

FRAND Limitations on Licensing Strategies

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Recent cases have dealt with setting a FRAND royalty rate, but there remains a paucity of authority regarding what limits, if any, FRAND imposes on license terms. In the wake of the 2008 Quanta case, discussing patent exhaustion, patentees in the WiFi and cell phone space have sought new and creative ways to push the licensing obligation further down the distribution chain, in order to collect royalties from makers of more valuable end products. This is a natural reaction to falling chip prices. Patent strategies have included licensing only at the end-user product level, or multi level licensing, in which a chip or component manufacturer receives a license which authorizes sales only to customers who are, themselves, licensed. Or, alternatively, charging differential royalties to chip or component makers based on the nature of the ultimate end-product, thereby placing the financial burden of price discrimination on the chip or component maker. None of these strategies has been tested against the FRAND commitment to license on fair, reasonable and non-discriminatory terms. This paper will explore the arguments likely to be raised in future FRAND litigation by patentees seeking to employ such strategies, and chip and component makers seeking to oppose them.

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