

FRAND – a Business Perspective

NOKIA

Timo Ruikka
Fordham IP Conference
28 March 2008



The Big Question:

Must get FRAND for Essential Patents

- or else: DROP THE STANDARD !

- **WHY ?**

Why are FRAND commitments necessary ?

- 1 Standards are created to be implemented -> investment
- 2 Patent licenses negotiated *ex post*: years after technical choice, investment
- 3 Bargaining power in ex post negotiation – safeguards needed

Alongside legal rules (antitrust), economic theory and arguments,

SDOs self-impose FRAND for Business Reasons

- Protect stakeholder investment into implementations
- Check abuses of leverage in negotiations

Implementer's Investment Perspective

Assuming complex products, broad specifications

-> hundreds of (potentially) Essential patents

Hypothetical “ex ante question”: would I invest, given this patent cost level ?

- Single patent cost: meaningless
- Single patent holder request: can be evaluated only in total cost context

Powerful argument for “TOP DOWN” evaluation:

- total cost of all Essential patents
- contribution of each licensed Essential patent portfolio

Bargaining Power in License Negotiations

- Ex post standard: Market-defining standard, in wide implementation
 - Only game in town
 - Collective exit barrier insurmountable
- Ex post implementer investment – sunk cost & committed resources

Current IPR policies leave too much room for opportunistic behavior

- Theory and policy observe holdup problem, game theory explains steep pricing in uncoordinated ex post situation
- Business Perspective observes patent holder negotiation power
 - When costs are sunk, rational licensees accede to higher cost than they would prior to investment
 - Evidence of deals is not proof of reasonable rates

Implications

1. Ideal world: Obtain visibility of Essential patent cost in advance ?
 - Multiple problems – e.g. knowing exact contents of final specification ?
2. FRAND must have legal meaning and binding economic effect
 - So necessary that standard dropped if FRAND not forthcoming
 - From business perspective, must have economic meaning for total cost of licenses
3. Business reasons argue for spelling out FRAND more exactly in SDO rules (IPR Policy) and IPR Undertaking practice
 - Alternative to litigation, antitrust enforcement
 - Alternative to legislation

Takeaways

- “FRAND or no standard” approach is based on business rationale (besides being necessary in an antitrust sense)
- FRAND has to be effective - or its absence would not be a showstopper
- Business rationale: to eliminate patent holder upper hand in ex post licensing
- FRAND must have economic meaning for royalty rates
- Meaning consistent with standardization objectives: total cost must not jeopardize investment in implementations
- SDOs should require patent holders to express (in licensing offers)
 - what total Essential patent cost (estimate) they base their offer on
 - what justified proportion of such total cost they consider as their appropriate royalty

A close-up photograph of a fishing net. A wooden post is in the center, with a red rope tied around it. A red buoy is attached to the rope. The net is made of white mesh and is set against a bright sunset sky with a rainbow. The water is visible in the background.

Thank you

NOKIA