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Back to First Principles: UK Court of Appeal Resets the FRAND Framework in *Optis v Apple*

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The Court of Appeal's judgment in *Optis Cellular Technology LLC v Apple Retail UK Ltd* [2025] EWCA Civ 552, handed down on 1 May 2025, is arguably the most significant UK FRAND decision since *Unwired Planet v Huawei*. It not only overturns the High Court's FRAND determination but re-establishes the centrality of a comparables-based approach and clarifies the treatment of expert evidence, hold out, and foreign judgments within a global FRAND framework.

This post summarises how we got here, what the Court of Appeal decided, and what it means for future FRAND disputes in the UK and beyond.

Background: How We Got Here

The case concerns Apple's use of standard-essential patents (SEPs) from Optis's telecommunications portfolio. Following the UK Supreme Court's decision in *Unwired Planet v Huawei*, the English courts confirmed their jurisdiction to determine global FRAND licence terms. In this case, Mr Justice Marcus Smith had conducted a trial (Trial E) to determine the terms of such a global licence between Optis and Apple.

His decision in June 2023 fixed a lump sum payment based on an averaged valuation method across a wide range of comparable licences, including 18 Apple licences and one Optis licence (with Google). He calculated the licence fee by setting an annual lump sum of \$5.13 million, which, when multiplied over an eleven-year term, resulted in a total of \$56.43 million. Optis appealed on 25 grounds, focusing on the valuation methodology and the terms of the final licence and order. Apple defended the outcome but also filed a respondent's notice raising six points of its own.

What Did the Court of Appeal Decide?

The Court of Appeal (Birss, Arnold and Newey LJ) unanimously allowed Optis's appeal on the main valuation and procedural grounds. They substituted their own FRAND determination of \$0.15 per unit and awarded a global lump sum of \$502 million plus interest, reflecting Apple's sales from 2013 to 2027 (the period covered by the licence). The amount of the licence is expected to exceed \$700m when interest is included.

Birss LJ gave the leading judgment on FRAND valuation, while Arnold LJ gave the leading judgment on the overlapping US proceedings and the non-royalty terms of the licence. Newey LJ

agreed with both.

What are the key takeaways from the decision?

Here are six key takeaways from the decision, with their broader implications for FRAND litigation:

1. Comparable Licences Must Be Reliable and Not Averaged Blindly

The trial judge's method averaged unpacked royalty values from a wide range of licences, even though their terms, contexts, and licensors varied significantly. The Court of Appeal found this approach flawed; averaging divergent data without assessing reliability led to an unjustified dilution of the strongest comparables. The fact that the judge's approach had not taken into account sales volumes of the licence counterparties in his calculations was found to be another source of error in his methodology.

The Court reaffirmed that FRAND assessments must be based on the most reliable comparable licences, and not on statistical smoothing. The judge's method, it held, was unprecedented, lacked economic justification and was inconsistent with the parties' expert evidence.

2. Expert Unpacking is Legitimate and Admissible

A central part of the appeal was the trial judge's decision to reject the accountancy experts' "unpacking" of licence data. He criticised their independence and methodology but never put these criticisms to them in cross-examination, which was held to be a clear breach of procedural fairness.

The Court of Appeal restored the evidential weight of the experts' analysis. It emphasised that licence unpacking is a legitimate expert function. Whether a licence is a good comparable is a legal question, but extracting reliable data from it is a matter for experts.

3. Hold Out and Hold Up: No Such Thing as 'Legitimate'

The Court rejected the trial judge's attempt to distinguish "legitimate" from "illegitimate" hold out or hold up. Citing the Supreme Court in *Unwired Planet*, it reiterated that both are mischiefs the FRAND system is designed to prevent.

Apple's refusal to take a portfolio licence and insistence on a patent-by-patent framework was characterised by the judge himself as "indefensible." The Court of Appeal held that such conduct was evidence of hold out and that rendered Apple's licences unreliable as comparables.

4. \$0.15 Per Unit is FRAND — Based on a 'Broad Axe' Approach

The Court undertook its own valuation based on unpacked dollar per unit (DPUs) rates from Google and the four Apple licences which implied the highest DPUs (Ericsson, InterDigital, Nokia, Sisvel). Google's implied rate (after scaling to Optis's 0.38% stack share) was significantly higher than any of the Apple comparables.

To identify a commercially reasonable FRAND rate, the Court cross-checked different DPU rates against Apple and Google's average device selling prices (ASP). It found that the rate implied by the Google licence was too high, as it suggested an unrealistic total stack price, but the rate implied

by the top four Apple licences was too low. A DPU of \$0.15 fell in between and implied a total royalty stack of 6.3% of Apple's historical ASP and 8.4% of Google's phones, a figure the Court found commercially reasonable.

Although the top-down methodology was not the primary basis for the decision, the Court used it as a cross-check – perhaps a signal that this tool may see more frequent use again in UK FRAND cases.

5. Foreign Judgments Must Be Respected — Treating US Damages as a ‘Floor’

The Court addressed how to reconcile its FRAND licence with a final US damages award obtained by Optis in the Eastern District of Texas in parallel proceedings. It rejected any requirement for Optis to vacate or surrender the US award, which Apple had sought.

Instead, the Court adopted a pragmatic solution, which was to treat the US judgment as a floor. Optis keeps the US award and if it recovers more under the UK FRAND licence, Apple pays the difference. This approach avoids double recovery while respecting comity.

6. Procedural Fairness and Judicial Restraint

Finally, the Court was critical of the trial judge's conduct in imposing licence and order terms that had not been argued by either party. Paragraph 6(2) of the order, which appeared to limit Optis's ability to act in the US without UK court approval, was labelled inappropriate. The Court expressed doubts as to whether such terms fell within the Court's jurisdiction at all.

What Does This Mean for FRAND Cases in the UK?

This decision reaffirms key FRAND principles: comparable licences are core to FRAND valuation and must be reliable; unpacking of licences by experts is legitimate; and top-down cross checks still have a role in FRAND valuations. It also signals a move away from over-engineered judicial methodologies and back to grounded, commercially-oriented reasoning.

It also demonstrates that the English courts will take a structured but flexible approach, avoiding mathematical precision where the evidence suggests that the FRAND rate lies within a range of values.

Above all, this ruling strengthens the UK's position as a leading venue for resolving global FRAND disputes, while offering important guidance on how FRAND assessments should be structured and how foreign proceedings should be factored into the outcome.

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