

Research on the Optimization Path of Good Faith Licensing Negotiation Models for Standard-Essential Patents

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Abstract: The licensing negotiation system for standard-essential patents (SEPs) is a core component of technological standardization and a key link in balancing technological innovation and market competition. Existing issues in the current negotiation system—such as the ambiguity of the FRAND (Fair, Reasonable, and Non-Discriminatory) principle, insufficient information disclosure, excessive declaration of non-essential patents, and opaque licensing fees—prevent genuine mutual trust and information sharing between negotiating parties, often leading to low negotiation efficiency or even deadlock. This paper combs through the practical models of good faith negotiation rules for SEPs in the United States, the European Union, and Japan, and accordingly proposes: 1) clarifying the obligation of SEP right holders and standard implementers to conduct good faith licensing negotiations; 2) learning from Japan's step-by-step licensing negotiation mechanism to guide the behavior of SEP right holders and implementers by specifying concrete negotiation steps, such as defining that both parties can initiate offers, and when the SEP right holder acts as the initiator, it should fully explain the necessary information about the patents involved in the negotiation in the offer; when the two parties negotiate specific licensing terms, the process should include both technical and commercial negotiations.

Keywords: Standard-Essential Patents; Licensing Negotiation; Good Faith Negotiation; FRAND Principles; Optimization of Negotiation Models

1. Introduction

Technological standardization has played a significant role in promoting industrial

upgrading and enhancing market competitiveness, becoming a key driver of national economic development. With deepening industry reliance on technical standards, the quantity of SEPs—important outcomes of technological innovation—has grown rapidly. While driving rapid industrial development and widespread technological adoption, this has also brought a series of complex issues. In licensing transactions, the problem of SEP licensing fees has become a core point of contention between patent holders and implementers, leading to transactional dilemmas [1].

Specifically, after the formation of industry standards, implementers can only use SEP technologies to produce and operate due to the difficulty of adopting alternative technologies or the high costs of doing so. SEP holders may exploit this dominant position to demand unreasonable high licensing fees or set unreasonable licensing conditions, giving rise to the "patent hold-up" problem. To regulate such behavior, standard-setting organizations (SSOs) require SEP holders to commit to licensing their SEPs to implementers under fair, reasonable, and non-discriminatory (FRAND) terms stipulated in the SSO's intellectual property policies. In SEP licensing practice, the FRAND principle is regarded as an important criterion for balancing the interests of SEP holders and implementers. However, due to the neutral stance of SSOs—and their avoidance of intervening in specific disputes or affecting standard development—SSOs only provide general definitions of the FRAND principle, without offering specific applicable criteria for reference. Determining what constitutes FRAND-compliant transaction conditions, specific royalty rates, timelines, quantities, and other details relies on negotiations between the parties. However, starting from their respective positions, the two sides often hold different views on defining

these conditions, leading to SEP licensing disputes. This has also given rise to the phenomenon of "reverse hold-up," where implementers may exploit the ambiguity and abstraction of the FRAND principle to hold up SEP holders, deliberately delaying negotiations or refusing to pay reasonable licensing fees[2]. Both patent hold-up and reverse hold-up can have adverse impacts on industries. While the impact of individual hold-up behaviors may be limited, their cumulative effects can lead to severe consequences. To address these two types of hold-up, courts typically employ two intervention measures: direct intervention and indirect intervention. The former facilitates transactions by determining royalty rates, while the latter uses injunctive relief and other means to push the parties toward negotiation and transaction. When right holders have strong bargaining power and hold-up risks exist, courts usually adopt direct intervention to promote smooth transactions. However, if implementers gain the upper hand in negotiations and reverse hold-up may occur, courts use injunctive relief and other indirect intervention methods to maintain fair market transaction order. From a static perspective, direct intervention appears most efficient in individual cases, as it directly resolves royalty rate issues and facilitates licensing transactions. Dynamically, however, this intervention method struggles to positively incentivize the overall market process of patent licensing transactions. In this scenario, implementers may not suffer losses from infringement and might even profit from it; the worst-case outcome is merely paying licensing fees, which may be lower than those resulting from market negotiations. In contrast, proactive negotiation might require implementers to pay higher fees. Academic debates also exist regarding injunctive relief, with opponents worrying that it may increase right holders' bargaining power and exacerbate patent hold-up risks[3].

