What is FRAND commitment?

- Commitment of patentee to undertake good faith bilateral negotiations with potential licensees
- Only for patents essential to the standard
- E.g. art. 6.1 ETSI IPR Policy
  - SSO will request (not: oblige) patentee to undertake in writing that it is willing to grant irrevocable licenses on FRAND T&C
  - Absent FRAND commitment: IPR can be excluded from the standard
FRAND means flexibility

- SSO policies strike balance between many competing interests of participating firms
- No “one size fits all” agreement that works for all licensees → importance of bilateral negotiations
- Ex ante disclosure of licensing terms / ex ante licensing?

When are T&C FRAND?

**Fair, Reasonable**
- not have direct result of precluding efficient licensee from commercially implementing the standard

**Non-Discriminatory**
- not offer similarly situated potential licensees materially different T&C
- BUT T&C must not necessarily be the same for all licensees as circumstances may differ
**FRAND commitment does NOT:**

- Constitute a license, only obligation to undertake bilateral negotiations in good faith
- Impose specific license terms
- Preclude injunctive relief for patentee
- Mean "ART/Numerical Proportionality" (because not all essential patents are created equal)

**FRAND and injunctive relief**

Can the courts issue an injunction against the user of a standard who rejected a FRAND offer from the patent owner?

<table>
<thead>
<tr>
<th>NO (Shapiro, Miller et al)</th>
<th>YES (Géradin et al)</th>
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<tbody>
<tr>
<td>« FRAND commitment ≠ waiver of right to seek injunction »</td>
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<td>« patent owner ≠ limited to payment claims »</td>
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- Court does not explicitly decide whether article 6.1 ETSI IPR Policy grants potential licensee an enforceable right to be granted a licence
- License offer by patentee was not FRAND
- No injunction granted

First reported court to dismiss a patent infringement action solely on the basis of a FRAND violation!


- Patents found essential and infringed
- Patent pool, but individual licenses still available
- License terms offered to standard adopter found reasonable:
  - Requirement to agree to standard pool agreement
  - Requirement to pay royalties for past infringement by affiliates
  - Absence of maximum royalty cap (⇒ *Siemens v Amoi*)
- Injunction granted
FRAND does not exclude injunctive relief

Three-tier test
The owner of
1. a valid essential patent;
2. that is found to be infringed; and
3. who made a licensing offer that is found to be FRAND
   complied with his obligations and
   can still obtain an injunction against the standard adopter
   who rejected the FRAND offer.

Thank you