



## Annual EU-China Forum 2023: Comparative Approach to Judiciary Procedures submission of comparable licenses 中欧知识产权司法论坛：呈交同类许可协议



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## Patents are national IP rights /// 专利具有国家性

- FRAND-rate is global, but injunction most of the times only for country of court /// 标准必要专利FRAND许可费率具有全球性，但在多数情况下，禁制令只适用于法院所在国
  - See e.g. Unwired Planet/Huawei in UK /// 例如，参见英国 Unwired Planet诉华为案
  - I.e.: implementer cannot import/sell in one country, unless he pays (or rather: takes a license with) a global (or regional) FRAND rate /// 也即：实施人要在一国从事进口/销售，就必须（获得全球或区域许可证）支付全球或区域FRAND许可费率
  - regional FRAND rate? → different rates for important markets, like China, India, EU, US etc. /// 区域FRAND许可费率? → 重要市场（如中国、印度、欧盟、美国等）不同许可费率

## Problems /// 问题

- Different national courts, different decisions /// 不同国家法院、不同判决
  - Patchwork of different (global/regional) FRAND rates /// 不同（全球/区域）FRAND许可费率各异
  - Legal uncertainty about which global/regional rate should be followed /// 就应当适用何种许可费率，存在法律不确定性
  - Economic damage as implementer might stop selling in a country /// 经济损失：实施人的产品可能在某一国出现停售
    - E.g. Oppo in Germany /// 例如，OPPO在德国
  - Patchwork of countries where a product is sold /// 产品在哪些国家可以销售，哪些国家不可以，整体较为混乱
  - Distortion of free movement of goods (in EU: justified?) /// 阻碍了商品的自由流动（在欧盟，这是合理的吗？）
  - Enforcement issues /// 维权问题

## Problems /// 问题

- Forum shopping, anti-suit injunctions, anti-anti-suit injunctions, i.e. races to most favorable court that: /// 择地行诉、禁诉令、反禁诉令，为选择对己方最有利的法院开展竞赛，以便：
  - Sets higher or lower global/regional FRAND rates /// 设置更高或更低的全球/区域FRAND许可费率
  - Is fast or slow /// 加快或减慢司法程序
  - Is situated in a big or small market /// 挑选大市场或小市场行诉
  - Entertains cross border injunctions /// 请求跨境禁制令
  - Other procedural differences, eg transparency about comparable licenses /// 其他程序差异：例如，同类许可协议的披露程序是否较为透明

## Transparency /// 透明度

- Transparency important (for FRAND) /// 就FRAND声明而言，透明度很重要
  - See also European Commission SEP reform proposal /// 参见欧委会标准必要专利改革提案
  - What rates/conditions for competitors? /// 竞争对手的费率/条件是什么?
    - “I will pay but similar rate as my main competitors and under similar conditions”/// “我方只愿意在类似条件下，支付与主要竞争对手类似的费率”
  - But many license agreements have non disclosure clause /// 但是，许多许可协议都设有保密条款
    - often exception if “court order”/// 除非“法院命令”公开

## Discovery of comparable licences /// 同类许可协议的披露

- In NL: as a type of pre-trial discovery, both parties submit comparable licences /// 在荷兰：作为审前披露程序，由双方呈交同类许可协议
- Art 22 Dutch Code of Civil Procedure (DCCP), Court can order to submit relevant documents /// 荷兰民事诉讼法典第22条规定，法院可以命令当事人呈交相关文件
  - Non-compliance: court can draw conclusions (i.e. assume claim/defence is not sufficiently substantiated) /// 当事人不服从的，法院可以认定其主张/抗辩证据不足
  - Both for claim of implementer that /// 对于实施人，可以主张
    - licence offer SEP-owner is not FRAND and that /// 标准必要专利权利人的要约不符合FRAND原则，并且
    - his counteroffer is FRAND /// 实施人的反要约符合FRAND原则。

## Discovery of comparable licences /// 同类许可协议的披露

- In UPC, no case law yet, but there seem possibilities  
/// 在统一专利法院，目前还没有判例，但有一定可能性
- Art. 172 UPC RoP: party stating a (likely) contested fact, shall produce available evidence /// 统一专利法院程序规则第172条：陈述（很可能）有争议的事实当事人应当举证
  - Of own motion /// 由当事人提出
  - Court may order at any time (if evidence in control of party), see also Art. 59 UPCA /// 法院可以随时命令当事人举证（如果证据由当事人控制），参见统一专利法院协议第59条
  - Non-compliance: “take such failure into account”/// 不服从的，“将当事人未能举证作为审议考虑因素”



