Optis v. Apple: Hold Out and F/RAND Rate Setting in the UK Courts

By Bryan W. Lutz and Jason Sigalos

The UK Supreme Court's review of *Optis v. Apple* may clarify how the concepts of hold out and hold up are considered when conducting fair, reasonable, and nondiscriminatory (F/RAND) rate setting. This article examines the appeal for forthcoming guidance on rate-setting methodology.

In short:

- The case puts the Court of Appeal's rate-setting methodology under scrutiny;
- The appeal may shape how courts balance practicality and mathematical precision when setting a F/RAND rate; and
- The decision may influence how courts select a rate within the F/RAND range.

BACKGROUND

Since the UK Supreme Court's 2020 decision in *Unwired Planet v. Huawei*,[1] the UK courts have become well-known as a forum that is willing to resolve global disputes concerning the licensing of standard essential patents (SEPs) on fair, reasonable, and nondiscriminatory (F/RAND) terms.

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Earlier last year, the UK Court of Appeal provided further guidance on how UK courts should conduct F/RAND rate settings in the long-running dispute in *Optis v. Apple*.[2] The Court of Appeal recalculated the total F/RAND royalty payment owed by Apple to Optis from the $56.43 million figure initially determined by the trial court to $502 million (excluding interest) covering a 14-year period.

The UK Supreme Court has now granted[3] Apple permission to appeal this ruling, which will give the Supreme Court an opportunity to assess how the lower UK courts have applied its guidance from *Unwired Planet v. Huawei* in the intervening five years.

While Apple has identified its own issues for the appeal, the forthcoming decision will likely be notable for how the UK Supreme Court discusses the parallel concepts of "hold up" and "hold out." Per the UK Court of Appeal,[4] "hold up" occurs where a patentee uses the threat of an injunction to compel the implementer to pay royalty rates that "exceed the reasonable market value" of the patented technology, whereas "hold out" occurs where an implementer is able to implement the patented technology "without paying the reasonable market value." F/RAND terms, in contrast, are the terms[5] "that would be agreed between a willing licensor not intent upon hold up and a willing licensee not intent upon hold out."

While the Court of Appeal's opinion in *Optis v. Apple* has received extensive scrutiny, less attention has been paid to the relevance of hold out to the Court of Appeal's reasoning. Relying on the framework set out in *Unwired Planet*, the Court of Appeal employed a comparable licenses methodology and a top-down cross-check.

Lord Justice Birss relied on two sets of comparable licenses: (1) Google's license with Optis for the same SEP portfolio at issue; and (2) four of Apple's licenses with other SEP holders that own notable cellular SEP portfolios. Importantly, Lord Justice Birss noted that Apple's licenses with larger SEP holders had higher unpacked per-unit rates than Apple's licenses with smaller SEP holders, suggesting that there was "a degree of hold out involved." Accordingly, he concluded that

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the lower court "was wrong to place weight on the values derived from the Apple licences as a whole."

That said, because the rate implied by Optis's license with Google was noticeably higher than the implied rates from Apple's four comparable licenses, Lord Justice Birss concluded that the F/RAND rate must be "between the two."

To set a rate within the range identified from comparable licenses, Lord Justice Birss turned to his "top-down cross-check." Using a 15% aggregate royalty rate for the entire stack of cellular SEPs (which he concluded was "too much"), Optis's rate for its 0.38% of the stack based on the average selling price (ASP) of a Google handset would be $0.27/unit.

Because a 15% aggregate royalty rate was too great, the question then became "where to go down from $0.27" per unit: $0.20, $0.15, or $0.10? Lord Justice Birss observed that a $0.20 rate would be "too much" because it would imply an aggregate royalty rate of 10.6% of the ASP of a Google handset. In contrast, $0.10 was "clearly too low" in light of the implied rate derived from Optis's license with Google. He therefore determined that $0.15 per unit would be the F/RAND rate for Apple to pay Optis.

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QUALITATIVE V. QUANTITATIVE ANALYSIS

The Court of Appeal's findings on hold out were "expressed in deliberately qualitative terms." Lord Justice Birss did not quantitatively adjust the implied per unit rates derived from the comparable licenses to account for the effect of hold out. Instead, he seemingly attempted to account for the effect of hold out by relying on Apple's licenses with larger SEP holders, which he believed were less susceptible to hold out. The opinion does not foreclose the possibility that the Supreme Court may attempt to quantitatively adjust implied rates derived from comparable licenses to account for the effects of hold out.

PRACTICALITY V. PRECISION

Lord Justice Birss expressly considered only three possible F/RAND rates in five-cent increments. To justify this approach, he stated that these rates were the "realistic options" and that "the nature of the evidence here [did] not justify fine distinctions." This reasoning should come as no surprise given the UK Court of Appeal has previously critiqued[6] efforts by lower courts to calculate "astonishingly precise" F/RAND rates because rate setting "is not a task that admits of . . . mathematical precision." The Supreme Court may further address the balance between practicality and precision in F/RAND rate settings.

RANGE V. POINT

The lower UK courts have accepted the principle that a range of rates might all be F/RAND, and that SEP holders may satisfy their F/RAND commitment by offering only the highest rate within the F/RAND range. The Court of Appeal has instructed[7] that courts "must take this into account" when setting a F/RAND rate. While Lord Justice Birss acknowledged the SEP holder's "entitle[ment]" to the "top" of the F/RAND range, it remains unclear how this principle may impact appellate review of his choice among the $0.20, $0.15, and $0.10 per-unit rates, especially given the absence of an express finding about the appropriate aggregate royalty or the potential upper bound of the F/RAND rate.

Notes

1. Unwired Planet Int'l Ltd v. Huawei Techs. (UK) Co. Ltd., [2020] UKSC 37, https://supremecourt.uk/uploads/Unwired_Planet_International_Ltd_and_another_Respondents_v_Huawei_Technologies_UK_Co_Ltd_and_another_Appellants_1a83113499.pdf.
2. Optis Cellular Tech. LLC v. Apple Retail UK Ltd., [2025] EWCA Civ 552, https://www.judiciary.uk/wp-content/uploads/2025/05/Optis-v-Apple-public-judgment-CA-2024-000695.pdf.

3. https://www.supremecourt.uk/cases/uksc-2025-0145.
4. Panasonic Holdings Corp. v. Xiaomi Tech. UK Ltd., [2024] EWCA Civ 1143, ¶ 6, https://www.bristows.com/app/uploads/2024/10/Panasonic-v-Xiaomi-2024-EWCA-Civ-1143-2.pdf.
5. InterDigital Tech. Corp. v. Lenovo Grp. Ltd., [2024] EWCA Civ 743, ¶ 187, https://www.bristows.com/app/uploads/2024/08/ewca_civ_2024_743.pdf.
6. InterDigital Tech. Corp. v. Lenovo Grp. Ltd., [2024] EWCA Civ 743, ¶¶ 253, 275, https://www.bristows.com/app/uploads/2024/08/ewca_civ_2024_743.pdf.
7. Lenovo Grp. Ltd. v. Telefonaktiebolaget LM Ericsson, [2025] EWCA Civ 182, ¶ 22, https://ipfray.com/wp-content/uploads/2025/02/Lenovo-v.-Ericsson.pdf.

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