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Submission of

ACT | The App Association

on the

United Kingdom's Intellectual Property Office Consultation on Standard Essential Patents

I. Executive Summary

ACT | The App Association is a policy trade association for the **small business technology developer community**. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with markets across virtually every modern industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the ecosystem the App Association represents—which we call the "app economy"—is valued at more than £4.5 trillion globally[1] and is responsible for more than 400,000 jobs in the United Kingdom (UK).[2]

The UK is home to a huge array of talented and innovative startups, scaleups, and small and medium-sized enterprise (SME) tech businesses. Many App Association members invent, develop, and sell internet of things (IoT) devices. The IoT ecosystem is expected to generate £4.1–£9.3 trillion for the global economy by 2030, significantly contributing to economic growth and job creation within the UK.[3]

The adoption of IoT capabilities across consumer and enterprise markets, both established and emerging, relies heavily on standardised solutions for interoperability and safety, and therefore the seamless licensing and implementation of standard-essential patents (SEPs) in those solutions. Unfortunately, SEP licensing across IoT use cases is fragmented and cost intensive,[4] making SMEs' ability to realistically obtain licenses to SEPs on fair, reasonable, and non-discriminatory (FRAND) terms paramount to ensuring a competitive and dynamic marketplace. The App Association welcomes the United Kingdom Intellectual Property Office's (IPO) consultation on SEPs and agrees with its assessment of the central problems that plague establishment of a fair and efficient marketplace. The lack of transparency, excessive litigation costs, and persistent information asymmetries are felt especially strongly by small businesses and act as a barrier to innovation and growth, damaging the UK economy long term. The SME tech companies of today are the big tech companies of tomorrow.

We agree with the IPO that lower-cost FRAND adjudication is a desirable objective. However, we are concerned that launching the rate determination track (RDT) prematurely will prevent it from delivering reliable, affordable, and fair outcomes given the resource-intensive nature of FRAND valuation. In order to establish a successful RDT, the App Association proposes four reforms that the IPO should enact to establish a strong foundation for the RDT:

- **Develop and Publish an Aggregate Royalty Benchmark**: The IPO should set an administratively determined aggregate royalty for each standard. A clear and fair benchmark would enhance transparency, allow licensees to forecast costs with confidence, reduce the

[1] *See* https://actonline.org/wp-content/uploads/About-the-App-Economy-2023_162023.pdf
[2] *See* https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf.
[3] See Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001, Page 10
[4] *See* https://actonline.org/2023/10/05/the-european-unions-proposal-for-a-transparent-fair-and-reliable-standard-essential-patent-landscape/. *See* https://actonline.org/2023/10/05/the-european-unions-proposal-for-a-transparent-fair-and-reliable-standard-essential-patent-landscape/.

need to re-litigate aggregate royalties in every case, and curb incentives for predatory licensing strategies that target smaller companies.

- **Improve Transparency**: The IPO should create a centralised database consolidating declared SEPs for standards that are widely licensed and integrate available independent essentiality studies. SEP holders should also be required to disclose the portfolios they intend to license, with representative samples that could be reviewed by third parties. This approach would provide licensees a baseline to assess essentiality at a fraction of the cost of a government-led patent-by-patent essentiality check.

- **Create a FRAND Guidance Service**: The IPO should establish a FRAND guidance service to support companies—especially smaller manufacturers and product developers—approached by SEP holders. Initially, the service would provide informal, confidential guidance on whether an offer falls within a plausible FRAND range, in view of the aggregate benchmark noted above, and the SEP holder's share of SEPs for the relevant standard. Over time, once other transparency reforms are in place, it could issue formal assessments that courts might recognise as evidence in litigation. This service should be offered as a precursor to the streamlined RDT court process.

- **Mandate SEP Holder Disclosures in Licensing Demands**: SEP holders making licensing demands that cover UK sales should be required to provide standardised disclosures, including their patent list, claimed stack share, the implied aggregate royalty, and relevant IPO benchmarks. They should also attach an IPO informational document outlining licensee rights and available support services. Pre-action protocols can be used as a lever to ensure disclosure.

- **Clarify that SEP Injunctions are Only Appropriate in Rare and Extreme Circumstances:** IPO should protect the interests of innovative SMEs, and to ensure that standards fulfil their intended role in fostering innovation and competition, by setting a clear policy stating that injunctions should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.

II. <u>Standards, Standard Essential Patents, and the FRAND Commitment</u>

Technical standards allow manufacturers to produce interoperable equipment by defining common protocols and specifications. Standards are ubiquitous in the modern world and include interoperability standards like 5G, Wi-Fi, and Bluetooth. Standards are developed by standard-setting organisations (SSOs) which involve broad collaboration from industry stakeholders who can voluntarily contribute their innovations during the standard development process.

Standardisation is particularly effective when an industry-wide uniform solution offers greater benefits than rapidly evolving, non-compatible technologies. In situations where the cost of frequent upgrades is high, and the advantages of such upgrades are limited, a stable, standardised foundation tends to serve the market more effectively.[5] In such cases, the value of the technology is significantly enhanced by the positive network externalities created through standardisation—on its own, a given

[5] *See* Knutt Blind, *Standards and Innovation: What Does the Research Say?*, ISO Research & Innovation Papers at 8 (Jan. 2022), https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100466.pdf

technology may have little standalone utility.[6] By agreeing on these shared specifications, companies can spread the cost of establishing the standard across an industry while mitigating the risk of it not being adopted and reducing redundant development efforts that would arise from parallel development of competing proprietary solutions.[7]

Although the adoption of a standard can slow certain aspects of 'upstream' innovation—since radical or non-backward-compatible changes become more cumbersome—it frequently triggers significant 'downstream' innovation among manufacturers who compete to utilise that standard.[8] Lower switching costs for consumers mean that they can more easily compare and migrate to products offering the best mix of quality, features, and price. As a result, manufacturers must continuously innovate in non-standardised features to differentiate themselves from rivals. This competitive dynamic drives substantial innovation in areas such as product design, user experience, and cost efficiency—outweighing the potential (and acceptable) impact on innovation of the technology underlying the standard.[9] Over time, the result is a healthier market ecosystem where interoperability, consumer choice, and sustained innovation all thrive.

Small businesses, including those the App Association represents, are particularly dependent on the widespread availability of standards on reasonable terms for implementation. These entrepreneurs, innovators, and developers can incorporate standardised features in their products by purchasing off-the-shelf modules without the need to design these components themselves or develop internal expertise in these technologies. Instead, they can dedicate their research and development (R&D) resources to developing the unique features that set their products apart and bring them to market more swiftly.[10]

This is particularly true in the context of IoT products, which are typically specialised devices designed to focus on one or two distinctive and innovative features.[11] Small business developers often have a competitive advantage in this area because they can develop these specialised and innovative products without the costly overhead and infrastructure of larger organisations.

