Injunctions in SEP cases in Europe

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I. Abstract

This paper3 discusses several public cases from Germany that deal with SEPs4 and FRAND5 and have been decided after the CJEU’s6 decision in Huawei v. ZTE7. It starts with the patent law system and appeal possibilities in Germany, explains briefly the Orange Book decision, sets out some details of the Huawei decision and explains the questions sent by the Regional Court8 of Düsseldorf that form the basis of the CJEU decision. The paper also discusses the decisions or orders from the Regional Courts of Düsseldorf and Mannheim as well as the Higher Regional Courts9 of Düsseldorf and Karlsruhe that followed the Huawei decision. Although many open questions still remain, the Huawei decision has brought quite some clarity to the courts in Germany, setting out when a SEP owner can obtain an injunction while offering a safe harbor for licensees that seek protection from such an injunction. But still it is rather difficult for both parties to predict the outcome of a specific case.

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3 Submission date: 10 March 2017
4 Standard Essential Patents
5 Fair, Reasonable and Non-Discriminatory, “FRAND” or “RAND” see, e.g., https://en.wikipedia.org/wiki/Reasonable_and_non-discriminatory_licensing
6 Court of Justice of the European Union
7 Case number “C-170/13” dated 16 July 2015, corrected on 15 December 2015, called “Huawei decision” in this paper, see http://curia.europa.eu/juris/documents.jsf?num=C-170/13
8 Regional Court: Landgericht (LG)
9 Higher Regional Court: Oberlandesgericht (OLG)
II. Introduction

One obstacle in writing this paper is the fact that in Germany court decisions are not public, except for the proceedings held in open court. And usually, court documents are not available. There is one exception: If the court thinks that the case has some “overarching” relevance also for other cases, the court will publish a redacted, anonymized version of the decision. All cases that are discussed or cited in this paper are publicly available. But there is an unknown number of unpublished cases in Germany, of which only the parties involved are aware. While these cases might give useful insights, we cannot and do not refer to those cases.

Often the otherwise anonymized published decisions are not fully redacted: they fail to conceal the identity of the parties; this makes it possible to identify at least the plaintiff (patent owner). For example, if there is a reference to an ETSI\textsuperscript{10} declaration with a specific date, a search of the ETSI IPR Database\textsuperscript{11} for that date may reveal the plaintiff’s name (for example, sometimes just one company made a declaration on that date). Even if there are multiple declarations, scanning those for patent numbers - which give you claims and figures - and matching the results to the case may reveal the name of the plaintiff.

Sometimes the court does not even anonymize the EP patent number; then, a search of the German patent register\textsuperscript{12} will reveal the name of the plaintiff. Moreover, sometimes one of the parties may make a press release. And often both parties (and possibly even supporting parties for the plaintiff and/or defendant) are disclosed in connection with the case number. Finally of course if the German court asks for answers on selected questions from the CJEU then the parties and underlying facts are made known in the CJEU judgment.

Nonetheless, despite such sleuthing, for German cases, it is pretty unusual to know about all aspects of the case.

III. Europe or Germany?

This paper is titled “Injunctions in SEP cases in Europe”, but Germany is by far the most used jurisdiction for patent infringement cases in Europe\textsuperscript{13}. And when looking into Germany,

\textsuperscript{10} European Telecommunications Standards Institute
\textsuperscript{11} https://ipr.etsi.org/
\textsuperscript{12} https://register.dpma.de/DPMAreregister/pat/einsteiger
\textsuperscript{13} Shortly before submitting this paper we were notified about the following publicly available cases:
UK: \textit{Unwired Planet v. Huawei & Ors}, [2015] EWHC 1198 (PAT), with several decision dates after Huawei [HP-2014-000005]
there are only three relevant Regional Courts\textsuperscript{14}: Düsseldorf, Mannheim and Munich (in that order). The relevant Higher Regional Courts are Düsseldorf, Karlsruhe and Munich. Finally an appeal is possible to the Bundesgerichtshof (BGH), the German Federal Court of Justice. (See figure 1 below for details.) In the BGH there is a special chamber (number 10, \textit{i.e.}, X) for patent cases.