In summary, within the current judicial logic framework, the issue of determining SEP licensing fees remains difficult to resolve effectively. Judicial intervention may not only contradict the parties' true intentions (particularly regarding the accuracy of judicial determinations of FRAND royalty rates), but also rupture long-term cooperative relationships, significantly increase negotiation

time costs, and burden judicial resources. Therefore, improving the SEP licensing negotiation framework to leverage market self-regulation and serve as a pre-litigation mechanism could promote efficient market operations while reducing burdens on judicial authorities. Establishing a procedural negotiation system within the FRAND principle framework by regulating the behavior of both parties in licensing negotiations represents the optimal solution for maximizing market efficiency while ensuring fairness.

2. The Connotation and Practical Dilemmas of Good Faith Licensing Negotiations

2.1 The Connotation of Good Faith Licensing Negotiations

Good faith licensing negotiations for SEPs refer to consultation activities between SEP holders and implementers regarding patent licensing, aiming to determine reasonable licensing rates, scopes, and conditions in accordance with the FRAND principle. Negotiations generally include core links such as technical necessity analysis and commercial term negotiation. The determination of licensing fees is the focal point of the game between the two sides: SEP holders set fees based on their market position, the contribution of the patents, and the market value of related products, seeking to maximize profits by raising fees as much as possible; implementers may attempt to lower fees by questioning the validity of SEPs or accusing holders of violating the FRAND principle, in order to reduce costs. This tug-of-war over licensing fees typically spans three stages of negotiations. First, the initiation stage, where the right holder proactively launches negotiations, issues negotiation invitations to implementers, exchanges basic information such as patent lists and claim comparison tables, and signs confidentiality agreements to ensure information security. Next, the negotiation stage involves technical negotiations, where the parties evaluate the correspondence and value of patents to standards through "claim comparison tables," followed by commercial negotiations on licensing rates and scopes, during which the right holder provides specific FRAND offers and the

implementer may propose counteroffers. At this stage, the parties must deepen information exchange: the right holder must disclose technical details of the patent portfolio and past licensing cases, while the implementer must provide data such as production scale and market share to support fee negotiations. If negotiations ultimately reach an impasse, third parties such as courts or arbitration institutions may be introduced to determine reasonable licensing rates or whether to grant injunctive relief through judicial intervention. When applying for an injunction, the right holder must demonstrate fulfillment of good faith negotiation obligations, while the implementer may assert antitrust defenses to challenge the right holder's abuse of market dominance [4].

2.2 Practical Dilemmas in Good Faith Licensing Negotiations

SEP licensing negotiations are not only private commercial games but also important links affecting social technological progress and industrial competition patterns. However, in practice, numerous issues persist in licensing negotiations between right holders and implementers.

2.2.1 Ambiguity of the FRAND principle

The FRAND principle, also known as the FRAND commitment, means fairness, reasonableness, and non-discrimination. It requires SEP holders to commit to fair, reasonable, and non-discriminatory licensing of SEPs, aiming to regulate SEP licensing behavior and prevent holders from exploiting market dominance to demand excessive fees or refuse licensing. Thus, the FRAND principle is both a right based on patent licensing rights and a restriction on those rights. In practice, conflicts of interest between right holders and implementers are most pronounced regarding the FRAND principle. In many SEP dispute cases, implementers often claim that the fees demanded by right holders during licensing negotiations violate the FRAND principle. Right holders prefer to keep the FRAND principle ambiguous to maintain an advantage in negotiations with different implementers, allowing discriminatory terms or even refusal to license to be interpreted as FRAND-compliant. Implementers, on the other hand,

desire a more enforceable FRAND principle to require right holders to disclose licensing fee calculation methods and other details. This shows that while the FRAND principle reduces patent hold-up risks, it also increases the difficulty of regulating reverse hold-up.