A. Risks of Standardisation and the FRAND Commitment

Despite the benefits of standardisation, adopting standardised technology creates risks. Once a company develops and begins to sell a product with a standardised feature, it typically becomes costly to abandon the standard. This is especially true if the standard has been widely adopted by an industry, leaving no alternative solutions, as is the case with communications standards such as cellular and Wi-Fi.[12] This phenomenon, known as 'lock-in', can make companies that market standard compliant products susceptible to 'hold-up'. Hold-up occurs when owners of the patented

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[6] *See id*. at 9.
[7] *See id*.
[8] See *id*. at 8
[9] Raphael De Coninck, Christoph von Muellern, et al, *SEP Royalties, Investment Incentives and Total Welfare* at 3-4, Charles River Associates *prepared for* Fair Standards Alliance
[10] European Commission, *Commission Staff Working Document – Impact Assessment Report* ("Impact Assessment Report"), at 20 (Apr. 27, 2023) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en.
[11] *See* Joachim Henkel, *Licensing Standard-Essential Patents in the IoT*, 51 Rsch. Pol'y 1, 2 (2022).
[12] Thomas Cotter, Erik Hovenkamp, Norman Siebrasse, *Demystifying Patent Holdup*, 76 Wash & Lee L. Rev. 1501, 1527–29 (2019).

technologies essential to the standard—SEPs—use the threat of injunctive or exclusionary relief against locked-in manufacturers to extract unreasonable and excessive royalties. The risk of SEP hold-up cannot only discourage companies from adopting standards but can also undermine many of the benefits standardisation is intended to provide; it can increase costs for consumers, hinder innovation, and disadvantage small businesses.

To address this risk, many SSOs have developed intellectual property rights (IPR) policies that require patent holders that voluntarily participate in the standard-setting process to make a binding commitment to license their SEPs on terms that are FRAND.[13] Many standards, like USB and Bluetooth, operate under royalty-free frameworks, where manufacturers either pay nothing or a flat administrative fee to use the features of the standard in their devices. For other standards, SEP holders who have volunteered their technology to the standard may charge royalties for use of their patented technology under the condition that their licenses comply with their FRAND commitments.

The FRAND commitment, as its name specifies, requires SEP holders to license their patents on terms that are **f**air, **r**easonable, **a**nd **n**on-**d**iscriminatory. A FRAND rate 'should reflect the approximate value of [the SEP's] technological contribution, not the value of its widespread adoption due to standardization'.[14] The 'royalty rate must reflect the value attributable to the infringing features of the product, and no more'.[15]

B. The FRAND Commitment and Competition Law

The FRAND commitment is not merely a contractual tool used by SSOs to encourage adoption of their standards. '[T]he concept of FRAND has been developed in an attempt to limit the ability of SEP holders to abuse their market power and to provide effective access to the standard for all interested third parties'.[16]

Courts have recognised that SSOs, which are often comprised of representative from competing companies, are 'rife with opportunities for anticompetitive activit[ies]'.[17] 'There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm'.[18] These cases recognised that an SSO that fails to establish and enforce policies prohibiting anticompetitive conduct can be held liable for violating antitrust laws. Competition authorities around the world have recognised that adopting IPR policies with FRAND licensing obligations is necessary for SSOs to claim the benefit of a safe harbour from competition enforcement.[19]

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[13] Some standard setting organizations use reasonable and non-discriminatory, or RAND, as the basis of their intellectual property policy. Despite the difference in terminology, they are considered functionally equivalent.

[14] *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233 (Fed. Cir. 2014); *see also* Horizontal Guidelines at ¶ 460 ("The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products, which is unrelated to the patented technology.")

[15] Id.

[16] Case COMP/M.6381 –*Google/Motorola Mobility,* Commission Decision at ¶ 107 (Feb. 13, 2012).

[17] Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982).

[18] *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500 (1988).

[19] Eur. Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements ¶ 451 (Jul. 21, 2023).

Ensuring the integrity of the FRAND commitment is paramount as industries implement connectivity technologies like 5G and Wi-Fi into their products. 'According to recent … estimates, some 25–30 billion devices in the home and workplace will be equipped with sensors, processors and embedded software….'[20] 'For proper market functioning as the connected economy develops, it will be critical to all market actors that FRAND licensing practices are followed and that abusive assertions are prevented'.[21]

The FRAND commitment is particularly important for businesses developing new products. These companies must assess the costs and benefits of incorporating a particular standard early in the product development cycle, and it is critical that they have a sense of what their SEP licensing costs will be. The FRAND commitment is meant to give some foreseeability by providing a promise that the ultimate terms will be fair, reasonable, and non-discriminatory and not be extracted under the existential threat of market exclusion. However, in practice, that is often not the case.

While 'the concept of FRAND has been developed in an attempt to limit the ability of SEP holders to abuse their market power and to provide effective access to the standard for all interested third parties', it is not self-enforcing.[22] Companies bound by FRAND commitments still have the incentive to seek to evade their obligations to maximize their revenue. Ultimately, the ability of the FRAND commitment in constraining anticompetitive conduct rests on the courts and competition agencies to enforce it.

For these reasons, competition authorities have taken action against SEP holders that have sought to exploit their FRAND encumbered patents by excluding competitors or attempting to extract above-FRAND royalties.[23] Licensors that have attempted to abuse their SEP portfolio have faced investigations and sanction.[24]

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[20] *Core Principles and Approaches for Licensing of SEPs* at 19*,* CEN-CENELEC CWA 95000, https://tinyurl.com/2wepm8yh

[21] *Id.* at 20.

[22] Case COMP/M.6381 –*Google/Motorola Mobility,* Commission Decision ¶ 113 (Feb. 13, 2012)

[23] *See e.g.,* Case AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents (Eur. Comm'n Apr. 29, 2014); *In re Robert Bosch GmbH*, 155 F.T.C. 713, 718–19 (Apr. 23, 2013) (enforcement action against party seeking injunctions for infringement of FRAND-encumbered SEPs against competitors willing to take licenses); *In re Dell Computer Corp.*, 121 F.T.C. 616, 618 (May 20, 1996) (enforcement action against party targeting competitors with patents essential to Dell's submissions to the VL-bus standard but not disclosed during the standardization process); Japan Fair Trade Commission, *Closing the Investigation on the Suspected Violation by One Blue, LLC of the Antimonopoly Act*, ¶¶ 1(2), 2(2), 3(3) (Nov. 18, 2016) https://tinyurl.com/5b88fbjy (finding that threatening a potential licensee's customers with injunctions—where the licensee was willing and in "a domestic competitive relationship" with pool members—was "in violation of . . . the Antimonopoly Act")

[24] *See e.g.*, Decision ¶ 49 Case COMP/38.636 – Rambus (Sept. 12, 2009) (recognizing SEP patent ambush scheme to extract excessive royalties as anticompetitive); *In re Motorola Mobility LLC & Google Inc.*, 156 F.T.C. 147, 201 (July 23, 2013) ("manufacturers, when faced with the threat of an injunction, are likely to surrender to higher royalty rates for SEPs"); *In re Union Oil Co. of Cal.*, Complaint, Docket No. 9305, ¶ 8(a) (FTC. Mar. 4, 2003), https://tinyurl.com/2yej3tyj (noting the increased royalties as an anticompetitive harm). Kim Yoon-kyoung and Kim Tae-gyu, *Qualcomm's $800M fine upheld by Korea's Highest Court,* UPI (Apr. 14, 2023) https://tinyurl.com/3e25tuvy (noting the supreme court upheld a lower court verdict that "Qualcomm was violating antitrust regulations by failing to license its [SEPs] on [FRAND] terms").