## Discovery of comparable licences /// 同类许可协议的披露

- Art. 103 UPC Rules of Procedure: in advance of interim conference, Judge Rapporteur may order parties to ‘produce evidence’ /// 统一专利法院程序规则第103条：在中期会议之前，汇报法官（JR，担任法官兼报告员）可以命令各方“出示证据”
  - Non-compliance: default judgment /// 不服从的：作出“不履行判决”
- Art 104 UPC RoP: during interim conference, JR may give further orders for e.g. documents, written evidence, expert evidence /// 统一专利法院程序规则第104条：在中期会议期间，汇报法官可就文件、书面证据、专家证据等进一步发出命令

## Confidentiality club /// 机密会

- Non-disclosure/confidentiality → (partly) “closed door”hearings /// 不予披露/保密→ “（半）闭门”听证
- Who can see the licences: ‘confidentiality club’ /// 谁有权取阅许可协议：“机密会”
- Art. 22a Dutch Code Civil Procedure /// 荷兰民事诉讼法典第22条第a款
  - Access to confidential documents may be restricted to only lawyers /// 可能仅限律师取阅机密文件
  - There is discussion if this conforms with ‘fair trial’(art. 6 ECHR) /// 如此是否符合“公平审讯”原则（欧洲人权公约第6条），存在不同观点

## Confidentiality club /// 机密会

- EU Trade Secrets Directive 2016/ 943, Article 9(2): /// 欧盟商业秘密指令2016/943第9条第2款：
  - In principle only applicable to proceedings where trade secrets are subject matter, not where ancillary, but sometimes used analogously /// 原则上仅适用于以商业秘密为标的物的诉讼，但有时在商业秘密并非标的物的诉讼中也有近似的应用
  - Restricting access to documents and hearings /// 对文件取阅和听证作出限制
  - To limited number of persons, no greater than necessary for effective remedy and fair trial, /// 对人数作出限制（不超过有效救济和公平审讯所需的人数）
  - the lawyers and at least one natural person from party /// 律师以及来自各当事方的至少一位自然人
  - Balancing proportionality: also interests of third parties /// 平衡相称：顾及第三方利益
    - counterparty to a licence /// 许可协议的对手方

## Confidentiality club /// 机密会

- Art. 58 UPCA / 262A RoP UPC: /// 统一专利法院协议第58条 / 统一专利法院程序规则第262A条:
  - Similar wording as Art. 9 trade secret directive /// 与商业秘密指令第9条措辞类似
  - By court order access restricted (to specific persons) /// 通过法院命令将取阅权限定于特定人员
  - Lawyers and (at least) one natural person from party /// 律师及来自各当事方的（至少）一位自然人

## Confidentiality club /// 机密会

- Problems: /// 问题:
  - at least one natural person from party, who? /// 来自当事方的至少一位自然人——哪一位自然人?
  - Somebody involved in actual licensing negotiations? /// 实际参与了许可协议谈判的人员?
    - He/she can perhaps give good input → fair trial /// 该人员也许可以提供有用意见 → 公平审讯
    - But difficult to forget confidential information /// 但是，机密信息很难遗忘
    - He/she could use the information when negotiating with other parties (e.g. implementer who also has SEP-portfolio, or SEP-owner obtaining info on licences from other SEP-owners) /// 该人员可以在与第三方谈判时使用该信息（例如，拥有一系列标准必要专利的实施人，或意图获取其他标准必要专利权人许可协议信息的专利权人）
    - Difficult to police misuse /// 难以对信息滥用进行规制
  - Balancing proportionality: also interests of third parties /// 平衡相称：顾及第三方利益
    - counterparty to a licence /// 许可协议的对手方

## Confidentiality club /// 机密会

- Problems: /// 问题：
  - (...cont'd) /// (.....接上)
  - see UK CoA Interdigital v OnePlus, 2 tier: /// 见英国上诉法院 InterDigital诉一加手机案：
    1. External Eyes Only (EEO), i.e. external lawyers and experts /// 仅限外部人员取阅 (EEO) , 即外部律师和专家
    2. Highly Confidential (HCONF), i.e. party employee with confidentiality undertaking /// 高度机密 (HCONF) , 即签署保密协议的当事人员工
  - E.g. Nokia/Oppo (UK, NL), HCONF: non commercial Oppo employee (i.e. not normally involved in licensing) and narrow licensing bar imposed (undertaking no involvement licensing re counterparty during proceedings + 2 years) /// 例如, 诺基亚诉OPPO案 (英国、荷兰), HCONF: OPPO非商务部门员工 (通常不参与专利许可工作), 对禁止参与专利许可工作作出严格规定 (承诺在诉讼期间及之后2年内不参与涉及对方的许可工作)
  - E.g. in Nokia/Oppo (NL), EEO for one Oppo licence /// 例如, 诺基亚诉OPPO案 (荷兰) 中, 对一项OPPO许可协议仅限外部人员取阅

- Thank you for your attention!  
感谢聆听!