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# Licensing Markets

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## Patent Licensing

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### 2023 IP Outlook: The Latest in SEP Licensing

The uncertainty surrounding standard essential patent (SEP) licensing persisted in 2022 and shows little sign of clearing in 2023. SEPs must be licensed to technology implementers on fair, reasonable and nondiscriminatory (FRAND) terms. Because there is no formal definition of FRAND terms, however, legal decisions involving FRAND have historically been determined by courts and non-governmental standard-setting organizations (SSOs). Disputes are frequent—especially between patent owners and technology implementers—and are becoming even more so as advanced wireless technologies such as 5G and WiFi 6 proliferate.

Various countries—including the United States—and SSOs developed new policies in 2022 to balance the interests of patent owners and licensees, but there is still a dearth of broad-ranging regulation. The United States still has no official policy on the appropriate remedies in an SEP/FRAND dispute. (See “2022 IP Outlook Key Takeaways and Outlook for 2022,” at <https://www.mwe.com/insights/2022-ip-outlook-report-the-developments-shaping-patent-law/#patentssep-frand-licensing>). This hands-off approach introduces substantial uncertainty for parties litigating 5G patents in

the United States. However, the US Department of Justice (DOJ) pledged to review conduct by patent holders and implementers on a case-by-case basis “to determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition,” but it remains to be seen how involved the DOJ will actually be.

### International SEP Policy Initiatives

Global policy for SEP disputes is similarly unsettled, as many countries are also assessing their policies.

- Europe is a particularly advantageous litigation venue for patent holders. For example, several injunctions issued in Germany in 2022 against well-known companies, including Huawei, Ericsson, and Ford. The European Union is currently assessing a new framework for SEP regulation, with a focus on transparency and efficiency in minimizing licensing disputes, but it’s unclear when and if the EU will release any proposals. The United Kingdom is also reviewing its SEP policy.
- In late 2021, China’s highest court ruled that it could set the terms of global FRAND

rates under certain circumstances, including adjudication of a dispute involving a foreign party if the dispute has an “appropriate connection” with China. An “appropriate connection” can be established if China is the country where the defendant is located, where the patent is to be enforced, or where a contract is signed or performed. This ruling may open the door to more patent holders filing or threatening to file SEP disputes in China.

- The Chinese decision followed on the heels of a UK court finding that the United Kingdom had jurisdiction to hear global disputes under contract law since a patent owner’s FRAND obligation stems from a contractual commitment made to SSOs, and because national courts may adjudicate disputes relating to those obligations.

While Europe is one of the most popular venues for SEP disputes, South America might become a more popular venue for SEP litigation. Ericsson recently won a preliminary injunction against Apple in Colombia. It is unlikely that patent holders will turn to courts in South America to establish rates, but they may well use the injunction to accelerate licensing negotiations.

In addition to governmental policies and recent court rulings regarding SEPs, the Institute of Electrical and Electronics Engineers announced in September 2022 that it was removing limits on patent owners’ ability to seek injunctions. This appears to be another win for patent owners and may provide further leverage during licensing negotiations.

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## Litigation Solutions

In SEP-related litigation, 2022 saw the resolution of a high-profile dispute over whether a patent owner was required to license SEP patents to specific implementers in the supply chain. This issue has been a theme in the United States and beyond, as SEP licensors (particularly those in 3G, 4G, and 5G spaces) tend to offer licenses solely to end-product manufacturers and not

to subcomponent manufacturers or other supply chain entities. In *Continental Automotive Systems v. Avanci*, Case No. 20-11032 (5th Cir. June 21, 2022), the US Court of Appeals for the Fifth Circuit found that Continental did not have Article III standing to bring an antitrust lawsuit against Avanci after Avanci refused a license to Continental.

The decision confirms that patent owners have significant discretion in developing their licensing programs and deciding to whom

in the supply chain they want to license. SEPs are thus likely to continue licensing the end-manufacture of products since those agreements likely offer the highest license payments.

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