Competition authorities have thus repeatedly prohibited SEP abusers from pursuing injunctions against putative licensees except under narrow circumstances. Unless a licensee refuses or is unable to take a license on FRAND terms, a SEP holder that pursues injunctive relief may be engaging in anticompetitive conduct.[25]

III. The Current Problems in SEP Licensing

Despite their FRAND commitments, SEP holders sometimes demand royalties many times higher than the rates that courts ultimately adjudicate to be FRAND.[26] Unfortunately, SEP licensing suffers from several significant asymmetries that give licensors a significant advantage in negotiations, which allow them to extract these above-FRAND royalties. The informational asymmetry between licensors and licensees harms small businesses by making it exceedingly costly to negotiate or, if need be, litigate with an aggressive SEP licensor. As a result of these high costs, small licensees are frequently forced to accept licenses at well above FRAND rates. Moreover, the reliance by some courts on comparable licenses for valuation has incentivised some SEP holders to target small companies for otherwise unprofitable licenses that they can use in litigation. There have also been cases such as *Interdigital v. Lenovo* where SEP holders have been found to routinely overcharge SMEs to artificially inflate the market rate of a SEP. Notably, the power to threaten and obtain injunctions gives SEP holders significant coercive power over potential licensees.

A. The Information Asymmetry in SEP Licensing

The asymmetry affords licensors a significant advantage that is ripe for and frequently abused. Licensors are well situated to assess the value of their portfolios, while licensees are not.[27] And this asymmetry is a global problem. As the European Commission has found, 100 per cent of licensees reported insufficient information about FRAND royalties and 97 per cent reported insufficient information about the SEP landscape, while only a small fraction of SEP licensors claimed the same.[28]

This asymmetry is amplified by several factors:

- The SSOs that develop many standards, including Wi-Fi, do not require SEP holders that commit to FRAND licensing to disclose which of their patents they believe are essential.[29] This lack of disclosure makes it difficult for licensees to estimate the share of the

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[25] *In re Robert Bosch GmbH*, 155 F.T.C. at 830; *In re Motorola Mobility LLC & Google Inc.*, 156 F.T.C. at 167; *see also* Decision ¶ 247, Case AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents (Eur. Comm'n Apr. 29, 2014).
[26] *See, e.g.*, *In re Innovatio IP Ventures, LLC Patent Litig.*11-C-9308, 2013 WL 5593609, at *43 (N.D. Ill. Oct. 3, 2013) (finding a RAND royalty of $0.0956 per unit as compared to the demand of $16.17 per unit for tablet computers); *Microsoft Corp. v. Motorola Inc.*, No. 10-1823, 2013 WL 2111217, at *99–100 (W.D. Wash. Apr. 25, 2013) (finding a FRAND rate of $0.03471 per unit compared to initial demands of $6–8 per unit); *Optis Cellular Tech. LLC v. Apple Inc.* [2023] EWHC 1095 (Ch) ¶¶ 342, 467(iv), 494 (May 10, 2023) (finding the FRAND rate was less than 2% of the rate demanded).
[27] Impact Assessment Report, at 36.
[28] Impact Assessment Report, at 36.
[29] Rudi Bekkers *et al*, *Disclosure Rules and Declared Essential Patents*, 52(1) Res. Pol'y 104618 at 3 (2023).

standard held in a licensor's portfolio or their potential total licensing liability for using the standard.

- For many standards, the vast majority of patents declared essential to the standard are not actually essential. Essentiality rates can vary significantly from portfolio to portfolio, and the cost of evaluating large portfolios can be prohibitively expensive.[30]

- SEP portfolios often have significant rates of invalid patents when actually litigated.[31]

- Royalty demands by SEP licensors often exceed the actual market rate, and smaller companies typically lack both access to the licensor's other license agreements and adequate experience to make their own FRAND estimations.[32]

As a result of these factors, licensees' attempts to estimate the aggregate royalty burden from using a standard and evaluate the value of an individual SEP portfolio can be incredibly expensive. Licensors typically do not need to make the former investment, while companies seeking to use the standard do. And while SEP holders only need to make the upfront investment in evaluating the value (and weaknesses) of their portfolio once, potential licensees are required to make this expenditure for every license negotiation. '[I]f a company (even a large one) is implementing the standard by using a component supplied by a third party, it will most likely have no knowledge of the relevant technology and must engage external experts to assist in the assessment of the royalty demand'.[33] This ultimately affords SEP holders more leverage in negotiations by driving up the costs for licensees.

These asymmetries pose a particularly significant problem for the SMEs (such as the App Association's members) who typically source their standard implementing components from third parties and lack both the resources and experience needed to negotiate or litigate for FRAND terms. Indeed, 38 per cent of SEP licensees reported that the 'costs involved in licensing SEPs (search, negotiation and litigation costs)' for SMEs was enough to make them 'go out of business/change business'.[34] In a recent study based on interviews with small and medium-sized companies utilising standards,[35] participants reported how these transaction costs make SEP licensing negotiations unaffordable:

- '[I]t is for startups ... impossible to find one's way in this jungle. Because for example I completely lack transparency as to which patents the technology of [the] modem in my device actually uses'.

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[30] *See* John Hayes et al., Charles Rivers Assocs., *A Critical Review of 5G SEP Studies*, at 6 (Nov. 8, 2022) (noting studies have found SEP essentiality range from 8–33%), https://media.crai.com/wp-content/uploads/2022/11/09132755/Critical-Reviewof-5G-SEP-Studies_Nov-2022.pdf
[31] Matthew Rose, Jay Jurata, & Emily Luken, "Between a Rock and a Hard Place": Unwired Planet v. Huawei and Dangerous Implications of Worldwide FRAND Licenses, Concurrences No. 84684 at 6 (2017).
[32] See Robert Pocknell, Buying and Selling Smart Devices: SEP Licenses and Competition Law (Mar. 25, 2024) https://www.keystonelaw.com/keynotes/buying-and-selling-smart-devices-sep-licences-and-competition-law.
[33] Impact Assessment Report at 20.
[34] Impact Assessment Report at 15.
[35] Joachim Henkel, *Licensing Standard-Essential Patents in the IoT*, 51 Rsch Pol'y 1, 6–7 (2022).

- '[A]s a startup, ... as a small company, I have no way really of evaluating the legal validity of what [licensors] say or not. I have no way of knowing is this reasonable, or not reasonable when they actually say how much money they want, I have no idea whether it is the same as anybody else or it's specific to me, is that fair, there is no way of judging. So I have no way of actually evaluating their request on any kind of merit'.

- '[By trying to evaluate a licensing offer] I would only delay my own innovation of the time to market and add a lot of cost I cannot afford to pay.'

- '[F]or a startup, it's a substantial expense to get educated, because they'll have to reach out for expertise.... It's a cost that you didn't plan for. It's also a liability that your financier may not appreciate....'

- '[C]ourt arbitration and legal proceedings are not an option for small companies . . .'

- '[T]here is no way for us to fight it, we are too small to take on a large organization....'