2.2.2 Insufficient information disclosure and excessive declaration of non-essential patents

During SEP development, information disclosure rules require certain entities to disclose to SSOs the patents necessary to implement standard solutions, including pending and granted patents. The purpose of information disclosure is to enable implementers to proactively understand which patents need licensing to implement the standard, avoiding unintentional patent infringement during standard product production and reducing patent ambushes by right holders to some extent. However, except for SSOs with government backgrounds, most non-governmental SSOs do not mandate disclosure and have no obligation to search or verify the patents declared by right holders. This significantly enhances right holders' negotiation advantages, forcing uninformed implementers into negotiations and paying licensing fees.

Contrary to right holders' under-disclosure of essential patents, excessive declaration refers to right holders disclosing technically non-essential patents or repeatedly disclosing patents. Increasingly, right holders recognize the value of standards and SEPs and declare their patents as essential to capture dividends from technological standardization. However, since most SSOs do not search, verify, or technically assess the necessity of disclosed patents, the legal validity and technical necessity of these patents cannot be guaranteed—particularly regarding technical necessity. A complex technical standard may involve tens of thousands of patents, making it difficult to individually verify whether each patent is technically essential, leaving room for right holders to manipulate the system. Implementers may unknowingly be required to pay licensing fees for non-essential patents.

This complicates interest conflicts between right holders and implementers, requiring consideration not only of patent ambushes from concealing essential patents but also "fraud" from excessive declarations. This reduces resource allocation efficiency and

deepens mutual distrust between right holders and implementers.

2.2.3 Opaque licensing fees widen information asymmetry

The key lies in the degree of information held by both parties in the game, with the better-informed party often gaining an advantage. Right holders, who understand their patents' value and standard value better, treat past licensing agreements with other implementers as trade secrets to resist licensees' and courts' requests for fee information. This undoubtedly increases the difficulty for potential licensees to determine whether the fees claimed by right holders comply with the FRAND principle, placing them at a disadvantage in negotiations. As a result, right holders, already in a dominant position, tend to demand higher fees by leveraging information advantages and monopoly power; licensees, already at a disadvantage, struggle to trust right holders due to critical information gaps. Under this dual pressure, licensing negotiations often reach a deadlock or collapse.

3. Practical Explorations of Overseas Good Faith Licensing Negotiation Mechanisms

In recent years, as SEP licensing negotiation rules remain uncoordinated, relevant government agencies in major countries and regions such as the U.S., EU, and Japan have successively issued a series of guiding documents or updated existing policies regarding SEP licensing negotiations, reflecting the latest perspectives in this field.

3.1 United States

The U.S. regulates the abuse of SEP infringement remedies through public policy statements on SEPs and encourages good faith licensing negotiations between parties.

In December 2019, the U.S. Patent and Trademark Office (USPTO), Department of Justice Antitrust Division, and National Institute of Standards and Technology (NIST) jointly issued the Joint Policy Statement on Remedies for Standard-Essential Patent Infringement under FRAND Commitments, clarifying that FRAND commitments by right holders are relevant factors in determining the appropriateness of remedies but should not prohibit any specific remedy. In December 2021, these agencies released the 2021 Joint Policy Statement, which for the first time

proposed a behavioral guidance framework for good faith negotiations by both SEP holders and implementers. Specifically, it outlined the following steps for good faith SEP licensing negotiations:

- (1) SEP holders should notify potential licensees of specific SEPs they believe are being infringed or will be infringed, provide relevant infringement information to the extent feasible, and make good faith FRAND offers;
- (2) Potential licensees willing to accept FRAND licenses and engage in good faith negotiations should evaluate the provided information and respond within a commercially reasonable time. For example, they may accept the offer, propose good faith FRAND counteroffers, raise specific questions about the offer's terms (including patent validity and infringement), propose third-party dispute resolution, or request additional necessary information;
- (3) SEP holders should respond in good faith to licensees within a commercially reasonable time to advance negotiations or conclude licenses. For example, they may accept counteroffers, address specific questions about the offer and propose new good faith FRAND terms, respond to the other party's needs, or propose third-party dispute resolution.

