

# Reasonable and non-discriminatory licensing

From Wikipedia, the free encyclopedia

**Reasonable and non-discriminatory terms (RAND)**, also known as **fair, reasonable, and non-discriminatory terms (FRAND)**, are a licensing obligation that is often required by standards organizations for members that participate in the standard-setting process.<sup>[1]</sup> Standard-setting organizations are the industry groups that set common standards for a particular industry in order to ensure compatibility and interoperability of devices manufactured by different companies. By 2013, "FRANeD" commitments were cited 10 times more often by courts and scholarly papers than 10 years earlier in 2003.<sup>[2]</sup>

## Contents

- 1 Overview
- 2 Definitions
- 3 Excluding costless distribution schemes
- 4 Related licenses
- 5 Negotiating process
- 6 References
- 7 External links

## Overview

Standard-setting organizations commonly have rules that govern the ownership of patent rights that apply to the standards they adopt, with an agreement to the obligation creating a contract as in *Microsoft v. Motorola*. One of the most common rules is that a patent that applies to the standard must be adopted on "reasonable and non-discriminatory terms" (RAND) or on "fair, reasonable, and non-discriminatory terms" (FRAND). The two terms are generally interchangeable; FRAND seems to be preferred in Europe and RAND in the U.S.<sup>[1]</sup>

Standard-setting organizations include this obligation in their bylaws as a means of enhancing the pro-competitive character of their industry. They are intended to prevent members from engaging in licensing abuse based on the monopolistic advantage generated as a result of having their intellectual property rights (IPR) included in the industry standards. Once an organization is offering a FRAND license they are required to offer that license to anyone, not necessarily members of the group.<sup>[1][3]</sup> Without such commitment, members could use monopoly power inherent in a standard to impose unfair, unreasonable and discriminatory licensing terms that would damage competition and inflate their own relative position.

## Definitions

While there are no legal precedents to spell out specifically what the actual terms mean, it can be interpreted from the testimony of people like Professor Mark Lemley from Stanford University, in front of the United States Senate Committee on the Judiciary that the individual terms are defined as follows:

**Fair** relates mainly to the underlying licensing terms. Drawing from anti-trust/competition law; fair terms means terms which are not anti-competitive and that would not be considered unlawful if imposed by a dominant firm in their relative market. Examples of terms that would breach this commitment are; requiring licensees to buy licenses for products that they do not want in order to get a license for the products they do want or requiring licensees to take licenses to certain unwanted or unneeded patents to obtain licenses to other desired patents (bundling), requiring licensees to license their own IP to the licensor for free (free grant backs) and including restrictive conditions on licensees' dealings with competitors (mandatory exclusivity).

**Reasonable** refers mainly to the licensing rates. According to some, a reasonable licensing rate is a rate charged on licenses which would not result in an unreasonable aggregate rate if all licensees were charged a similar rate. According to this view, aggregate rates that would significantly increase the cost to the industry and make the industry uncompetitive are unreasonable. Similarly, a reasonable licensing rate must reward the licensor with adequate compensation for contributing its essential patents to a standard. Compensation is adequate if it provides the licensor with the incentive to continue investing and contributing to the standard in future time periods.<sup>[4]</sup> It is worth noting that a licensor which has several different licensing packages might be tempted to have both reasonable and unreasonable packages. However having a reasonable "bundled" rate does not excuse having unreasonable licensing rates for smaller unbundled packages. All licensing rates must be reasonable.

**Non-discriminatory** relates to both the terms and the rates included in licensing agreements. As the name suggests this commitment requires that licensors treat each individual licensee in a similar manner. This does not mean that the rates and payment terms can't change dependent on the volume and creditworthiness of the licensee. However it does mean that the underlying licensing condition included in a licensing agreement must be the same regardless of the licensee. This obligation is included in order to maintain a level playing field with respect to existing competitors and to ensure that potential new entrants are free to enter the market on the same basis.

The most controversial issue in RAND licensing is whether the "reasonable" license price should include the value contributed by the standard-setting organization's decision to adopt the standard. A technology is often more valuable after it has been widely adopted than when it is one alternative among many; there is a good argument that a license price that captures that additional value is not "reasonable" because it does not reflect the intrinsic value of the technology being licensed. On the other hand, the adoption of the standard may signal that the adopted technology is valuable, and the patent holder should be rewarded accordingly. That is particularly relevant when the value of the patent is not clearly known before the adoption of the standard.<sup>[5]</sup>

Some interpretations of "non-discriminatory" can include time-oriented licensing terms such as an "early bird" license offered by a licensor where terms of a RAND license are better for initial licensees or for licensees who sign a license within the first year of its availability.

## **Excluding costless distribution schemes**

RAND terms exclude intangible goods which the producer may decide to distribute at no cost and where third parties may make further copies. Take for example a software package that is distributed at no cost and to which the developer wants to add support for a video format which requires a patent licence. If there is a licence which requires a tiny per-copy fee, the software project will not be able to avail of the licence. The licence may be called "(F)RAND", but the modalities discriminate against a whole category of intangible goods such as free software<sup>[6]</sup> and freeware.