Avoiding the cost of meaningful negotiations and litigation by acceding to SEP holders' demands can be detrimental to both the targeted small business and the market as a whole. Without the ability to meaningfully negotiate or litigate, small businesses often pay significantly more (on a per unit basis) than large licensees who have the resources and expertise to engage with SEP holders. In a recent case decided in the UK, the court observed that the only companies who paid the licensor's published 'program rate' were 'the smallest and least sophisticated licensees'.[36] Another UK judge commented that 'no implementer could stay in business paying [the licensor's] rates'.[37]

B. Costly and Complex FRAND Determinations

FRAND determinations can be extremely expensive, costing tens of millions of pounds and thus making them effectively unavailable for most small licensees. A significant driver of these high costs is the use of comparable license valuation, which has been the primary tool used by UK courts in FRAND rate setting. Even decisions made in the first instance on a version of the top-down valuation methodology frequently look to comparable licenses to establish the aggregate.[38]

Comparable license valuation uses existing licenses as points of comparison to establish what rates are FRAND. It relies on an assumption—often *not* the case—that the parties to the prior negotiation agreed on an arms-length basis that the rates in the prior licenses were FRAND. As noted, many agreements are entered for other reasons, such as avoiding the cost of litigation or the cost of injunctions. As such, comparable licensing analysis requires at least two complex assessments: (1) what the actual economic terms of the existing license were (despite complex terms that may obscure those economics), and (2) which agreements are comparable and indicative of an arms-length agreement as to FRAND rates. Both elements can be highly complex.

First, SEP licence agreements are not readily comparable. Differences in how the agreements are structured mean they must be 'unpacked' before the terms could be readily understood.

[36] *InterDigital Tech. Corp. v. Lenovo Group Ltd.* [2023] EWHC 539 (Pat) ¶ 516 (Mar. 16, 2023).
[37] *Optis Cellular Tech. LLC v. Apple Inc.* ¶ 467(iv) [2023] EWHC 1095 (Ch) (May 10, 2023).
[38] *See id.* at ¶ 456.

> By way of example, *A* might have concluded a licence with *B* involving a lump sum payment of US$*X* which covered (without differentiation) both past and future sales. At the same time, *C* might have concluded with *D* a licence providing for a discounted lump sum payment of US$*Y* in respect of past sales and an *ad valorem* rate of *Z*% in respect of future sales. 'Unpacking' these two (hypothetical) licences so as to make them comparable is (self-evidently) extremely difficult. The process involves making a number of factual assumptions (which may not be evident from the face of the licence) regarding, for instance, the [average selling price] of products sold or the past/future sales volumes of such products.[39]

'[U]npacking' involves a degree of subjectivity or judgement'.[40] This means that inferences drawn from these analyses 'will certainly have to be treated with caution'.[41] Unsurprisingly, in both the *Optis v. Apple* and *InterDigital v. Lenovo* trials, the experts responsible for providing the numerical aspect of unpacking (they relied on other testifying experts to interpret certain provisions related to the scope) spent four days testifying.

Second, in order for a license to be a valid comparable, the rate must represent a good-faith, arms-length agreement regarding the economic value of the patented technology. Where other considerations, such as the cost of market exclusion or potential litigation costs equal or exceed the unpacked value of the license, it typically would not be accepted as a comparable. For example, the royalty rate in a license that was consummated shortly after an injunction was issued against the licensee in a major jurisdiction may not be based on the actual economic value of the patents, but rather on the cost of exclusion. Similarly, companies with low volumes of sales may agree to pay a higher rate given that the cost of litigation would greatly exceed any savings from obtaining monetary terms that are actually FRAND. Weeding out prior agreements that do not reflect a licensee's evaluation of the economic value of the patents can be difficult.

This is frequently the subject of significant disagreement between the parties. In *InterDigital v. Lenovo*, InterDigital initially proffered 20 license agreements to use as comparables, all of which were rejected by the court.

These costs mean that small licensees can be more likely to accept above FRAND licensor demands than their larger counterparts. As Justice Mellor observed in *InterDigital v. Lenovo*:

> when the sums payable by the larger implementers (often lump sum deals) are at least a degree of magnitude higher than the costs of litigation, it seems logical to assume that the unpacked rate is more likely to represent the "true value" of the licensed technology. By contrast, where the costs of litigation would be around or greater than the total sum payable under a licence, it is far more likely that the implementer has little choice but to accept what the licensor is demanding.[42]

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[39] Apple v. Optis at ¶ 55(ii)(d)
[40] *Id.* at ¶ 55(ii)
[41] *Id.* ¶ 55(i).
[42] *InterDigital Tech. Corp. v. Lenovo Group Ltd.* [2023] EWHC 539 (Pat) ¶ 288 (Mar. 16, 2023).

C. Small Licensees Targeted to Generate Inflated Comparables

The emphasis on comparable licenses in FRAND adjudication does more than make FRAND adjudications unaffordable for small licensees. It also incentivises predatory licensors to target SMEs. Some SEP holders have made a strategic choice to pursue small licensees in order to obtain inflated comparables that can be deployed against larger companies in litigation.[43] Licensors know that a court applying these rates in cases involving the world's largest licensees could mean hundreds of millions, or even billions, of pounds in additional revenue.

While some courts—including those in the UK—have been rightly sceptical of these agreements and refused to accept them as comparables,[44] other courts have allowed them to be used as comparable agreements for setting FRAND rates.[45] This incentivises licensors to pursue agreements with small licensees where the revenue of the agreement appears to be 'dwarfed by the transaction costs' associated with negotiating the license. In other words, some SEP licensors pursue small licensees to obtain inflated, non-FRAND license agreements simply because of the valuation methodology they expect to be used in litigation against other, larger market participants.

The actual tactics that are used to obtain these licenses are rarely made public because small licensees rarely litigate. Moreover, the negotiations and licenses are often covered by strict non-disclosure agreements (NDAs) that prevent the licensee from disclosing the tactics after the fact.[46] However, KPN's 2022 U.S. litigation against Bullitt Group reveals what SEP holder tactics against small companies can look like and the resources some SEP holders are willing to expend for even *de minimis* revenue.

During the litigation, Bullitt revealed that KPN had demanded a $0.05 royalty per unit from Bullitt for its 15 patent families that had been declared essential to 4G/LTE.[47] Given that there were more than 23,000 4G patent families declared essential to 4G/LTE,[48] this rate would imply an aggregate royalty in excess of $75 for cellular functionality and would account for more than 25 per cent of the cost of certain Bullitt models.[49]

What is notable, however, is that the U.S. litigation would only permit KPN to recover royalties for the 21,600 units that Bullitt had sold in the United States.[50] KPN's damages were thus capped at $1,080. Notably, KPN engaged the U.S. law firm Susman Godfrey—a firm that generated $2.4 million per

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[43] *Optis v. Apple* at ¶ 398(iii)(b)(iv) ("it is difficult to avoid the conclusion that Optis was not dealing with these small counterparties for the revenue streams they would bring in, but because the licensees they agreed would produce comparables that would assist Optis in this litigation.")
[44] *See InterDigital v. Lenovo* [2023] EWHC 539 (Pat) at ¶ 609.
[45] *See HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 407 F.Supp.3d 631, 639–40 (E.D. Tex., 2019).
[46] Joachim Henkel, *Licensing Standard-Essential Patents in the IoT*, 51 Rsch Pol'y 1, 8 (2022).
[47] Defs.' Mot. for Separate Trial Ex. 1, at 23, *Koninklijke KPN N.V. v. Bullitt Grp. Ltd.*, No. 1:21-cv-00044-LPS (D. Del. Aug. 26, 2021), ECF No. 22-1.
[48] *See Q1 2021 4G-5G SEP Market Report & Analysis* at 17, Tech+IP Advisory LLC (Feb. 15, 2021) https://tinyurl.com/y523mdh3
[49] Jasper Hart, *Device Review: Cat S42—Low Specs, High Durability*, MobileNews (July 20, 2020) (noting the Cat S42's launch price of £229)
[50] Defs.' Mot. for Separate Trial Ex. 1, at 3–4, *Koninklijke KPN N.V. v. Bullitt Grp. Ltd.*, No. 1:21-cv-00044-LPS (D. Del. Aug. 26, 2021), ECF No. 22-1.

lawyer in 2024.[51] Given that U.S. patent litigation requires both sides to bear their own litigation expenses, costs for KPN of even having the complaint filed would dwarf any recovery. For this litigation to make any financial sense, it is clear that KPN had to have been motivated by something other than the damages at issue.