\textbf{Figure 1: German courts and appeal possibilities for patent matters \textsuperscript{15}}

While patent infringement cases are brought before the Regional Courts, nullity actions are filed with the Bundespatentgericht (BPatG), the German Federal Patent Court. This separation of courts and proceedings is called “bifurcation”. The bifurcation system is often criticized\textsuperscript{16} as infringement and validity are decided independently, which can lead to injunctions based on patents that are held invalid later. This is especially the case, as the decision by a Regional Court is usually rendered before the BPatG decision. Our review of the cases indicates, however, the courts are handling each case on its own merits, and the instances where the injunction was not stayed were rare.

Courts in Germany (and in all other European Union member states) can send questions, like in \textit{Huawei v. ZTE}, to the Court of Justice of the European Union (CJEU) which will then


\textsuperscript{15} https://www.bundespatentgericht.de/cms/media/Oeffentlichkeitsarbeit/Veroeffentlichungen/Informationsbroschueren/infobroschueren_en.pdf

decide the questions. Those CJEU decisions are not decisions in the original cases, but are limited to interpretation of the European Union law for the questions submitted. The court that sent the questions then decides the original case based on the CJEU guidance. Note that referrals to the CJEU are rather rare.

In Huawei v. ZTE the Regional Court of Düsseldorf asked the CJEU about antitrust issues for SEPs. As there are plenty of English language articles available about the Huawei case, we refrain from any details here. We discuss only the key aspects that the CJEU decided in its ruling.

IV. Pre-Huawei: Orange Book decision

Before the CJEU’s decision in the Huawei case (discussed below), the Federal Supreme Court of Germany decided a case where a plaintiff, owner of a patent related to rewritable optical drives, sought an injunction against a defendant that was infringing the patent. That case resulted in the so-called Orange Book decision\(^\text{17}\) that lays out the circumstances under which a patent owner with monopoly power can obtain an injunction and avoid being found to have abused its dominant position.

Specifically, according to the Orange Book decision, a patent owner cannot be found to have abused its dominant market position if the defendant has not made an unconditional offer to take a license on FRAND terms. Moreover, the court reasoned that, since under a license agreement the defendant would have to pay royalties, to avoid an injunction, the defendant must pay royalties for the past and ongoing infringement (the amount being unobjectionable under antitrust law). Also, if the plaintiff rejects defendant’s offer, to obtain the injunction, the plaintiff must make a counteroffer on FRAND terms.

V. Huawei v. ZTE decision by the CJEU

In 2011, Huawei Technologies brought a patent infringement action against ZTE Corp. at the Landgericht Düsseldorf (“Düsseldorf Court”), in Germany\(^\text{18}\). Huawei, an owner of a patent, was seeking to enjoin ZTE from further infringement, to render accounts, to recall all infringing products, and to obtain an award of damages\(^\text{19}\).

\(^{17}\) Also called “Orange-Book-Standard”  
The patent in question was notified by Huawei to ETSI\textsuperscript{20}. Notably, the rules of ETSI state that “when an intellectual-property right essential to a standard is brought to the attention of ETSI, the Director-General of ETSI must immediately request the owner of that right to give, within three months, an irrevocable undertaking that it is prepared to grant licenses on fair, reasonable and non-discriminatory terms (‘FRAND terms’) in relation to that right.”\textsuperscript{21} While ETSI does not check whether the patent is in fact “essential”,\textsuperscript{22} in any case, the Düsseldorf Court ruled that the patent in question was essential to the “Long Term Evolution” (LTE) standard\textsuperscript{23}.

In 2013, while considering whether to issue an injunction, the Düsseldorf Court referred the following five questions to the Court of Justice of the European Union (CJEU)\textsuperscript{24}.

(1) Does the proprietor of [an SEP] which informs a standardization body that it is willing to grant any third party a license on [FRAND] terms abuse its dominant market position if it brings an action for an injunction against a patent infringer even though the infringer has declared that it is willing to negotiate concerning such a license?

or

Is an abuse of the dominant market position to be presumed only where the infringer has submitted to the proprietor of the [SEP] an acceptable, unconditional offer to conclude a licensing agreement which the patentee cannot refuse without unfairly impeding the infringer or breaching the prohibition of discrimination, and the infringer fulfils its contractual obligations for acts of use already performed in anticipation of the license to be granted?

