

Blueprint for Success

Empowering businesses in the UK through
access to Standard Essential Patents



Summary report of an Onward and Fair Standards
Alliance partnership

ONWARD ➤



About Onward

Onward's mission is to develop bold and practical ideas to boost economic opportunity, build national resilience, and strengthen communities across all parts of the United Kingdom.

We are not affiliated to any party but believe in mainstream conservatism. Our vision is to address the needs of the whole country: young and old, urban and rural, for all communities across the UK – particularly places that have too often felt neglected or ignored by Westminster.

We believe in an optimistic conservatism that is truly national – one that recognises the value of markets, supported by a streamlined state that is active not absent. We are unapologetic about standing up to vested interests, putting power closer to people, and supporting the hardworking and aspirational.

About the Fair Standards Alliance (FSA)

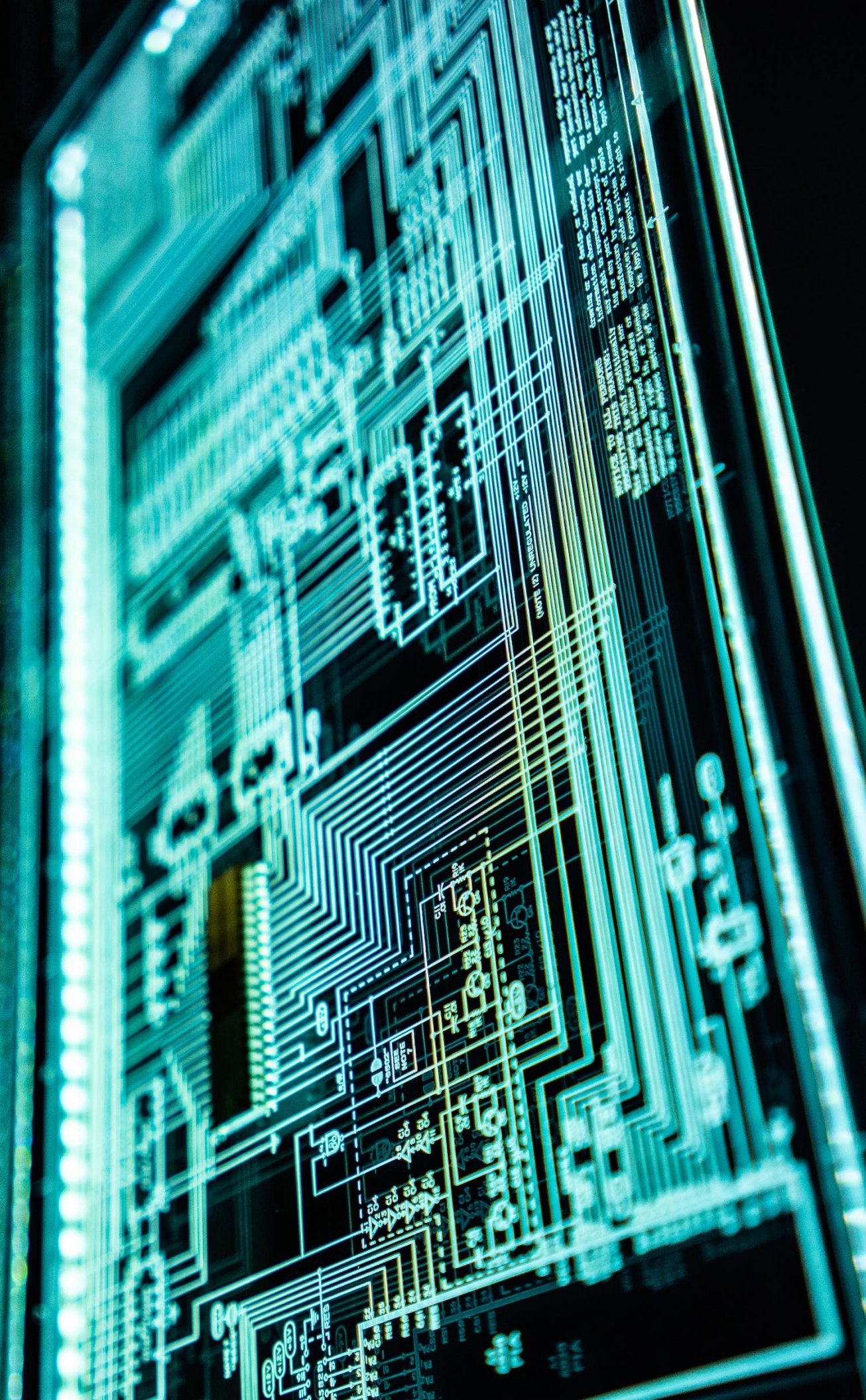
The Fair Standards Alliance (FSA) is a key contributor to the debate around Standard Essential Patents (SEPs). The FSA advocates for an open and collaborative approach to the licensing of SEPs that are needed for the creation of the next generation of wireless technology products. We are contributing to the future of balanced SEP with policy makers around the world.