These practices have a material effect on companies' bottom line. In 2024, Bullitt closed. Its statement of affairs showed that there were three SEP licensors—Ericsson, Nokia, and VIA Licensing—in the top 10 of Bullitt's non-affiliate creditors. The amount owed to these three entities accounted for almost 10 per cent of Bullitt's outstanding non-affiliate debts.[52]

D. SEP Injunctions Can Undermine FRAND Licensing

Injunctions can present an acute competition problem in the context of SEP licensing. For small businesses the threat injunction is an overwhelmingly powerful persuasive tactic, because they simply cannot afford to suffer the consequences of an injunction. Injunctions should be an instrument of last resort not a threat during a normal negotiation.

The cost of market exclusion resulting from a granted injunction can be orders of magnitude higher than the excessive royalty demands made by SEP licensors.[53] As a result, potential licensees often face substantial pressure to accept above-FRAND royalties, particularly for smaller companies that cannot afford to engage in costly litigation. Above FRAND royalties paid for SEPs are ultimately passed on to consumers through higher prices or reduced investment in R&D.[54]

FRAND commitments thus limit SEP holders' ability to seek injunctions against manufacturers who adopt standards incorporating their SEPs.[55] Indeed, the 'normal exploitation of the patent in the context of standard-compliant products is to collect FRAND royalties'.[56] By committing to license its patents on FRAND terms, a SEP holder is acknowledging 'its objective [should it seek to monetize its patents] is not to stop the sale of infringing products but to collect royalties from the sales'.[57] 'Seeking injunctions against willing licensees of FRAND-encumbered standard essential patents … is a form

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[51] *See* Debra Cassens Weiss, *This law firm is ranked No. 1 after posting $8.8B in gross revenue; which other firms are 'category leaders'?* ABA Journal (Apr. 16, 2025) https://www.abajournal.com/news/article/this-law-firm-is-ranked-no-1-after-posting-88b-in-gross-revenue-which-other-firms-are-category-leaders

[52] *See* Notice of Statement of Affairs, Form LIQ02, *In re Bullitt Mobile Ltd.*, at 14 (Apr. 28, 2024), available at https://tinyurl.com/3wm86cdb.

[53] John Hayes & Assaf Zimring, *Injunctions in Litigation Involving SEPs,* 6/2024 GRUR Patent 240, 242–43 (June 20, 2024), https://tinyurl.com/3dajevn4.

[54] *See, e.g.,* FTC, *Analysis of Agreement Containing Consent Order to Aid Public Comment*, at 3 (June 10, 2005), https://tinyurl.com/y5b53m6e. ("According to Unocal's own expert, approximately 90 percent of this royalty charge is likely to be passed on to California consumers" in a case involving SEP ambush); A. Doug Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective,* 127 Yale L.J. 2110, 2114 (2018).

[55] *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012) ("Implicit in [the FRAND] promise is, at least arguably, a guarantee that the patentholder will not take steps to keep would-be users from using the patented material, such as seeking an injunction").

[56] Impact Assessment Report at 122.

[57] *Id.* at 121.

of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate'.[58]

SEP injunctions against licensees that are able and willing to pay a FRAND rate 'threaten[] to increase prices and reduce the quality of products on the market and to deter firms from entering the market'.[59] Where a potential licensee has committed to taking a license on FRAND terms, the only reason 'to use the exclusionary power of injunctions . . . [is] to try to force the [licensee] to pay more than [a court would adjudicate to be FRAND]'.[60] Even the threat of an injunction can be used to evade a FRAND commitment because 'royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favour of the patentee'.[61] As such, seeking an injunction without negotiating in good faith constitutes a breach of the FRAND commitment.[62]

Competition authorities have thus repeatedly prohibited SEP owners from pursuing injunctions against willing licensees except under narrow circumstances. Unless a licensee refuses or is unable to take a license on FRAND terms, a SEP holder that pursues injunctive relief may be engaging in anticompetitive conduct.[63] The Commission has recognised that threatening, pursuing, or enforcing injunctions 'against a good faith potential licensee, may significantly impede effective competition by, for example, forcing the potential licensee into agreeing to potentially onerous licensing terms [which may include higher royalties] which it would otherwise not have agreed to'.[64]

IV. <u>ACT | The App Association's Policy Proposals</u>

The IPO has correctly identified some of the central problems facing the SEP licensing system: a lack of transparency on pricing and essentiality, litigation costs that are prohibitive for many companies, and persistent information asymmetries that disadvantage smaller firms. These challenges create inefficiencies, distort bargaining dynamics, and risk slowing the adoption of new technologies in the UK. The App Association agrees that these problems are real and must be addressed; until they are, the UK's competitiveness and economic security will be increasingly damaged.

We believe that the IPO's proposal to establish a RDT to serve as a lower-cost alternative to court adjudicated FRAND determinations could help address many of the problems discussed above. However, in order for it to be successful and address the problems in SEP licensing, particularly those

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[58] Federal Trade Commission, Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Robert Bosch GmbH*, File No. 121-0081, Dkt. No. C-4377, at 4 (Apr. 23, 2013).
[59] Federal Trade Commission, Analysis of Proposed Consent Order to Aid Public Comment, *In re Motorola Mobility LLC & Google Inc.*, File No. 121-0120, Dkt. No. C-4410, at 4 (Jan. 3, 2013).
[60] *Panasonic Holds. Corp. v. Xiaomi Tech. UK Ltd.*, [2024] EWHC 1733 (Pat) ¶ 82 (Eng.).
[61] Third Party United States Federal Trade Commission's Statement on the Public Interest at 2–3, *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers & Components Thereof,* Inv. No. 337–TA–745 (June 6, 2012) https://tinyurl.com/4n73ht3z (quoted with approval in *Apple, Inc. v. Motorola, Inc.,* 869 F.Supp.2d 901, 914 (N.D. Il., 2012) (Posner, J.)).
[62] *Telefonaktiebolaget LM Ericsson v. Lenovo (United States), Inc.*, 120 F.4th 864, 876 (Fed. Cir. 2024) ("if the FRAND commitment means anything of substance, it must mean that an SEP holder that has made such a commitment cannot just spring injunctive actions against other standard implementers without having first complied with *some* standard of conduct").
[63] Decision ¶¶ 495-96, Case AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents (Eur. Comm'n Apr. 29, 2014); *see also In re Robert Bosch GmbH*, 155 F.T.C. at 830; *In re Motorola Mobility LLC & Google Inc.*, 156 F.T.C. at 167.
[64] Case COMP/M.6381 –*Google/Motorola Mobility,* Commission Decision at ¶ 107 (Feb. 13, 2012).

faced by the SME community the App Association represents, it is critical it is able to deliver reliable rate determinations in a cost-effective manner.