(2) If abuse of a dominant market position is already to be presumed as a consequence of the infringer’s willingness to negotiate: Does Article 102 TFEU\textsuperscript{25} lay down particular qualitative and/or time requirements in relation to the willingness to negotiate? In particular, can willingness to negotiate be presumed where the patent infringer has merely stated (orally) in a general way that it is prepared to enter into negotiations, or must the infringer already have entered into negotiations by, for example, submitting specific conditions upon which it is prepared to conclude a licensing agreement?

(3) If the submission of an acceptable, unconditional offer to conclude a licensing agreement is a prerequisite for abuse of a dominant market position: Does Article 102 TFEU lay down particular qualitative and/or time requirements in relation to

\textsuperscript{20} Id.
\textsuperscript{21} Id. at par. 15.
\textsuperscript{22} Id. at par. 20.
\textsuperscript{23} Id. at par. 23.
\textsuperscript{24} Id. at par. 39.
\textsuperscript{25} Treaty on the Functioning of the European Union, see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT; articles 101 and 102 were formerly numbered 81 and 82; see Appendix for the full text.
that offer? Must the offer contain all the provisions which are normally included in licensing agreements in the field of technology in question? In particular, may the offer be made subject to the condition that the [SEP] is actually used and/or is shown to be valid?

(4) If the fulfilment of the infringer’s obligations arising from the license that is to be granted is a prerequisite for the abuse of a dominant market position: Does Article 102 TFEU lay down particular requirements with regard to those acts of fulfilment? Is the infringer particularly required to render an account for past acts of use and/or to pay royalties? May an obligation to pay royalties be discharged, if necessary, by depositing a security?

(5) Do the conditions under which the abuse of a dominant position by the proprietor of a[n SEP] is to be presumed apply also to an action on the ground of other claims (for rendering of accounts, recall of products, damages) arising from a patent infringement?26

Responding to the questions from the Düsseldorf Court, the CJEU set out a test for determining whether a SEP owner can obtain an injunction or has abused its market power by seeking to block competitor’s products from the market and cannot get an injunction27. The following flowchart illustrates obligations of the SEP owner and the alleged infringer and shows when each obligation takes effect.

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27 The CJEU considered availability of injunction in view of the underlying German law which states that “[t]he injured party may, where there is a risk of recurrence, bring an action for an injunction against any person who uses a patented invention in breach of Paragraphs 9 to 13.” Huawei, at par. 10.
The CJEU concluded that a SEP owner that seeks an injunction is presumed to abuse its market power, unless the SEP owner satisfies the procedural (and substantive) requirements set forth in the Huawei decision. Specifically, the CJEU noted that a SEP holder that has agreed to offer its SEP under a FRAND license creates an expectation for those who use infringing technology. As such, the CJEU ruled that the SEP holder is required to alert the infringer of the existence of the SEP and of the way in which the SEP is infringed by the infringer. Without this first step, a SEP owner would be deemed to have abused its market power and would not be able to obtain an injunction.

After being alerted, the infringer must promptly show willingness to take a FRAND license to the SEP. If, however, the infringer does not show such willingness, the SEP owner will not be deemed to act abusively and can obtain an injunction.

If the infringer is willing to take a FRAND license, the SEP owner must make a specific offer under FRAND terms. Without this offer, the SEP owner would be deemed to have abused

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29 Huawei, par. 61.
30 Id. at pars. 60, 71.
31 Id. at par. 65.
32 Id. at par. 71.
its market power and would not be able to obtain an injunction\textsuperscript{34}. The CJEU did not explain which terms and conditions a FRAND compliant offer should include or must not\textsuperscript{35}.

If the SEP owner has made a license offer on FRAND terms, the infringer that does not wish to accept the offer must promptly make a FRAND counteroffer\textsuperscript{36}. Absent a FRAND counteroffer from the infringer, the SEP owner will be able to obtain an injunction\textsuperscript{37}.

Moreover, if the SEP owner does not wish to accept the counteroffer, the infringer must provide security and render accounts for all past acts of infringement\textsuperscript{38}. And if the infringer does not provide security and accounting, the SEP owner will be able to obtain an injunction\textsuperscript{39}.

To conclude, first, the Huawei decision appears to apply only to SEP owners that have agreed to license their SEPs under FRAND terms. For example, if the owner of a patent that happens to be essential for practicing a standard is not obligated to license the patent under FRAND terms, the Huawei decision (apparently) would not apply to such owner.

