

Intellectual Asset Management

International Report

Supreme Court confirms FRAND jurisdiction

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In recent years patent owners of standard essential patents have been quite successful when enforcing their patents in Germany against companies implementing such technical standards without accepting their licensing obligations. Recently the Supreme Court confirmed that a defendant who refuses to offer a licence and pay a reasonable royalty cannot defend a patent infringement case based on the compulsory licence defence, also known as the "fair, reasonable and non-discriminatory" (FRAND) defence. Thus, the Supreme Court confirmed the views of the district and higher district courts.

In accordance with this decision, a potential pool licensee now has two options.

The defendant can accept the obligation to pay something for the use of the patents. It may then claim that the royalties offered or requested are not FRAND. A decision on this question must be made by the court in an antitrust case. This is obviously a difficult task, especially when many licensees have accepted the terms offered, as is the case in standard licensing programmes.

Alternatively, the defendant might want to contest the allegation of patent infringement and - to be consistent - not offer a licence at all. In such cases, the FRAND defence is not available. The defendant will then have to focus on the question of patent infringement.

In light of this, it is still not the season for patent smurfs⁽¹⁾ in Germany. Companies that believe they need not fulfil obvious licensing obligations and which try to discriminate against innovative companies as "patent trolls" will find no quarter before the German courts.

Endnotes

(1) For a further discussion of patent trolls and patent smurfs, please see the [Germany](#) chapter of *IP Value 2009*.

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