The Fair Standards Alliance is an association created in 2015 to strengthen the voice of innovative technology companies of all sizes to ensure that licensing of SEPs required by so many smart devices is done on a fair, reasonable and non-discriminatory basis (FRAND).

About this report

This summary report is a record of a roundtable event held in the summer of 2023, hosted by Onward and supported by the Fair Standards Alliance. The event was held under the Chatham House Rule, so all comments below are anonymised and the discussion summarised.

For more information, or to explore how you might partner with Onward in future, please contact office@ukonward.com.





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Foreword

You could be forgiven for thinking that patent rules are the preserve of lawyers and policy wonks. But they should be a concern for us all. Get them right, and they can help the UK lead in this new age of innovation – allowing the country to cement its position as the incubator of invention that drives growth and technological progress across the world. Get them wrong and the UK risks failing to achieve its science superpower ambitions, by stifling competition, and spurring inventors to go elsewhere.

This is particularly true when it comes to Standard Essential Patents (SEPs). In an increasingly interconnected world, standardised technologies such as 4G, Bluetooth and WiFi underpin swathes of our economy. The importance of SEPs is only set to grow, making the rules governing them of central importance.

SEPs are the lifeblood of the innovation ecosystem. They are critical to accessing the standardised technologies that ensure devices and systems can seamlessly communicate and work together. Standardisation provides a platform for inventions and innovations to be built on top of base technologies. As such, in sectors like telecoms, electronics and energy, SEPs and their owners can act as gatekeepers to who can innovate and succeed in the market. Whether it is the Internet of Things, smart energy, driverless cars, or virtual reality, Britain's vitality as a world-leading tech hub will depend in large part on ensuring its SEPs rules are right.

That is why Onward partnered with the Fair Standards Alliance to host a roundtable event on SEPs. Listening to the experience of those in industry is crucial to understanding where the system is working well and where improvements must be made. Our roundtable brought together industry experts and practitioners from various sectors, together looking at the role of SEPs in the UK's science and technology landscape, the challenges faced, and potential solutions.

Thank you to the attendees for sharing their experiences and views, and to the FSA for their partnership. In particular, special thanks to Viscount Camrose, Minister for Intellectual Property, for joining us and engaging in this timely and thought-provoking discussion.



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Introduction

Standardised technologies such as 4G, Bluetooth and WiFi are essential for technological progress. Developed by consensus, these industry standards are necessary to permit businesses to innovate in areas such as autonomous vehicles, smart meters and medical devices. Frequently the technologies underlying the standard are patented and it is practically very difficult, or impossible, for a business to use the standard without infringing on these Standard Essential Patents (SEPs).

It is important to have a balanced IP policy that benefits the UK economy and businesses more broadly. Companies that own SEPs have dominant market power because industry is locked into the selected standardised technology. As recent UK court decisions have demonstrated,¹ some SEP holders have abused that market power by seeking excessive licensing terms, refusing to offer licences to certain companies, discriminating against smaller companies, and delaying announcements of licensing terms until after adoption has begun – creating a lock-in effect.

To ensure fair access to the standardised technology, and to avoid the competition law issues that would otherwise arise through competitors creating standards together, SEP holders voluntarily commit to offer licences to their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms.

However, a true FRAND rate can only be determined by a court, and these decisions in the UK have given SEP holders even more market power by allowing them to exclude product manufacturers from the UK market unless they pay their demanded fees on a global scale. The cost of such litigation can run into tens of millions of pounds and many firms,² particularly SMEs, cannot afford such expensive litigation to protect themselves from unreasonable licensing demands. This leaves prospective SEP licensees with the choice of either paying unreasonable royalties or exiting the UK market.

Amid these challenges, the number of claimed SEPs continues to accelerate. Declared SEPs have been doubling on average every five years over the past three decades. As of 2020, around 95,000 patents were declared essential for 5G alone.³ The majority of which are owned by companies based in China, the EU, the US, Japan and Korea. Estimates suggest that only 20-45% of all SEPs are truly essential.⁴

The Intellectual Property Office (IPO) has been assessing the SEP landscape.⁵ This has included consulting to understand how the SEP framework and licensing environment works for smaller-sized businesses.⁶ Findings have demonstrated the challenges faced by SMEs when obtaining licences with cost, complexity and uncertainty around financial liabilities highlighted.