3.2 European Union

The EU enhances the transparency and operability of SEP good faith negotiation regulation through judicial decisions and policy issuances. In July 2015, the Court of Justice of the European Union (CJEU), based on EU competition law, established a good faith licensing negotiation framework for SEP holders and implementers in *Huawei v. ZTE*, consisting of the following steps:

- (1) Infringement warning: SEP holders issue infringement warnings to implementers, disclosing specific patent information being infringed;
- (2) Expression of willingness: Implementers explicitly express their willingness to obtain a license;
- (3) Issuance of offer: SEP holders issue written licensing offers compliant with the FRAND principle, including licensing fees and calculation methods;
- (4) Response to offer: If in agreement, implementers promptly accept the offer; if not, they should propose written counteroffers;

(5) Provision of security: If the counteroffer is rejected by the SEP holder, implementers should provide reasonable security in accordance with commercial practices;

(6) Dispute resolution: If unable to agree on FRAND licensing terms, the dispute may be submitted to an independent third party for resolution.

This judgment provided a basic framework for SEP good faith licensing negotiations but did not specify details such as the content of proposed conditions or response timelines.

Regarding SEP information disclosure transparency, the European Commission's EU Approach to Standard-Essential Patent Licensing (November 2017) emphasized improving the quality and accessibility of information in SSO databases and developing transparency tools to assist licensing negotiations. The New Framework on Intellectual Property - Standard-Essential Patents (Draft) (February 2022) proposed introducing a necessity review mechanism for SEPs.

On FRAND terms, the EU Approach to Standard-Essential Patent Licensing further clarified that FRAND-based negotiations require both parties to engage in good faith and efficient negotiations and encouraged the establishment of legitimate patent pools or other licensing platforms. The New Framework on Intellectual Property - Standard-Essential Patents (Draft) proposed developing specific guiding principles and application processes to enhance the operability of the FRAND principle.

3.3 Japan

To adapt to the increasingly intense global competition in SEPs and frequent disputes, Japan's Patent Office released the SEP Licensing Negotiation Manual (June 2018), which details situations where implementers may be deemed unwilling to accept licenses, including: (1) passively responding or failing to respond to the right holder's licensing offers without just cause while continuing to implement the patent; (2) requiring clarity on the necessity and validity of SEPs before starting negotiations; (3) refusing negotiations on the grounds that the right holder does not disclose licensing contract details with third parties; (4) requiring the right holder to publish agreements containing confidentiality clauses;

(5) repeatedly providing non-substantive responses; (6) colluding with other implementers to refuse licenses based on others' unlicensed implementation. In addition to defining implementers' behaviors indicating a lack of willingness to accept licenses, the Manual also specifies circumstances where implementers' responses to right holders' offers may constitute bad faith: (1) refusing the right holder's licensing fee offer while merely listing FRAND non-compliance justifications without providing counteroffers; (2) insisting on obviously unreasonable counteroffers; (3) failing to provide counteroffer calculation bases or FRAND compliance justifications.

On March 31, 2022, Japan's Ministry of Economy, Trade and Industry released the Guidelines for Honest Negotiations Related to SEP Licensing (hereinafter Guidelines), aiming to establish honest negotiation rules between SEP holders and implementers and guide both parties to conduct licensing negotiations within the FRAND principle framework. The Guidelines outline four main negotiation steps as a basic framework to clarify the actions each party should take at each stage:

Step 1: Licensing offer - SEP holders' offers must include at minimum a patent list, a claim comparison table matching patent claims to standard claims, information explaining how the implementer's products comply with the standard, and information explaining existing FRAND commitments and corresponding standard documents.

Step 2: Expression of intent to conclude a FRAND license contract - If the right holder has made an offer in accordance with Step 1, the implementer should immediately express intent to conclude a FRAND contract. This expression does not mean waiving the right to challenge the patent's necessity, validity, or infringement likelihood, and such challenges shall not be deemed evidence of unwillingness to accept a license. Implementers have the right to seek professional advice during negotiations, and right holders must not hinder implementers from disclosing the information provided in Step 1 to third parties.

Step 3: Proposing specific licensing terms - Upon receiving the implementer's expression of willingness to accept a license under Step 2, the right holder should provide specific licensing conditions including the royalty rate,

along with the calculation method, licensing agreement information with third parties, patent pool rates, relevant judicial precedents, and other information to demonstrate that the offer complies with FRAND commitments.