Second, the Huawei decision sets forth a process that litigants must follow. Essentially, the Huawei decision requires the parties to act in good faith when litigating infringement of a SEP. As mentioned above, the CJEU did not address the substantive requirements of FRAND licensing. Nevertheless, it is important to note that the SEP owner must offer a FRAND license to the alleged infringer, and, presumably, the terms of the offered license may get a substantive review, to determine whether the offered license was on FRAND terms.

VI. Overview of “post-Huawei” decisions (in Germany)

The following table lists the cases that we discuss below. For a list of all public cases that we are aware of as of 10 March 2017, please see the Appendix.

\textsuperscript{33} Id. at pars. 63, 65.
\textsuperscript{34} Id. at pars. 63, 71.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at par. 66.
\textsuperscript{37} Id. at pars. 66, 71.
\textsuperscript{38} Id. at par. 67.
\textsuperscript{39} Id. at pars. 67, 71.
<table>
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<th>No</th>
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<tr>
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<td>4a O 144/14</td>
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<td>OLG Düsseldorf</td>
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<td>2 O 106/14</td>
<td>LG Mannheim</td>
<td>St. Lawrence v. Deutsche Telekom and HTC</td>
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<td>5</td>
<td>8 Jan 2016</td>
<td>7 O 96/14</td>
<td>LG Mannheim</td>
<td>Pioneer v. Acer</td>
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<td>31 May 2016</td>
<td>6 U 55/16</td>
<td>OLG Karlsruhe</td>
<td>Pioneer v. Acer Appeal</td>
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<td>4b O 120/14</td>
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<td>29 Jan 2016</td>
<td>7 O 66/15</td>
<td>LG Mannheim</td>
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<td>4a O 126/14</td>
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<td>1 Jul 2016</td>
<td>7 O 209/15</td>
<td>LG Mannheim</td>
<td>Philips v. Archos I</td>
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**Note:** Appeal cases are indicated with bolded dates and text.

It is important to note that each case is considered on its own, *i.e.*, the court always makes a very thorough case-by-case analysis of all aspects and finally weighs all factors to come to the decision. That's why even cases that violate the plain reading of the Huawei decision did issue an injunction against the (unwilling) potential licensee.

### A. Sisvel v. Haier

The first public case, *Sisvel v. Haier*, to have followed the Huawei decision was decided by the LG Düsseldorf on 3 November 2015 (less than 4 months after the Huawei decision). That case was filed before the Huawei decision, and therefore it is a so-called transitional case. (Note that all other cases in this paper are also transitional cases, except for the two *Philips v. Archos* cases.) The main point to note is that the LG granted an injunction against Haier, because Haier did not make a proper and timely counteroffer, did not render accounts and did not timely provide security after Sisvel rejected Haier’s counteroffer; these were seen as delay tactics.

Though Sisvel failed to notify Haier before taking action, Sisvel was exempted from that obligation according to the LG as the current case started before the Huawei decision and at that

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40 Please see the Appendix for links to all cases and further information. The authors welcome any information about other public cases and press releases covering any public or non-public cases.

41 The official date may be wrong (4 March 2016 may be the correct date).

time the Orange Book decision was valid in Germany, which did not require an action by the patent holder before filing a case. Though Sisvel only offered the parent company a license (and not the defendant itself), the court decided that it was not an issue, as the defendant would have been captured by a license to the parent. The court even went as far as to state that even a non-FRAND offer by Sisvel would have triggered the obligation by Haier to at least respond to Sisvel’s offer and make a FRAND counteroffer as Haier was practicing the patent in question. And after Haier’s counteroffer was rejected by Sisvel, according to the LG, Haier was obliged to promptly render accounts and provide security. Instead Haier did render accounts and did provide a security only during the oral proceedings at a quite late stage of the case. The court therefore denied this as being insufficient and even judged this late action as a delay tactic which results in the denial of a defense based on Article 102 TFEU (abuse of dominant position).

Although the ETSI IPR Policy requires patent holders to disclose their patents, the court did not judge the late disclosure by Nokia (the previous owner of the patent in question) as a general bar towards a claim for an injunction. In the opinion of the court the non-disclosure only results in the obligation to license on FRAND terms. The court considered whether, based on a prior decision, the facts warranted a royalty-free license, but found the circumstances differed from the earlier case. In addition, as Sisvel did a FRAND declaration at a later time, Haier and others are in the same situation now, as if they had been when Nokia had disclosed the patent in the first place. The court also denied the allegation by Haier that some other technology would have been chosen if Nokia had timely disclosed the patent, as this was not shown by the evidence.