This form of discrimination can be similarly caused by common licence terms such as only applying to complete implementations of the licensed standard, limiting use to particular fields, or restricting redistribution. The Free Software Foundation suggests the term "uniform fee only" (UFO) to reflect that such "(F)RAND" licences are inherently discriminatory.<sup>[7]</sup>

## Related licenses

Related to RAND licenses are RAND-Z (RAND with zero royalty) or RAND-RF (RAND Royalty Free) licensing, in which a company promises to license the technology at no charge, but implementers still have to get the licensor's permission to implement. The licensor may not make money off the deal but can still stop some type of products or require some type of reciprocity or do more subtle things like drag out the licensing process.<sup>[8][9][10]</sup>

## Negotiating process

*Further information: Orange-Book-Standard and Huawei v ZTE*

The negotiating process for FRAND licenses places requirements on the patent owner and the envisioned patentee. The terms for these negotiations were set in German case law in a case regarding the Orange-Book-Standard, and these terms are often used in licensing negotiations. In 2015 the European Court of Justice interpreted FRAND licensing terms in case *Huawei v ZTE* (C170/13, ECLI:EU:C:2015:477 (<http://curia.europa.eu/juris/documents.jsf?critereEcli=ECLI:EU:C:2015:477>)) significantly diverging from the Orange-Book-Standard.<sup>[11]</sup>

## References

1. Layne-Farrar, Anne; Padilla, A. Jorge; Schmalensee, Richard (2007). "Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments" (<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/antil74&div=23&id=&page=>). *Antitrust L.J.* **74**: 671.
2. <http://leconcurrentialiste.com/2014/01/27/frand-statistical-comparison-between-cases-and-research-papers/>
3. Salant, David J (2007). "Formulas for fair, reasonable and non-discriminatory royalty determination" (<http://mpira.ub.uni-muenchen.de/8569/>). Munich Personal RePEc Archive. Retrieved 11 December 2011.
4. J. Gregory Sidak, *The Meaning of FRAND, Part I: Royalties*, 9 J. COMPETITION L. & ECON. 931, 989–90 (2013), available at <http://www.criterioneconomics.com/meaning-of-frand-royalties-for-standard-essential-patents.html>
5. Mariniello, Mario (2011) Fair, Reasonable and Non Discriminatory (FRAND) Terms: A Challenge for Competition Authorities - Journal of Competition Law and Economics, Oxford University Press, Vol. 7, n. 3
6. "FRAND" is a FRAUD (<https://www.fsf.org/blogs/community/frand-is-a-fraud>) Free Software Foundation, 2012
7. Words to Avoid (<http://www.gnu.org/philosophy/words-to-avoid.html#RAND>) gnu.org
8. "A Buyer's Guide to Standards" (<http://www.goland.org/buyingopenstandards/>). 2002-09-20. Retrieved 2011-05-23.
9. "Patent Licensing Assurances in Standards Organizations" (<http://standardslaw.com/?p=36>). 2007-08-06. Retrieved 2011-05-23.
10. *Standardization Feedback for the National Science and Technology Council* ([http://standards.gov/standards\\_gov/sos\\_rfi\\_docs/5\\_ABA.pdf](http://standards.gov/standards_gov/sos_rfi_docs/5_ABA.pdf)) (PDF), retrieved 2011-05-23
11. "The European Court of Justice on enforcement of FRAND patents: Huawei v. ZTE" (<http://www.lexology.com/library/detail.aspx?g=c936f159-96c3-4390-bd71-75cdaad57fcb>). *Lexology*. Retrieved 4 August 2015.

## External links

- Pat Treacy and Sophie Lawrance, "*FRANDly fire: are industry standards doing more harm than good?*" (<http://jiplp.oxfordjournals.org/cgi/content/abstract/jpm212v1?papetoc>"), *Journal of Intellectual Property Law & Practice*, 2007, doi:10.1093/jiplp/jpm212 (<https://dx.doi.org/10.1093%2Fjiplp%2Fjpm212>)
- 3G Patents Ltd (<http://www.3glicensing.com/>), the licensing body for WCDMA patents
- Current Patent Practice (<http://www.w3.org/TR/patent-practice>), a W3C Note dated 24 January 2002
- "Everything You Always Wanted to Know About FRAND (But didn't know who to ask)" (<http://www.consortiuminfo.org/standardsblog/article.php?story=20120221074826486>) by Andy Updegrove, dated 26 February 2012
- Tom H. Chia, "*Fighting the Smartphone Patent War with RAND-Encumbered Patents*" ([http://btlj.org/data/articles/27\\_2/209-240\\_Chia\\_Final\\_071012\\_WEB.pdf](http://btlj.org/data/articles/27_2/209-240_Chia_Final_071012_WEB.pdf)"), *Berkeley Technology Law Journal*, Vol. 12, Annual Review, Pages 209-240, 2012.
- Schaumberg, Tom M.; Emi Ito Ortiz (February 25, 2013). "Why Can't They Be FRANDs? Concerns About The International Trade Commission (ITC's) Approach to Standard-Essential Patent Cases Are Unwarranted" (<http://www.natlawreview.com/article/why-can-t-they-be-frands-concerns-about-international-trade-commission-itc-s-approac>). *The National Law Review* (Adduci, Mastriani, & Schaumberg LLP). ISSN 2161-3362 (<https://www.worldcat.org/issn/2161-3362>). Retrieved March 3, 2013.

Retrieved from "[https://en.wikipedia.org/w/index.php?title=Reasonable\\_and\\_non-discriminatory\\_licensing&oldid=678112313](https://en.wikipedia.org/w/index.php?title=Reasonable_and_non-discriminatory_licensing&oldid=678112313)"

Categories: Standards | Patent law

---

- This page was last modified on 27 August 2015, at 13:06.
- Text is available under the Creative Commons Attribution-ShareAlike License; additional terms may apply. By using this site, you agree to the Terms of Use and Privacy Policy. Wikipedia® is a registered trademark of the Wikimedia Foundation, Inc., a non-profit organization.