Step 4: Proposing counteroffers - If the implementer deems the licensing offer in Step 3 unreasonable, it should propose specific counteroffer conditions including the royalty rate, along with the calculation method and a series of supporting information to demonstrate FRAND compliance.

Although neither the Manual nor the Guidelines are legal norms, they reflect the Japanese government's efforts to guide SEP holders and implementers to negotiate in good faith within a framework, standardize negotiation behaviors, prioritize negotiation as the optimal means to achieve cooperation, and treat litigation as a last resort, thereby truly realizing the value of SEP licensing negotiations and reducing judicial resource burdens[5].

4. Feasible Optimization Paths for Negotiation Mechanisms

Due to the unequal negotiation positions and significant interest divergences between patent holders and standard implementers, licensing negotiations for standard-essential patents (SEPs) often involve unethical practices such as threatening negotiations with injunctions, excessively withholding valuable technical or commercial information, and deliberately delaying negotiations[6]. These actions of bad faith frequently lead to negotiation deadlocks. A reasonable licensing negotiation mechanism can set a demonstrative and guiding role, effectively facilitating both parties to reach consensus on key issues such as the licensing territory and royalty determination, thereby preventing disputes from escalating to judicial or arbitral institutions.

4.1 Identification of "Good Faith" in Licensing Negotiations

Good faith licensing negotiations require at least two aspects: First, both parties should demonstrate sincere willingness to negotiate, and shall not delay, interrupt, or reject negotiations without just cause. Upon receiving a notice from the patent holder, the standard implementer shall, within a reasonable period, indicate its willingness to

negotiate and shall not refuse to accept the infringement notice from the patent holder. Second, neither party shall obtain favorable negotiation terms through concealment, coercion, or other improper means. Information exchange during SEP negotiations is crucial to reaching an agreement: On one hand, patent holders should disclose as much information as possible about the infringed patents and their correspondence with standards to facilitate implementers in verifying infringement; on the other hand, standard implementers should actively exchange information such as product sales and profits to help patent holders understand patent usage.

However, an absolutely fair and reasonable outcome is not the sole goal of negotiations; efficiency must also be balanced. Excessively lengthy negotiations can erode the parties' confidence in reaching an agreement, affect negotiation results, and delay patent holders from recovering investment costs, thereby hindering innovation. Overseas policies emphasize licensing negotiation efficiency—for example, the UK Intellectual Property Office's Feedback Report on SEPs and Innovation: Consultation (2022) and the revised Guidelines for Good Faith Licensing Negotiations for SEPs (2022) issued by Japan's Patent Office both include special sections on key negotiation matters to prioritize efficiency while guiding good faith negotiations[7]. Therefore, when a large number of patents lead to complex and time-consuming technical reviews, standard implementers may retain the right to challenge patent validity and necessity without using such challenges to delay or refuse negotiations.

4.2 Licensing Negotiation Models

Compared with stage-based mechanisms [8], Japan's step-by-step licensing negotiation mechanism is more operational. By clarifying specific negotiation steps to guide the behavior of SEP holders and implementers and defining the basic behavioral patterns to follow during negotiations, it provides stronger normative guidance for both parties' actions.

The primary issue in constructing a licensing negotiation framework is determining which party initiates negotiations. In practice, step-by-step processes initiated by patent holders have been recognized by major countries and

regions [9], mainly because the vast number of SEPs makes it difficult for implementers to identify which patented technologies are actually used in standards. However, Germany's Supreme Court, in its proposed "Orange Book Standard," states that the first step for implementers to avoid patent infringement is that "the process of concluding a patent license contract must be initiated by the standard implementer, who must issue an unconditional and reasonable offer to the patent holder"[10]. To meet this requirement, implementers must actively initiate negotiations and propose offers. Thus, both implementers and patent holders have valid reasons to act as negotiation initiators. Experienced implementers with sufficient information can identify the patents they need and their holders, especially when SEPs are licensed through patent pools.

