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The meaning of “fair and reasonable” in the context of FRAND commitments

Commitments to license patents on fair, reasonable and non-discriminatory (FRAND) terms have become central to the operations of significant number of standard-setting organizations. They are required by such organizations because they are perceived to be necessary to ensure that proprietary standards are available to all market participants who wish to implement them in their products.

Though majority of FRAND commitments are made within the context of standard development, such commitments are also made outside of that context, principally to draw the attention of various market participants to particular patent protected technologies and to ensure that licensing fees will be kept at the level allowing for their broad use.

FRAND commitments have attracted global attention. There is a growing consistency in the interpretation of FRAND globally by courts and market participants.

The purpose of the paper would be to examine the origins of FRAND commitments, the scope of their application in various industries and last, but definitely not least the meaning of the “fair and reasonable” component of such commitments.

FRAND commitments are strongly linked to antitrust/competition laws. They were present in various forms in the US back in the 1940's and also became widely referred to by the competition authorities in the EU at the end of the 20th century. With the growing importance of standardization, they have also become essential to the success of standard-setting efforts by organizations developing standards.

The meaning of the “fair and reasonable” component in FRAND commitments must take into account the purpose of such commitments, namely concerns over patent hold-up or royalty-stacking. With these concerns in mind, FRAND addresses the concerns of patent implementers. But, fairness also requires that the rationale underlying the patent system, namely to encourage innovation, is also properly taken into account. The paper will try to show how these concerns may be balanced and what is the result of such balancing? It will also deal with various criteria to examine licensing terms in order to establish whether they meet the “fair and reasonable” threshold.