Kluwer Patent Blog

SEP, FRAND, and Arbitration: A “Paranoid” Quest for Harmony in Global Patent Disputes

Matthieu Dhenne (Dhenne Avocats) · Tuesday, April 29th, 2025

Much like Black Sabbath’s iconic track “Paranoid”—an anthem whose unsettling riffs once left skeptics bewildered—I find myself contemplating the equally discordant landscape of Standard Essential Patents (SEPs). As someone known for my passion for both music and the intricacies of patent law, I see uncanny parallels between the dissonant chords of early heavy metal and the high-stakes, anxiety-inducing battles surrounding SEPs. The question that has long preoccupied me—whether arbitration could serve as a more harmonious alternative to the relentless discord of SEP litigation—took on renewed urgency following a particularly insightful panel discussion at the LESI 2025 Thought Leadership Panel on SEPs (April 28). The panelists’ “melody” of arguments was so compelling that it naturally inspired my own reflections.

Indeed, the overlapping litigation in SEP disputes frequently yields contradictory rulings and triggers frantic forum shopping by litigants. Among the chief culprits exacerbating this confusion are anti-suit injunctions, often strategically wielded to disrupt or halt rival proceedings in other jurisdictions. Such jurisdictional gamesmanship generates profound legal uncertainty and fosters a toxic environment of strategic escalation—something widely acknowledged as untenable by industry observers. Amidst this chaotic backdrop, arbitration emerges as a potentially unifying remedy—provided, of course, (and this is a significant caveat) that the disputing parties consent to be bound by its decisions.

Advocates of arbitration underscore its relative swiftness, confidentiality, and the specialized expertise of arbitrators. By stepping away from overloaded national courts, parties can achieve faster resolutions, while confidentiality mitigates concerns about sensitive licensing terms becoming publicly scrutinized (see Thomas Legler and Alexandra Bühlmann, A Look to the Future of International IP Arbitration, IAM, November 8, 2024). Additionally, arbitrators deeply versed in patent law, economics, and technology might indeed be better positioned to unravel the labyrinthine complexities involved in FRAND rate determinations. Conversely, critics caution that private arbitration risks diminishing transparency, potentially leading to progressively less accurate determinations of FRAND rates over time (see Barbara Lauriat, “FRAND Arbitration Will Destroy FRAND,” 30 MICH. TECH. L. REV. (2024)).

Moreover, there is no assurance that arbitral awards will receive uniform respect across diverse jurisdictions. Courts and competition authorities in some regions may resist delegating oversight to private tribunals. Nevertheless, viewing matters through my “triple legal persona”—academic, patent litigator, and arbitrator—I cannot help but regard arbitration as at least a partial remedy to

the current litigation frenzy. By consolidating disputes into a single proceeding, arbitration might significantly reduce the pernicious cycle of contradictory judgments and anti-suit injunctions. Certainly, no one could credibly argue that arbitration represents a universal panacea. Yet, in an era when global SEP disputes feel increasingly "paranoid," perhaps it is high time we give this alternative dispute resolution mechanism a more attentive ear.

And yet, despite these critiques, most observers seem united in recognizing arbitration's potential—so long as it is appropriately structured (see Peter Georg Picht and Gaspare Tazio Loderer, "Arbitration in SEP/FRAND Disputes: Overview and Core Issues," Journal of International Arbitration, 36(5):575-594 (2019)).

To effectively frame arbitration for FRAND licensing disputes, several measures could be envisaged: implementing clear procedural guidelines tailored explicitly to SEP disputes; establishing transparent selection criteria for arbitrators with recognized expertise in patent law, economics, and relevant technologies; mandating disclosures to balance arbitral transparency with confidentiality; and developing specialized arbitration centers. The forthcoming UPC Patent Mediation and Arbitration Centre, in particular, could play a pivotal role by establishing standardized arbitration frameworks to facilitate consistent FRAND rate determinations across Europe and potentially on a global scale.

Ultimately, while I harbor no illusions that arbitration will swiftly transform the contentious world of SEP litigation overnight, I remain firmly convinced of its potential to reconcile a deeply fragmented landscape. Perhaps, much like Black Sabbath's once-controversial yet enduringly influential song, the true surprise will be discovering that an unconventional approach—arbitration—can chart a path toward genuine harmony amidst the global cacophony of SEP disputes. Whether the industry is ready for such an approach remains uncertain, but like any great riff, arbitration's potential deserves to be played loudly enough for everyone to truly appreciate.

This entry was posted on Tuesday, April 29th, 2025 at 5:54 am and is filed under FRAND, Patents, SEP, UPC
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.