1. **Sisvel v. Haier Appeal**

Very soon after the LG delivered its decision, Haier filed an appeal at the OLG which decided to stay the injunction. But the OLG only stayed the enforcement of the injunction concerning destruction and recall of products but not the enforcement of the claim for rendering of accounts. The reason for this stay by the OLG was that the LG did not fully consider Sisvel’s offer, so it was unclear for the OLG if that offer was in fact on FRAND terms. In the OLG’s opinion if it was not a FRAND offer, there would be no obligation from the Huawei decision for Haier to respond to that offer. In order to actually have the injunction stayed, Haier had to post a bond of 450,000 Euro with the court. We do not know if that happened, but we assume that it did. Meanwhile, the OLG issued a second decision in the appeal proceedings on 17 November 2016 (i.e., 10 months after the first decision). The second decision instructed Sisvel and Haier to do some “homework”: Until 19 December 2016 (i.e., in “just” about 1 month) Sisvel needed to provide a FRAND offer, while Haier needed to reply by 19 January 2017 (i.e., in just a month thereafter, even including Christmas season in Germany) with a FRAND counteroffer, if Haier chose to reject Sisvel’s offer. Although those one-month deadlines seem very short, one needs to

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43 LG Düsseldorf, 24 April 2012, 4b O 274/10.
take into account that both parties were in contact and exchanged offers for at least two years. So they should have been well prepared to keep the deadlines.

But there is one aspect that needs closer attention. The OLG’s order to Sisvel was not merely “to make a FRAND offer”; rather, the OLG actually made quite a lot of comments as to what shall be included in the offer. The OLG, for example, asked Sisvel to:

a. specify the way in which the royalty is to be calculated, i.e. provide calculation factors,
b. provide information that the offer is neither discriminatory nor exploitative,
c. provide other licenses to show non-discrimination (while confidentiality obligations towards third parties do not release Sisvel from its duty to show non-discrimination),
d. use e.g., claim charts to show infringement (while the OLG already said that 3 claim charts are not enough for a portfolio of more than 400 patents),
e. provide a “proud list” of 10 to 15 patents with claim charts (as this is usual business practice to start negotiations),
f. explain in detail the selection of the patents in the “proud list”,
g. provide further explanations if differing claims exist in a patent family and those differing patents would not be infringed, which could lead to a noticeable change in scope of all licensable actions,
h. explain (direct- or indirect-) infringement not only for device claims but also for method and system claims - that do not protect the device - under applicable laws with regard to those patents that do not have any device claims,
i. add an adjustment clause that makes it possible to adjust the price (in both directions) when there is a noticeable change concerning the validity of the patents (while a time limitation of 3 years does not compensate for that),
j. show that with respect to the license fees a comparison with a pool is justified (which is only the case if the portfolio has similar quality and extent),
k. provide a statement about the allegation that the validity of some patents had not been challenged only because Sisvel did not file an action against potential infringers,
l. justify any selection of sued infringers (as there can be discrimination if only selected infringers have been sued),
m. explain why it is FRAND if the same licensee fee, which is due for all patent families of the portfolio, also applies for usage in countries where only one patent is valid and infringed (but it might be possible to argue this with “industry practice”; otherwise it might be necessary to bind the license fee to the number of used patents),
n. explain the same for expired patents, and
o. protect a licensee from a too high burden in case further license requests of SEP holders would be made (if this would be missing, reasons would need to be provided).

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44 The OLG actually used the English language expression “proud list”, which in US might be called “Crown Jewels”
One month for answering all those requests and questions by the OLG seems very short.

In the same decision, the OLG asked Haier to explain the exhaustion allegations that they had made during the case. And the court noted that an unacceptable overall royalty burden for Haier is not apparent, as only license fees actually requested by third parties can be considered for such an allegation.

Another comment from the OLG was that, just because Sisvel is described by Haier as an “NPE” (“Patentverwertungsgesellschaft”), Sisvel should still not be handled differently than any other plaintiff.

On 16 February 2017 (i.e., 4 weeks after Haier’s counteroffer), there was a further oral hearing at the OLG which did not result in a final decision. While the court will ultimately decide on the FRAND offer, in that hearing the court stated that, generally, the SEP owner has a lot of flexibility concerning the terms and conditions of the FRAND offer. There is some chance that on 30 March 2017 (which will be after the date of submission of this paper) the OLG will render its final decision in this case.