Without establishing a set of tools that the RDT adjudications can rely on, we are concerned that the IPO may not be able to meet its objectives in addressing the problems with SEP licensing. FRAND rate adjudications are expensive because comparable license valuation is complex and cumbersome. It requires a significant investment of resources from the parties and a large amount of time and attention from the court.

An expedited proceeding would not give adjudicators the time needed to evaluate license agreements, unpack their terms, and test whether they are in fact reflective of arms length agreement as to FRAND terms based on the economic value of the patents (rather than other considerations such as cost of litigation or market exclusion). Comparable licenses vary widely in structure—lump sums, running royalties, and hybrids—and each must be 'unpacked' to determine the actual implied rate. This requires detailed assumptions about past sales, future volumes, and average selling prices, all of which are contested by the parties. An expedited proceeding would not give adjudicators adequate time to identify which licenses are appropriate comparables and scrutinise the assumptions used to unpack their rates, including distortions created by the targeting of SMEs by experienced SEP licensors that seek to skew comparability exercises, which have been documented in detail by the UK courts.[65] This expedited timeline procedure would produce unreliable results.

Affordability requires that the cost of the process be proportionate to the sums at stake, especially for smaller companies. However, the savings from an expedited adjudication are unlikely large enough to make the RDT a viable venue. FRAND adjudications are costly not because parties choose to overspend, but because the valuation methodologies themselves can be complex. A large portion of litigation costs arise from disputes about which licenses are appropriate comparables, the work required to unpack and analyse the licenses, and disputes over methodology. Even if the trial itself occurred over a shorter period, this work would still need to be done behind the scenes. As a result, any procedural streamlining would have limited impact on the actual expenses of the litigation. For small licensees, these costs could still dwarf the potential savings from successfully obtaining a license on FRAND terms.

Finally, fairness demands that neither side can exploit the structure of the proceeding to secure a systematic advantage. But fairness will be an issue if comparable licenses were to serve as a primary basis for expedited rate setting. The extrinsic value of obtaining an inflated license as a comparable creates strong incentives for SEP holders to pursue agreements where the costs of obtaining them far exceed the revenues at stake. As discussed above,[66] this dynamic is already visible in cases where licensors litigate for de minimis damages in order to generate precedents useful against larger implementers. In an expedited proceeding, the imbalance would persist: SEP holders could afford to overspend in order to create favourable benchmarks, while licensees would be forced to weigh litigation costs against the far smaller sums at issue. As long as SEP holders are incentivised to pursue unprofitable agreements for their strategic value, there will be pressure to find ways to exploit the system, undermining the fairness of the process.

[65] *InterDigital Tech. Corp. v. Lenovo Group Ltd.* [2023] EWHC 539 (Pat) ¶ 516 (Mar. 16, 2023).
[66] Supra at p. 9-11.

The RDT thus faces serious hurdles until the IPO can equip it with the resources needed for reliable, affordable, and fair rate determinations. The following policy proposals are designed to respond directly to these concerns by providing transparency on aggregate royalties, improving visibility into the SEP landscape, supporting licensees through a FRAND Guidance Office, and requiring SEP holders to make standardised disclosures when making licensing demands.

Importantly, each proposal is offered for IPO's consideration with cost-effectiveness in mind and work together to establish a strong foundation for the IPO's end goal of establishing the RDT. Rather than starting at what we see as the endpoint, these proposals focus on practical reforms that can deliver meaningful improvements as the IPO builds the resources needed for the RDT without imposing unnecessary expense. Implemented together, these measures would reinforce one another, offering a coherent and balanced approach to making SEP licensing in the UK more transparent, fair, and efficient.

A. Develop and Publish an Aggregate Royalty Benchmark

The IPO should develop and publish an aggregate royalty benchmark for standards subject to significant licensing activity. Licensing negotiations and disputes are currently shaped by uncertainty over the total royalty burden associated with standardised technologies. Although industry stakeholders have indicated a need for rate transparency, no independent body provides guidance on aggregate royalties. This has left courts to address the issue case by case, with inconsistent outcomes.[67] A benchmark rate set by the IPO would give SMEs, all other licensors and licensees, and courts a clear reference point for negotiations and disputes.

The IPO is well situated to provide this guidance. Courts, on the other hand, typically are tasked with resolving disputes between specific parties, based only on the evidence those parties choose to present. This focus on the positions of the litigating parties may not be well suited to addressing broader disagreements that can exist across parties and industries. As one prominent licensor noted in litigation, there can be dramatic differences in interests between licensors that can lead them to act like 'cats in a sack',[68] each fighting for more than their own fair share of available royalties. The IPO can solicit participation on an industry wide basis and ensure that benchmark is established based on input from multiple stakeholders, making it well situated to develop and publish a credible aggregate rate.

By publishing an aggregate royalty benchmark, the IPO could provide rate transparency that courts, licensors, and licensees currently lack. A credible benchmark would give all parties a clearer view of the total royalty burden, reduce the cost and complexity of litigation, and limit incentives for predatory licensing practices that target smaller companies. The following subsections explain each of these benefits in turn.

While there may be significant costs associated with administering an aggregate rate determination, we believe that these costs could be fully covered by fees. Filing fees from inter partes reexamination (IPR) proceedings that challenge SEP validity in the United States indicate that the market can bare significant fees. Filing an IPR challenge costs at least $23,750 with $28,125 or more due if the action

[67] *Compare* implied aggregate royalty in *InterDigital v. Lenovo* with that in *Optis v. Apple*

[68] Tesla Inc. v. Idac Holdings, Inc., Claim No. HP-2023-0042 [2024] EWHC Pat (oral arg., May 20-22, 2024) at 58:16.

is instituted.[69] Between 2017 and 2023, USPTO received fees from an average of more than 50 SEP IPR filings and 30 IPR institutions per year.[70] If inter-industry coalitions with interests in obtaining FRAND royalties could share the burden if instituting a rate determination process, we believe that even significant costs would not represent a barrier to these proceedings. As long as any party is allowed to participate in the proceeding as equals, SMEs will not be prejudiced by high initiation fees.

a. Provide Rate Transparency

Guidance from the IPO on aggregate rates would introduce a level of transparency that is largely absent in today's SEP licensing market. At present, both licensors and licensees operate with little visibility into the overall royalty burden for a standardised feature. In these scenarios, SMEs, which are relatively under resourced and lacking in SEP licensing experience, are the most vulnerable to abuse. This dynamic fosters mistrust, increases transaction costs, and leaves room for aggressive demands untethered from the underlying value of the technology.

For manufacturers and product developers, transparent aggregate guidance would make it possible to forecast royalty exposure with far greater accuracy. The ability to model licensing costs in advance would not only inform product design and adoption decisions but also reduce a major source of financial uncertainty. Lack of reliable information about aggregate royalties interferes with a startup or SMEs' ability to secure financing.[71] IPO guidance could help remove this barrier by providing a credible and independent benchmark.