SEP licensing affects competition, innovation, product compatibility, and consumer choice. The UK's approach to SEP licensing should be a matter of coherent Government policy that considers its priorities and economic needs. However, UK companies are overwhelmingly net licensees of SEPs owned by foreign companies. Excessive SEP licence fees extract value from the economy. Therefore, effective regulation of SEPs in the UK is critical if it is to meet its innovation aspirations. This roundtable looked at how the SEP system is functioning at present and considered possible interventions that could be taken to improve it.

Summary of the Discussion

The discussion centred around identifying key areas of concern with the current UK SEP licensing environment and possible policy solutions. A central theme was the failure by some SEP holders to abide by their undertaking to license their SEPs on FRAND terms, instead leveraging confidentiality claims and the threat of market exclusion by court-ordered injunctions to secure unfair royalties, especially from SMEs and smaller companies. One participant described the threat of injunctions by SEP holders as breaking their promise to license any user on FRAND terms. They claimed that that broken promise is chilling innovation and emphasises the need for reform.

Key issues identified included: exploitative litigation, abusive licensing practices, and a lack of transparency. These issues impact innovative companies irrespective of their size and can harm their competitiveness. Cumulatively they can contribute to SEP licensing acting as a barrier to growth, adversely affecting investment, innovation and consumer choice.

1. Litigation and injunctions

Participants agreed that one of the most significant issues related to the threat of litigation and injunctions. They noted that despite SEP licensors' commitments to license their SEPs, many still seek or use the threat of injunctions to exclude licensees from the market as a way of coercing licensees to accept unfair terms. The High Court has recognised that the threat of such litigation may lead a licensee to act against its own interest by accepting unfair terms which are in excess of what is FRAND, because this represents less cost and risk than litigation.⁷ We heard that a High Court FRAND licensing trial in July cost the parties in excess of £31 million,⁸ demonstrating how most firms, and particularly smaller companies, cannot afford to litigate to protect themselves from licensors who may be acting in bad faith. This leaves these prospective SEP licensees with the choice of either paying excessive royalties or exiting the UK market. We also heard about a forthcoming publication of new research on this issue which will cover the risk SEP injunctions present to the roll-out of the UK's smart energy network and smart meters.

2. Abuse of licensing power

Owning SEPs gives companies vast amounts of market power which is susceptible to abuse. Once a patented technology is incorporated into a standard, users of the standard have no option but to license it. It was claimed that in some instances, and contrary to their obligation to license their SEPs on fair terms, some licensors have been using abusive practices to secure excessive royalties. Court cases in 2023 have pointed towards this.⁹ Improper "hold-up" tactics have included: refusing to license certain companies on spurious grounds in order to secure

higher royalties from other licensees; relying on confidentiality provisions to prevent prospective licensees from understanding what royalties are being paid by others for the same SEPs; and delaying seeking licences until companies are “locked-in” to the standardised technology and so have no commercial choice but to take a licence whatever the cost.

Earlier in 2023 in *InterDigital v Lenovo*, High Court judge Mr Justice Mellor found that InterDigital’s licensing approach was the antithesis of FRAND: its royalty offers (including the programme rates it made public) were not FRAND and it discriminated against smaller licensees. Participants highlighted that discriminatory pricing puts companies at a competitive disadvantage.

3. Transparency

The event heard how a lack of transparency is another key concern for many in industry. Participants noted how innovators seeking to incorporate standardised technologies into their products face a series of challenges in identifying what SEPs they are required to license and from whom. The issue of transparency carries through to substantive licensing negotiations with SEP holders, where there is no readily available information to assist with understanding whether a licence to the SEPs in question is actually required and/or what represents a fair price for SEPs that are required. As evidenced by High Court decisions,¹⁰ this has resulted in licensees, especially smaller companies, being significantly overcharged for SEP licences. The IPO has recommended that improving transparency of pricing and information concerning how a SEP is necessary.

4. Impact on growth

It was argued that the excessive costs and uncertainty associated with the current SEP regime, are serious risks that are harming companies’ competitiveness and ability to grow. Companies are having to seek investment and make business decisions on where to innovate under the constant threat of SEP injunctions. The point was made that the current system places a large financial burden on companies, including through lost opportunities to secure finance and having to manage the risk of unexpected SEP licensing and/or litigation costs. This has a knock-on effect on their competitiveness, ability to invest in R&D and decisions on the technologies upon which they may innovate. Participants reported that some UK companies are designing-out cellular technologies from their products to avoid this uncertainty, even though this results in sub-optimal products. Not only does this hold back the firms’ individual innovative capacity, but it is a hindrance on the UK’s objectives to drive growth in science and technology. The case was made that if left unresolved, the issues growing around SEPs will not only place a cost upon businesses but also the wider economy.

5. Possible solutions

A number of policy interventions were discussed, ranging from government guidance to primary legislation. These ideas were focussed on preventing the inappropriate leverage SEP licensors have been able to achieve by exploiting the threat of injunctions. There was a broad consensus that the simplest and most effective solution would be legislation to limit the circumstances under which an injunction can be awarded for SEPs subject to a FRAND obligation.