B. St. Lawrence v. Deutsche Telekom and HTC

Not even 4 weeks after the Sisvel v. Haier decision of the LG Düsseldorf, the LG Mannheim decided in first instance about the complaint of St. Lawrence (SLC). There was an appeal filed with the case number “6 U 220/15” but that is not public yet. Just as the LG Düsseldorf, the LG Mannheim granted an injunction as Deutsche Telekom (DT) did not show any willingness to negotiate a FRAND license - in contrast to some of its suppliers. This case is special since DT relied mainly on the fact that HTC as its supplier was willing and that SLC’s behavior was abusive towards HTC.

The court found that SLC made several world-wide (FRAND) offers to HTC, but HTC replied with offers that covered Germany only, and even conditioned those on the High Court of England and Wales to set a license fee. HTC deposited an insufficient security only after the Huawei decision was published (and 5 months after its own counteroffer). The European Commission asked DT, HTC and another company to provide information for an investigation into a possible anti-competitive conduct. The LG Düsseldorf case continued as the pending investigation did not merit a stay of proceedings. (And - as far as we know - no decision has been taken yet by the European Commission.) As in Sisvel v. Haier, the LG Mannheim argued that even a patent ambush would only result in a FRAND license obligation and not in an unenforceability of the patent. Also here the notification from SLC to DT was considered late by the court, but, in its view, the late notice was irrelevant because in any event DT was considered unwilling to conclude a license.
The court held that a time span of 3 months for the reply by HTC to an offer from SLC is too long. Besides that, the counteroffer from HTC was considered to be not sufficient. Again, just as in *Sisvel v. Haier* in first instance, the LG Mannheim held that there’s no necessity for SLC to make a FRAND compliant offer to serve as a trigger for DT to make a counteroffer. Though this was reversed by the OLG Düsseldorf in the *Sisvel v. Haier Appeal* case, we don’t know if the OLG Karlsruhe would have made the same decision. The court also stated just as Advocate General Wathelet in its Opinion in the Huawei case[^45], that a SEP owner - that is under a FRAND obligation - shall prepare an offer at the time of the grant of the SEP.

**C. Pioneer v. Acer**

Just as *SLC v. DT and HTC*, the *Pioneer v. Acer* case was decided by the LG Mannheim. Here the court stated that in transitional cases any obligations arising out of the Huawei decision can be rectified after filing the case. As you will see below at the Appeal in this case, the OLG Karlsruhe confirmed this statement, while in the case *Philips v. Archos I* (which is not a transitional case, see below) the LG Mannheim decided differently.

The court decided that if the original offer was world-wide, and the infringer sells also in other European countries, a counteroffer that only covers Germany and the patent in suit does not comply with the usual practice in the industry concerned and therefore is not considered FRAND. The LG also held that a patent holder can sue an infringing component vendor or the seller of the whole product. The court’s statement also made clear that there is no rule that an infringing component vendor alone should be the subject of a claim. With those reasons the court granted an injunction against Acer, also because the court considered Acer’s counteroffer to be insufficient and because Acer did not render accounts, which amounted to delay tactics.

This case was stayed from November 2014 until July/August 2015 to await the outcome of the Huawei decision. The LG Mannheim decided that Pioneer made an offer that isn’t obviously non-FRAND. But this test was reversed by the OLG Karlsruhe (see below).

1. **Pioneer v. Acer Appeal**

Just as most cases, this one went to the OLG for appeal. In the order that stayed the injunction the OLG gave some general guidance:

   - In transitional cases an Article 102 TFEU defense isn’t possible even if the patent holder only informed the infringer of the infringement when filing the action and made a written FRAND offer during the proceedings when the infringer does not respond to that offer according to the usual business practices and in good faith.

- When checking if the offer of the patent holder is in fact FRAND, the (lower) court needs to do more than just a “summary review” and “evidentiary check”.
- But it is possible to allow the patent holder quite some flexibility for its decision to define a license on FRAND terms and conditions.