When SEP holders act as negotiation initiators, they should fully explain necessary information about the patents involved in the negotiation in their offers. Specifically, SEP holders should provide SEP lists, infringement analysis comparison tables, licensing fee calculation methods, SEP protection timelines, transfer status, and other necessary information directly relevant to licensing. This not only avoids implementers incurring costs to verify patent necessity and validity, improving negotiation efficiency, but also provides a basis for determining FRAND-compliant licensing fees.

Next, the two parties negotiate specific licensing terms, generally including technical and commercial negotiations. Technical negotiations rely on the degree of information disclosure by patent holders to standard-setting organizations, the existence of necessity determinations, publicly available patent information, and the parties' information exchange. The core of commercial negotiations is determining licensing fees. A general behavioral benchmark for commercial negotiations is that patent holders shall not demand excessively high fees, nor shall implementers propose excessively low fees. FRAND fee determination primarily follows technical and market approaches: the former includes top-down and bottom-up methods, while the latter includes comparable agreement and party quotation methods. When making offers, both parties should clarify their

calculation methods, fee bases, and considerations. If an offer is significantly higher or lower than those proposed by industry competitors, the party making the offer shall provide a detailed rationale; otherwise, it may be deemed at fault in negotiations. As negotiations may involve multiple rounds of offers, any round containing terms inconsistent with the FRAND principle should be promptly adjusted.

5. Conclusion

SEP licensing negotiation, as a core link in technological standardization, is not only a focal point for interest games between patent holders and implementers but also a key to balancing technological innovation and market competition. By analyzing the practical dilemmas of licensing negotiation mechanisms and overseas institutional explorations, this paper provides feasible optimization paths for establishing a systematic SEP licensing negotiation mechanism in China.

In the current licensing negotiation system, issues such as the ambiguity of the FRAND principle, insufficient information disclosure, excessive declaration of non-essential patents, and opaque licensing fees prevent genuine mutual trust and information sharing between parties. Patent holders may exploit their dominant positions to inflate fees, while implementers delay negotiations through reverse hold-up, often leading to low efficiency or deadlock. Although judicial intervention can resolve disputes on a case-by-case basis, over-reliance on judicial decisions not only burdens the judiciary but also weakens market self-regulation.

Jurisdictions in the U.S., EU, and Japan have each attempted to standardize negotiation processes and leverage negotiation mechanisms. Overseas experience shows that refining the FRAND principle through institutional design can effectively regulate negotiation behaviors. The U.S. clarifies bilateral obligations through a phased negotiation framework; the EU establishes negotiation processes through the *Huawei v. ZTE* judgment; Japan refines step-by-step operations through Guidelines. All seek to alleviate negotiation imbalances by enhancing transparency and procedural justice. These explorations share commonalities: strengthening information disclosure

obligations, standardizing negotiation steps, encouraging third-party dispute resolution, and treating litigation as a last resort. However, differences persist—for example, the U.S. emphasizes antitrust regulation, the EU focuses on competition law frameworks, and Japan prioritizes good faith negotiation guidance—reflecting different jurisdictions' trade-offs between efficiency and fairness.

The overseas experiences of these three jurisdictions offer strong reference for improving China's SEP licensing negotiation mechanisms. On one hand, China should construct a procedural negotiation framework based on the optimization paths proposed in Section 4, clarifying the rights and obligations of both parties in licensing negotiations. For instance, patent holders should be required to proactively fulfill information disclosure obligations by providing patent lists, infringement comparison tables, and fee calculation bases, while implementers should promptly respond to offers and provide necessary commercial data (e.g., product sales, market share) to reduce information asymmetry. On the other hand, dynamic adjustment mechanisms should be introduced to determine FRAND rates by integrating technical and market approaches, avoiding negotiation deadlocks caused by extreme offers. Additionally, implementers should be allowed to reasonably challenge patent necessity and validity during negotiations, but their abuse of challenge rights to delay proceedings must be restricted to balance efficiency and fairness.

In summary, China should encourage SEP holders and implementers to determine reasonable licensing terms and fees through negotiation to leverage market self-regulation. Meanwhile, institutional efforts must unify and improve negotiation processes and standardize the behavior of both parties to create a healthy negotiation environment for market participants.

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