Case Study

UK small company manufacturing mobile telecoms devices

This UK company relies on innovation to create a niche for itself within a crowded market for consumer mobile devices, manufacturing products for larger household brands. Its products have won numerous awards internationally, recognising their innovative and market leading nature.

However, the space this company carves for itself rapidly shrinks as other manufacturers (both the dominant mobile telecoms manufacturers and cheap volume producers from places such as China) see the worth of, and so follow, its innovations. As such this company has to constantly innovate to stay ahead, developing next generation technologies (e.g. maintaining mobile device connectivity in areas with no or extremely limited cellular coverage) which it expects to be ubiquitous in a few years' time. It has launched world-first services, showcasing the UK's innovative potential.

As a mobile device manufacturer this company requires SEP licences. However, one of the biggest challenges it faces in the current SEP licensing landscape is the lack of transparency. There is ostensibly no reasonable mechanism for it to obtain even basic information such as: what licences are required; who owns those licences; and what is a fair value to pay for them. It therefore lacks certainty as to what licence fees it is required to pay, to whom and when demands for fees may arise.

This creates business risk which impacts all aspects of the firm, from its ability to fund future innovations to its attractiveness to investors. It faces the choice of either increasing its prices to cover the risk of subsequent SEP assertions (making it non-competitive against foreign rivals not subject to the UK's licensing regime) or trying to absorb the costs of SEP claims as and when they arise (which affects its viability as a going concern).

Growth capital is essential. It allows this small company to capitalise upon its breakthrough innovations and benefit from the modest head-start this gives it against much larger rivals. Its survival would be almost impossible without it. However, the uncertainty caused by the current SEP licensing framework is seriously detrimental to its ability to attract and secure outside investment. The significant provisions it needs to carry on its balance sheet for the risk of subsequent SEP assertions acts as a deterrent to many potential investors.

The lack of transparency has a severe detrimental impact. For example, it was approached by a major non-UK SEP licensor and told that it needed to take a licence to the licensor's SEP portfolio at a particular royalty. It was also informed that all licensees paid this royalty rate and so it entered the licence on those

terms. It later discovered through disclosures made in litigation to which it was not party that this was not true and that it was in fact paying significantly more than its competitors.

In other cases, this company was told by its component suppliers that certain SEP licensors, contrary to their obligation to license any willing party, were refusing to grant them a licence - another tactic leaving this small company vulnerable to exploitation by SEP licensors.

As a small company it does not have the resources to challenge unfair licensing demands. It simply cannot afford the cost of litigation to ensure it is only taking licences it requires and does not overpay for those licences. This means that it is especially vulnerable when licensors threaten litigation and seek injunctions. Under the current system effectively has to pay what it is told to by the SEP licensors, because it cannot afford the risk and expense of litigation and/or an injunction preventing it from selling its products.

Endnotes

¹ *InterDigital v Lenovo* [2023] EWHC 1583 (Pat) [[link](#)] and *Optis v Apple* [2023] EWHC 1095 (Ch) [[link](#)].

² The cost of a recent High Court SEP licensing case was over £31 million – see *InterDigital v Lenovo* [2023] EWHC 1578 at [35] [[link](#)].

³ IPO UK, ‘Standard Essential Patents and Innovation: Summary of Responses to the Call for Views’ (2023) [[link](#)].

⁴ See e.g. Goodman, D. J., and Myers, R. A., ‘3G Cellular Standards and Patents’ [[link](#)], International Conference on Wireless Networks, Communications and Mobile Computing, IEEE, 2005, Vol. 1; Stitzing, R., et al. ‘Over-Declaration of Standard Essential Patents and Determinants of Essentiality’, SSRN 2951617, 2017 [[link](#)]; Brachtendorf, L., Gaessler, F. and Harhoff, D., ‘Truly Standard-Essential Patents? A Semantics-Based Analysis’, 2020; ‘Are Patents merely “Paper Tigers”?’ [[link](#)].

⁵ IPO UK, ‘Standard Essential Patents and Innovation: Call for views (2021) [[link](#)].

⁶ IPO UK, ‘SEPs questionnaire for SME, small-cap and mid-cap businesses: Summary of Responses’ (2023) [[link](#)].

⁷ *Interdigital v Lenovo* [2023] EWHC 1583 (Pat) at [288] [[link](#)].

⁸ *InterDigital v Lenovo* [2023] EWHC 1578 at [35] [[link](#)].

⁹ *InterDigital v Lenovo* [2023] EWHC 1583 (Pat) [[link](#)] and *Optis v Apple* [2023] EWHC 1095 (Ch) [[link](#)].

¹⁰ *Ibid.*

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