Transparency in regard to aggregate rates would also improve the efficiency of licensing negotiations. SEP holders could rely on the aggregate benchmark as an independent anchor for setting portfolio rates, while licensees could use it to test whether a proposed royalty demand falls within a reasonable FRAND range. This shared reference point would reduce the scope for opportunistic demands, narrow disagreements, and help bridge the trust gap that often fuels contentious negotiations. In doing so, IPO guidance on aggregate rates would not only lower costs but also promote more stable and predictable licensing relationships, reducing the need for costly litigation on the front end, a vital assurance for the SME community.

b. Reduce Litigation Costs

The costs associated with a single litigation can easily be existential for an IoT startup or SME. A IPO aggregate royalty could significantly lower litigation costs by providing a credible and cost-effective check on comparable license valuation, which currently is the most contested and expensive part of FRAND disputes. Instead of requiring each case to reconstruct the aggregate through unpacking and interpreting licenses, a credible aggregate benchmark figure published by the IPO would provide a

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[69] These rates represent a floor. IPR petitions challenging more than 20 claims must pay additional filing and institution fees. *See* United States Patent and Trademark Office, *USPTO Fee Schedule* (effective Jan. 19, 2025, last revised Sept. 1, 2025) https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule.

[70] *See* Ryan C. Richardson, *Standard Essential Patents at the PTAB: Are SEPs Faring any Differently than Non-SEPs?* PTAB Year in Review 2023 at 31–32 https://www.sternekessler.com/app/uploads/2024/02/Standard-Essential-Patents-at-the-PTAB-Are-SEPs-Faring-any-Differently-than-Non-SEPs.pdf

[71] SEPs Questionnaire for SME, Small-Cap and Mid-Cap Businesses: Summary of Responses, UKIPO (July 5, 2023) https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/outcome/seps-questionnaire-for-sme-small-cap-and-mid-cap-businesses-summary-of-responses

stable economic benchmark. While parties in litigation would remain free to challenge aspects of that benchmark, it could serve as a plausible starting point that narrows the field of dispute.

With an aggregate benchmark to reference, parties could spend less time and fewer resources arguing about specific individual agreements. Instead, they could cross-check their positions against the IPO's determination and focus on narrower issues such as portfolio strength or relative share of the aggregate. This shift would significantly reduce evidentiary disputes, simplify expert testimony, and cut down on the amount of disclosure required, thereby lowering the burden and costs for both the parties and the courts.

While establishing an aggregate royalty would not make litigation inexpensive, it would make it meaningfully more affordable for SMEs. By lowering the cost of contesting rates, it could make litigation a viable option for companies with moderate sales, enabling them to more effectively resist above-FRAND demands. Even if smaller implementers still face practical barriers, the overall effect would be to reduce system-wide costs and promote greater efficiency in FRAND adjudication.

c. Remove Incentives for Predatory Licensing

An aggregate royalty determination by the IPO would reduce incentives for predatory licensing targeting SMEs. As noted above, when courts rely primarily on comparables to construct aggregate rates, SEP holders have strong incentives to generate favourable precedents by targeting SMEs that cannot defend themselves. Although UK courts have sometimes rejected such agreements as unreliable, the incentive to create them persists so long as they can influence rate setting in other jurisdictions or in future cases.

If the IPO were to publish an aggregate royalty, the incentive to target SMEs with excessive rates, or other companies with market exclusion, to generate inflated comparables would change fundamentally. One off, inflated licenses would no longer have the power to set the trajectory of global FRAND rates, since the aggregate could be assessed independently of such opportunistic tactics.

Without the incentive to skew future FRAND adjudications through inflated comparables, cases like the KPN–Bullitt litigation may never have been brought. The minimal damages at stake could not justify the expense of enforcement absent the strategic value of creating a 'comparable' to deploy in larger disputes. By establishing an aggregate royalty, the IPO would strip such tactics of their utility, reducing predatory targeting of small companies and narrowing litigation to issues that more directly reflect the value of standardised technology.

B. Increase Patent Landscape Transparency

The current SEP licensing environment suffers from a lack of reliable information about the overall patent landscape, which most acutely disadvantages SMEs. Patent declarations to standard-setting organisations are scattered across multiple databases, presented in inconsistent formats, and often overinclusive. As a result, companies negotiating licenses, courts resolving disputes, and even SEP holders themselves operate without a clear picture of how many declared essential patents are actually essential to a standard or which portfolios form part of the landscape. This opacity increases costs, creates room for opportunistic behaviour, and leaves both licensors and licensees negotiating under conditions of uncertainty.

The IPO is well placed to address this information deficit. Establishing a centralised database of declared SEPs, supplemented with available, unbiased essentiality studies and portfolio disclosures from SEP holders, would provide an independent and useful source of information about the patents that make up each standard. Such transparency regarding patents and essentiality can help reduce information asymmetries, enable more accurate valuation of portfolios, and support a more predictable and efficient licensing environment. We propose that IPO could take two steps: first, create a comprehensive database of declared SEPs with overall essentiality estimates based on unbiased studies; and second, require SEP holders to provide structured disclosures of their portfolios that can be independently verified.

a. Centralised SEP Database and Provide Patent Landscape Studies

The IPO can begin by creating a centralised database that consolidates all declared SEPs for each widely-licensed standard. Today, declarations are dispersed across multiple standard-setting organisations, often with inconsistent formats and varying levels of detail. By aggregating this information in a single database, the IPO can provide a reliable baseline that captures the full scope of declared essential patents relevant to UK licensing disputes. This database would be especially valuable for standards that permit blanket disclosures, such as Wi-Fi and HEVC.

By maintaining an authoritative database, the IPO would provide SMEs, as well as courts, all licensors, and all licensees, with a clearer picture of the patent landscape for each standard. This transparency would reduce disputes over the size of the relevant patent pool, provide a firmer foundation for aggregate royalty determinations, and narrow the scope for opportunistic claims.

b. Portfolio Disclosure and Representative Sampling

The IPO can also establish a process for SEP holders to disclose the portfolios they intend to license for each relevant standard, which would benefit SMEs widely. Today, SEP licensing negotiations are often shaped by asymmetric information, with SEP holders able to highlight a handful of "crown jewel" patents while withholding visibility into the rest of their portfolios. This practice creates uncertainty for licensees and increases the risk that negotiated rates will be based on incomplete or selective information. A comprehensive disclosure obligation can help to correct this imbalance by ensuring that all parties will have consistent information of the scope of the portfolios on offer.

The IPO can work with courts and potentially link disclosure compliance to the prelitigation protocols. A SEP holder that fails to provide a complete list of patents within its licensing program might be required to bear the attorney costs associated with producing this information if litigation arises. In addition, UK courts—when setting global FRAND rates—might choose to treat nondisclosure as inconsistent with a party's good-faith obligations.

Once portfolios are disclosed, the IPO can generate statistically significant samples from each and request claim charts for the patents selected. SEP holders could have three options for each patent in the sample: provide the relevant claim chart, state that they do not have one, or acknowledge that they have one but decline to share it. This structured process would allow licensees to evaluate the breadth and quality of a portfolio using a representative sample, rather than being limited to the carefully curated examples chosen by the licensor.

The consultation also raises the possibility of the IPO conducting patent-by-patent essentiality checks. While this could be explored in the longer term, it is unlikely to be a cost-effective transparency measure in the near term. Because SEP licensing is negotiated globally, any service limited to UK patents would leave substantial blind spots and could be gamed by SEP holders registering only their strongest families in the UK. To be meaningful, assessments would need to extend across the global patent stack, which already includes more than 135,000 declared families across cellular, Wi-Fi, audio, and video standards. Even if only statistically significant samples were reviewed, the volume of evaluations required would run into the tens of thousands, with costs likely exceeding £100 million at prevailing rates of £4,000–£6,000 per check.[72] And even then, essentiality determinations would remain uncertain until tested in litigation. In the near term, more targeted measures—portfolio disclosure, representative claim-chart sampling, and aggregate royalty guidance—offer a more cost-effective way to provide transparency. Once these reforms are established, the IPO could revisit whether a larger-scale essentiality assessment service is still needed.

