable to the licensee. When a court concludes that the SEP-holder has offered FRAND terms, the court will have no need and no basis to consider what other terms may be FRAND. In the present case, by contrast, the court's role was specifically to declare the terms of a FRAND licence. Outside of this unusual and particular circumstance, however, there is no reason for a court to undertake the complex exercise of determining, in the abstract, the value of the at-issue SEPs. The Court should take care to ensure that its reasoning does not blur the distinction between that exceptional situation and the case in which the primary question concerns whether an offer made by the SEP-holder is within the FRAND range.

31. The principle that multiple sets of terms may be FRAND is well-established. As the Court of Appeal held in *Unwired CA* at § 121, "In our judgment it is unreal to suggest that two parties, acting fairly and reasonably, will necessarily arrive at precisely the same set of licence terms as two other parties, also acting fairly and reasonably and faced with the same set of circumstances. To the contrary, the reality is that a number of sets of terms may all be fair and

³⁶ Or, as the German courts put it, in the "FRAND corridor".

reasonable in a given set of circumstances.” And as the Court of Appeal explained in *InterDigital v Lenovo* [2024] EWCA Civ 743 at § 33: “a number of sets of terms might all be FRAND. If two (or more) different sets of terms were each FRAND, then the SEP owner would satisfy its obligation to ETSI if it offered the FRAND set of terms which was most favourable to itself.”

32. As the Court of Appeal explained at § 1, the court’s jurisdiction to determine a FRAND rate is “based on the contractual effect of the undertaking given by the patentee” (citing *Unwired SC*). If the SEP-holder has complied with that undertaking by engaging in negotiations and offering a FRAND licence, but the licensee is unwilling to accept it, then the court does not have a basis to consider what other terms might hypothetically be FRAND, but instead should enjoin the unwilling licensee’s infringement. (*Unwired SC* §§ 163-169.)
33. If the Court adopted a rule requiring the determination of a rate in every case, even where a SEP-holder has made an offer within a FRAND range, an unwilling licensee would be incentivised to hold out rather than engage in good-faith commercial negotiations. If a prospective licensee knows that the court will adjudicate from scratch, even if there is an offer within the FRAND range, and knows that the rate will never be higher than it has been offered in negotiation, it will rationally reject such an offer. This dynamic would devalue SEPs and, ultimately, reduce the amount companies are willing to spend on R&D. This Court recognised the importance of guarding against such incentives in *Unwired SC* at § 167, where it explained that if injunctions against unwilling licensees were unavailable, “it would not make economic sense for them to enter voluntarily into FRAND licences”.
34. It would also be wrong to claim that recognising the SEP-holder’s entitlement to offer any terms that are FRAND would undermine a “wider general aim to lower product costs” (see *Apple WC* § 65). There is nothing in *Unwired SC* that identifies “lowering product costs” as a freestanding aim of the FRAND commitment, but a regime that systematically underpays innovators would undermine the aim of ensuring innovators are rewarded for their innovations, as recognised in *Unwired SC* at §§ 7, 10 and 14. The reference to “lower product costs” in *Unwired SC* at § 4 relied upon by Apple merely describes the downstream effects of ensuring that standardised technologies are widely accessible (as compared with non-standardised

alternatives), not a freestanding principle to determine SEP licence rates. To do the latter would be to invert the careful balance that the ETSI IPR Policy was designed to establish.

35. Because of the way the parties submitted their dispute for resolution, the trial judge here determined a single, abstract FRAND rate for the at-issue patents by taking a simple average of various values derived from licences of widely varying comparability. As the Court of Appeal explained at §§ 106 and 114, the trial judge’s averaging approach had “no precedent or basis in the evidence” and was an example of “exactly the technique which Lloyd LJ warned against in *Cimetidine*”. Beyond those flaws, however, such an exercise also could not accomplish the threshold task, required in most FRAND disputes, to determine whether a SEP-holder has offered FRAND terms.

CONCLUSIONS

36. For the foregoing reasons, Qualcomm respectfully submits that, in determining the outcome of this case, the Court should bear in mind the following principles:

1. The best evidence of the value of a patent portfolio is other licences to that same portfolio; and
2. A range of different licensing terms may each be FRAND, and ordinarily, where the SEP-holder has offered any FRAND terms, it has discharged its FRAND obligation and the court need not consider what other terms may be FRAND.

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22 May 2026