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IDC v Lenovo: reinforcing the English Court's pragmatic approach to FRAND determination

James Boon (Bristows) · Wednesday, August 7th, 2024

On 12 July 2024 the English Court of Appeal gave its second FRAND determination judgment, in the context of an appeal and cross-appeal of Mellor J's first instance decision in *IDC v Lenovo*. This decision continues the English Court's theme, first developed in *Unwired Planet*, of taking a pragmatic approach to arriving at a set of global FRAND licence terms between the parties.

The issues on appeal concerned the FRAND rate, what sales that rate should apply to, the payment of interest, the use of top down, and the relevance of conduct in negotiations.

In allowing part of IDC's appeal, the Court of Appeal demonstrated a willingness to adjust the rate derived from comparable licences to take into account non-FRAND elements. Specifically, the rate derived from the LG comparable, relied upon at first instance, was adjusted upwards to account for the fact that the LG licence included a non-FRAND reduction of the value recovered on past sales. The adjustment was estimated by the Court of Appeal based on the evidence available, involving an increase of about 30% in the FRAND rate and corresponding lump sum.

Arnold LJ and Birss LJ agreed with IDC that the first instance judgment suffered from an internal inconsistency: it identified a non-FRAND element in the comparable licences due to the reduction in value attributable to past sales, but failed to account for this in using the LG licence to derive a FRAND rate for Lenovo. Nugee LJ expressed doubts, reasoning that Mellor J may have considered the discounting of past sales to be merely a matter of presentation that did not result in the final licence being non-FRAND, but did not go as far as formally dissenting.

One aspect of Lenovo's cross appeal was an argument that limitation periods should apply to FRAND licence terms, with the consequence that an implementer would not have to pay for past sales that fall outside of the limitation period. The Court of Appeal rejected this argument. The determination of FRAND licence terms is distinct from the calculation of damages, and should reflect what willing parties would agree on the eve of infringement.

The thread running through each of these aspects of the judgment is that FRAND licence terms require full payment in respect of all past sales.

The second aspect of Lenovo's cross appeal concerned the interest awarded on the FRAND lump sum at first instance. The Court of Appeal held that interest should be awarded from the time of first infringement at a rate that reflects the time value of money. The Court further noted that the

payment of interest was not conditional on the SEP holder having made a FRAND offer. It was, however, acknowledged that interest may be reduced or withheld due to an SEP holder's conduct in an extreme case.

On the use of top down, the Court of Appeal agreed with Mellor J that this approach is less reliable than deriving a rate from comparable licences. The subtext appears to be that a top down check is likely to be of limited utility, if any. It did not contribute to adjusting the FRAND rate in this case despite a significant discrepancy between IDC's top down calculations and the Court of Appeal's adjusted FRAND rate. The Court of Appeal was similarly reluctant to get into issues relating to the parties' past conduct, observing that what really matters in the context of a FRAND determination in the English Court is what sum of money is FRAND.

This ruling provides clear guidance from the Court of Appeal that parties' efforts and resources in FRAND disputes are best directed toward analysis of comparable licences.

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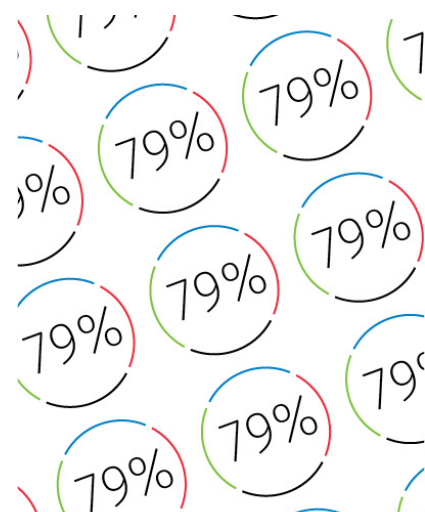
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