By implementing portfolio disclosure in this way, the IPO would provide a neutral evidentiary baseline that can be used in both negotiations and litigation. Licensees would gain a reliable reference point to test licensing offers, while licensors would benefit from a more credible and transparent process for demonstrating the value of their portfolios. Ultimately, this measure would reduce information asymmetries, curb opportunistic negotiation tactics, and help align portfolio valuations with the actual scope of essential rights.

C. *Clarify that SEP Injunctions are Only Appropriate in Rare and Extreme Circumstances*

As discussed above, the use of injunctions in the context of FRAND-committed SEPs is generally inconsistent with the purpose of the FRAND commitment, which aims to promote competition and innovation. Seeking injunctions against licensees who are ready to accept a SEP license but challenge whether the SEP holder's offer is FRAND violates the spirit of FRAND and harms SMEs that rely on technology standards; further, the threat or pursuit of injunctions should not be used as a bargaining tool to coerce more onerous licensing terms, as this undermines both fair competition and the innovation ecosystem. Because monetary damages are typically an adequate remedy for infringement of FRAND-committed SEPs, injunctions should only be considered in exceptional circumstances. Such exceptions could include situations where a licensee refuses to pay a court-determined FRAND royalty or when a licensee is bankrupt and unable to pay.

The App Association notes that the broad availability of injunctions for FRAND-committed SEPs creates a disproportionate risk for SMEs, potentially forcing them to design around open standards or abandon product lines altogether – neither being a policy goal held by the UK government. This risk is particularly problematic given the growing importance of SEPs in emerging technology markets.

The App Association therefore urges the IPO to protect the interests of innovative SMEs, and to ensure that standards fulfil their intended role in fostering innovation and competition, by setting a clear policy stating that injunctions should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.

[72] Impact Assessment Report at 38

D. *Offer FRAND Guidance Services*

The IPO is encouraged to establish an office to offer FRAND guidance services that provide practical support on SEP licensing, particularly for SMEs, that have been approached by a SEP holder. We see this service as the evolution of the IPO's successful FRAND Resource Hub. and an important first step in the RDT process.

At present, many companies negotiating SEP licenses—particularly smaller manufacturers and product developers—lack the expertise or resources to assess whether a licensing offer is consistent with FRAND. This imbalance allows licensors to use aggressive tactics, including supra-FRAND royalty demands and threats of injunctive relief, to pressure licensees into unfavourable agreements. By creating an advisory service, the IPO can provide companies cost-effective access to independent resources for guidance on negotiations as a willing licensee.

The FRAND Guidance Office could ensure that the rate and patent transparency information developed by the IPO is readily usable by companies engaged in licensing negotiations. Aggregate royalty benchmarks and patent landscape data have little value if they remain abstract or inaccessible to those who need them most. By providing a service that helps guide companies on how to access and utilise this information, the office would help the licensee to translate technical and economic analysis into practical guidance that the licensee can act on with confidence.

The office could also help companies that may be encountering SEP licensing for the first time. Many manufacturers and product developers lack in-house expertise on FRAND obligations and negotiation practices. Without guidance, these companies face a steep learning curve and are vulnerable to supra-FRAND demands or aggressive negotiation tactics. The FRAND Guidance Office can give these companies a structured way to understand what it means to engage as a willing licensee, to evaluate licensing terms, and to resist pressure to conclude non-FRAND agreements.

Establishing this office would also allow the IPO to build direct expertise in the practical realities of SEP licensing. By participating more closely with affected parties, the IPO would gain insight into how negotiations unfold in practice. This experience would help to create an institutional knowledge base that could inform future policies, support the development of a rate determination track, and ensure that the IPO's transparency initiatives are grounded in actual market conditions.

Finally, the office would serve as a check on opportunistic demands and aggressive licensing strategies. Knowing that licensees may receive assistance from the IPO in real time will discourage licensors from making demands that fall well outside the plausible FRAND range or from employing tactics such as injunctive threats against willing licensees. In addition, the information submitted to the office would contribute to the IPO's broader transparency efforts, providing a richer dataset for assessing licensing practices across the market.

E. *Mandate SEP Holder Disclosures*

The proposed services above will not benefit companies that are unaware of them—particularly smaller firms with no prior SEP licensing experience. To ensure a level playing field, the IPO should require SEP holders to provide a standardised set of disclosures when making licensing demands that cover sales into the UK.

At the outset of contact, SEP holders should be required to provide a IPO informational document explaining the rights of licensees under the FRAND commitment. This document can include guidance that licensees are third-party beneficiaries of the FRAND undertaking, that overbroad NDAs are not required for FRAND licensing, and that injunctive relief cannot be sought against a willing licensee under *Huawei vs. ZTE*. It should also contain information on the services of the FRAND Guidance Office and how licensees can obtain independent support when evaluating an offer.

When a SEP holder provides a rate offer, additional disclosures should be provided. These include:

- The per-unit rate;
- The royalty structure (lump sum, running royalty, or hybrid) and how it applies to past and future sales;
- A complete list of the patents the SEP holder intends to license;
- The licensor's claimed share of the SEP stack and the basis for that claim;
- The implied aggregate royalty based on the offer;
- The IPO's aggregate rate, where it exists;
- The list of patents in the IPO's sample of the portfolio and whether claim charts exist for each patent in the sample; and
- The IPO's patent landscaping information, if available.

These disclosures would embed the IPO's transparency initiatives—including the aggregate royalty, patent landscape, and Guidance Office—into day-to-day licensing practice. They would also give licensees the tools to act as willing licensees, reduce information asymmetries, and discourage aggressive tactics such as overbroad NDAs or threats of injunctions against companies prepared to negotiate. By making key information available at the point of demand, this policy would lower transaction costs, reduce disputes, and promote a more predictable and fair SEP licensing environment.

These requirements are also reasonable and proportionate. SEP holders already maintain internal records of the patents they declare essential, their estimated share of the stack, and their preferred royalty structures. The disclosure obligations merely formalise the provision of this information in a standardised format, with reference to independent benchmarks that the IPO will already be maintaining. Far from creating an undue burden, the requirements provide SEP holders with an opportunity to demonstrate the credibility of their positions up front, reducing downstream disputes and litigation risk.

Compliance can be incorporated into the pre-litigation protocols in the UK. For example, where a licensor fails to comply, any litigation costs incurred in obtaining missing information during a dispute may be borne by the SEP holder until they have satisfied the disclosure requirements. Courts would already be empowered to treat non-compliance as evidence that a negotiation was not conducted on a FRAND basis and, where appropriate, to invalidate agreements that were entered into under false, materially incomplete or misleading disclosures.

V. Conclusion

We thank the IPO for the opportunity to submit these comments and suggestions. We remain ready and available to address any questions or issues regarding this submission as the IPO may request.

Sincerely,

S. Tulip

Stephen Tulip
UK Country Manager

Brian Scarpelli
Senior Global Policy Counsel

ACT | The App Association