

# Kluwer Patent Blog

## FRAND Litigation in France (Part I): the Nature of the FRAND Commitment

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It's been a long time since I've evoked my favorite topic here. It seemed to me that the last four weeks before New Year's Eve were an ideal time to summarize the understanding of FRAND litigation in French law. Four parts: the nature of the FRAND commitment, the jurisdiction, the setting of the royalty rate, and the essentiality of patents. This week, we will begin with the nature of the FRAND commitment.

### *Civil Law vs. Competition Law*

There are essentially two opposing views on the characterization of the FRAND commitment: the competition law approach and the civil law approach. The second approach characterizes the commitment as a contract with the standard-setter, such that it contains a stipulation for third parties ("stipulation pour autrui") whereby the owner to the patent declared essential undertakes to grant licenses on FRAND terms to future licensees. The main effect of this characterization is to crystallize the forum at the location of the standard-setter, mostly in France, since ETSI is located in Nice, and thus gives the French Judge jurisdiction to rule on a global royalty rate.

### *"Stipulation pour autrui": pros and cons*

The French authors tend to see in the "FRAND" commitment the result of a contract concluded by the patentee with the standard-setter, which would include a stipulation for the benefit of third parties for licenses.

This qualification is nevertheless open to criticism. The mechanism of stipulation for third parties implies the promise of a service (art. 1205 and 1163 of the French Civil Code). As a consequence, it is only possible to invest the beneficiary with a right, which excludes the promise of a contract such as a patent license. The arrangement is therefore more akin to a special contractual figure: the stipulation of a contract for another person, whereby the standard-setter (the stipulator) makes the patentee (the promisor) promise to enter into a licensing contract on FRAND terms with a third party beneficiary who accepts it.

The indeterminacy of the beneficiary on the day of the stipulation does not affect the validity of the transaction, as long as the beneficiary can be precisely determined or determinable on the day of execution of the promise (art. 1205, in fine, of the French Civil Code). In this case, the third party beneficiary, who had requested a license from the patentee, accepted the promise. The interest of

the mechanism is to allow future candidates for the license to access through the negotiating power of the stipulatorex ante (i.e. the standard-setter during the procedure of elaboration of the standard) to contractual conditions (the FRAND terms) that they would not have obtained ex post by individuals and separates discussions with the patentee. Thus, since the beneficiaries have the right to opt for the conclusion of the contract from the moment of the stipulation (art. 1206 of the French Civil Code), they can sue for the compulsory execution of the promise.

The insufficient determination or determinability of the content of the promised license — as to its price and sometimes even as to its subject matter, i.e. the essential patent — has raised doubts as to the legally binding nature of the “FRAND” commitment. The effectiveness of the mechanism of the stipulation of contract for third parties, and therefore of the commitment of the patentee to the standard-setter, would thus be subordinated to the determination of the essential elements of the promised license. It should be noted that, as the license contract belongs to the category of contracts for the hire of goods (art. 1709 of the French Civil Code), the special rule for determining the price for contracts for the provision of services cannot be applied (art. 1165 of the French Civil Code). In the absence of a method of determining the amount of the royalty in the “FRAND” undertaking, the patentee would only undertake, at most, to negotiate in good faith.

However, the reformed French Law of contracts contains sufficient resources to meet the challenge of the legal effectiveness of the “FRAND” commitment. On the one hand, the standardization process, through the enactment of a set of technical specifications, ensures the determinability of patents that are actually essential to the standard, whether or not they are declared as such to the standard-setter. On the other hand, the “FRAND” commitment, the founding act of the stipulation for third parties can be interpreted as a variety of framework contract, adapted to the economy of a triangular operation, defining the general characteristics of the essential patent licenses to be intervened. The indeterminacy of the price of these subsequent agreements in the “FRAND” commitment would then not affect its validity: the amount of the royalties could thus be fixed unilaterally by one of the parties or give rise to a judicial revision in case of abuse (art. 1164 of the French Civil Code).

### *“Stipulation pour autrui”: case law*

The civil law approach has recently been adopted twice by the Paris Judicial Court (in Paris High Court, February 6, 2020, TCL v. Philips, RG n° 19/02085, see [here](#), and in Paris High Court, Xiaomi v. Philips, Dec. 7, 2021, RG n° 20/12558, see [here](#)).

It is worth noting that this conception of FRAND commitment also seems to be shared by the English Supreme Court (see [here](#)) and could be encouraged by the attitude of some implementers (such as OPPO who preferred to leave the German market in the face of a preliminary injunction, see [here](#)).

We will see next week, in the second part of this series, that this position of the French Judge has consequences both as to the forum and scope of jurisdiction.

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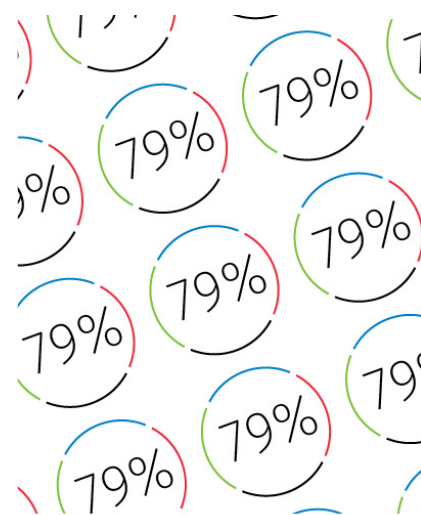
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