

# INTELLECTUAL PROPERTY: CASE UPDATE

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## CASES REPORTED IN NOVEMBER 2021

Every case is interesting to someone and no case is interesting to everyone, and so we provide snapshots of each intellectual property decision reported by bailii.org (British and Irish Legal Information Institute) from the Patents Court (which deals with all registered rights), the Intellectual Property Enterprise Court (for smaller or simpler claims), and the appeal courts, and a contents table so that you can see quickly whether there is anything interesting to you.

Please get in touch with [tom.carver@wablegal.com](mailto:tom.carver@wablegal.com) for more detail on any of the cases, or for any other queries, questions or discussions.

### Court of Appeal

Patent essentiality; burden of proof

[Optis Cellular Technology LLC & Ors v Apple Retail UK Ltd & Ors](#)

### High Court

Case management; jurisdiction of High Court; late filing of Acknowledgement of Service

[Nokia Technologies OY & Nor v Oneplus Technology \(Shenzhen\) Co., Ltd & Ors](#)

Patent validity; identity of the 'skilled person'; secondary evidence

[Optis Cellular Technology LLC & Ors v Apple Retail UK Ltd & Ors](#)

Case management; confidentiality of disclosure documents

[Interdigital Technology Corporation & Ors v Lenovo Group Ltd & Ors](#)

### [Optis Cellular Technology LLC & Ors v Apple Retail UK Ltd & Ors](#)

The claimants own a portfolio of patents that have been declared to be essential to one or more telecommunications standards. At first instance the patent in suit was held valid, essential and infringed by the defendants' products. The defendants appealed each ground.

The defendants argued, in relation to essentiality, that the claimants had failed to prove that certain key numbers were comparable (the technical details of which are beyond the scope of this snapshot), and that the judge had made an error in law by not concluding that the claimants had failed to do so. The judge had contradicted himself in accepting, in one part of his judgment, that the numbers "may or may not" have been comparable and then concluding, in a later part of his judgment, that the numbers were comparable.

The Court of Appeal agreed with the defendants that the judge had made an error, that the onus was on the claimants to prove comparability and that the claimants had not done so. It followed that the patent was not essential to the standards in issue and not infringed.

### [Nokia Technologies OY & Nor v Oneplus Technology \(Shenzhen\) Co., Ltd & Ors](#)

The claimants seek a declaration that the UK patents are essential to the relevant standards and that they are valid and infringed by the defendants. Further, a declaration that the terms of the global licence offered by them to the defendants are FRAND.

The defendants applied to have service against the non-UK defendants set aside on the basis that the English court had no jurisdiction over them consequential to a Chinese Supreme Court ruling that the Chinese courts have jurisdiction to settle global terms of a FRAND licence, and that such an action was already on foot in China; and on the basis that the recast Brussels Regulation no longer applies in the UK. The defendants also applied for the claims against the UK defendants to be stayed as a matter of case management, pending resolution of the FRAND trial in China.

The decision comprises 141 detailed paragraphs, but in summary the judge decided that the English court does have jurisdiction to decide on the validity, essentiality and infringement of UK patents irrespective of the action in China. He also held that a stay was not appropriate, making his decision on the balance of prejudice to the parties and the absence of any compelling circumstances.

Lastly, the claimant contended that the UK defendants had filed their Acknowledgement of Service out of time. The judge declined to decide whether in fact the Acknowledgement of Service had been filed out of time and instead assumed that it had been and moved on to the criteria set out in *Denton v TH White Ltd* as to whether the court should grant relief from sanctions to comply with the deadline. Those criteria are:

- (a) identify and assess the seriousness or significance of the relevant failure. If a breach was not serious or significant, relief would usually be granted and there would be no need to spend much time on the second and third stages;
- (b) consider why the failure or default occurred; and
- (c) consider all the circumstances of the case. A serious breach for no reason was not automatically prevented from attracting relief.

The judge had no doubt that the defendants are entitled to relief from the sanctions.

### [Optis Cellular Technology LLC & Ors v Apple Retail UK Ltd & Ors](#)

This concerned the validity of three related patents, essentiality having been conceded.

There was a dispute of the identity of the skilled person. In addition to the usual guidelines, the judge noted that the attributes of the skilled person may be deduced from assumptions which the specification makes about their abilities. In this case the specification of the patents gives the skilled person only some “modest amount of help” on certain technical points, and the judge used this absence of detail to deduce the skill level of the skilled person.

There is a useful recap of some the legal principles relating to secondary evidence, including:

- the usefulness of evidence as to what other researchers in the field were doing;
- the relevance of prejudice, or ‘lions in the path’, and whether the patent must address the particular prejudice directly;
- the risk of hindsight in ‘salami slicing’, that is to say the practice of deconstructing the gap between the prior art and the patent into a number of smaller steps; and
- the importance of the difference between whether the skilled person could or would do something.

An unusual wrinkle in the perennial discussion of what was common general knowledge was the question of whether the third edition of a text book replaced the second edition, or whether the second edition remained CGK along with the third. The judge held that the second edition was no longer CGK.

While the patents were found to be non-obvious over the Knuth prior art and sufficient, they were found to be obvious over the Ericsson prior art.

### [Interdigital Technology Corporation & Ors v Lenovo Group Ltd & Ors](#)

Another decision regarding confidentiality of licence agreements and information derived from them in a case relating to SEPs and FRAND licensing. The judge applied the principles derived from *Oneplus v Mitsubishi* (as reported last month).