With those principles in mind the OLG stayed the injunction against Acer, as the OLG refused to follow the main findings of the LG decision. The OLG did not accept that even a “not exactly FRAND” offer would be fine and that only an offer that is an “exploitation abuse” would be non-FRAND and anti-competitive. The OLG further held that the LG’s decision was not justifiable in light of the Huawei decision as only a FRAND offer can trigger the obligation by the alleged infringer to make a FRAND counteroffer. The OLG also noted that decisions of the CJEU, according to Article 267 TFEU, have an *ex tunc* effect, and so need to be complied with even in transitional cases.

**D. Unwired Planet v. Huawei and Samsung**

Unwired Planet (UP) filed three parallel actions at the LG Düsseldorf against Huawei and Samsung. They were all decided and published on the same day. It is not fully clear if all three decisions concern all defendants (and the patents might be different), but the substance of the decisions is identical anyway.

These three cases are different to most of the others we discuss in this paper, as UP did not seek an injunction in the first place. Still the defendants made an Article 101/102 TFEU defense, which was not granted. Ericsson is an intervening party in these cases, as Ericsson owned the UP patent(s) originally. The defendants were judged to render accounts and to provide various information (*e.g.*, about advertising, production costs, etc.). The court held that the “Master Sale Agreement” between Ericsson and UP did not infringe Article 101 TFEU.

For the court there are no antitrust reasons that would hinder the transfer of the patents in suit as the turnover thresholds in Germany were not exceeded. The intention of Ericsson to get a fair return on its patents is not in violation to antitrust law and there is no general ban on sales of SEPs by antitrust law either. There is not even an obligation for the patent holder to continue licensing its SEPs as in the past, except to comply with FRAND. Splitting a portfolio by sale to different companies is permissible (except if the objective is to extract excessive, specifically higher than FRAND, royalties or to discriminate against potential licensees). Higher, but still FRAND, royalties after the split are not impermissible.

The court considered the argument that in the aggregate the royalties were outside of FRAND. The court held that the defendants must disclose information about other license agreements applicable to the products of the case and which license fees were requested, to determine whether all fees combined are still in line with FRAND or might need to be reduced.
because of their total amount. Not each SEP results in market dominance, but in this case, as the technology in question is essential for network operators as well as end users, the court found market dominance.

A FRAND declaration in itself does not give any potential infringer the right to conclude a FRAND license.

E. NTT DoCoMo v. HTC

Ten days after the UP decisions in Düsseldorf, the LG Mannheim decided the case *NTT DoCoMo v. HTC*. The court emphasized the following principles:

- The notification obligation of the patent holder can be satisfied by providing claim charts to the alleged infringer if these enable the alleged infringer to assess the alleged infringement.
- A court does not need to objectively judge the FRAND offer. It is sufficient if the patent holder shows why in its opinion its offer is FRAND and the alleged infringer does not show that the offer manifestly violates FRAND aspects.
- The alleged infringer needs to respond to that offer even if, as usual, the alleged infringer thinks the offer is not FRAND.

Based on those principles the court granted an injunction as HTC did not promptly reply to NTT DoCoMo’s offer. Actually HTC waited for about 18 months after getting a first offer and six month after the case was filed until it made a first counteroffer. HTC also did not promptly provide a security after DoCoMo rejected its counteroffer and did not comply with all its obligations until the end of the oral proceedings.

The court noted that claim charts for six patents by way of example are sufficient information even for a portfolio license. The offer from NTT DoCoMo is not insufficient according to the rules of the Huawei decision just because HTC and NTT DoCoMo differ in their opinion that the smallest saleable unit should be the base, or that also the value of the patents and not just their share in the W-CDMA and LTE pools should be taken into account when calculating the royalty. At one time the fees of the offer by NTT DoCoMo and the proposed fees in the counteroffer of HTC differed by a factor of 33.

F. St. Lawrence v. Vodafone and HTC

Besides suing Deutsche Telekom and HTC in Mannheim, SLC also sued Vodafone and HTC at the LG Düsseldorf. There are several parallels, but this case is different as you will see at the Appeal below. The LG granted an injunction as Vodafone did not declare its willingness in
time and did not make a counteroffer. Actually even the patent in suit is the same one as the one in the DT case in Mannheim.

The LG noted that other mobile phone manufacturers have taken licenses for the patents in suit. Also here HTC offered license agreements that covered (only) the whole German portfolio and the fee should be determined by an English court. The European Commission also looked into this case, just like in *SLC v. DT and HTC*.

Though Vodafone is known as a network operator, Vodafone also sells handsets under its own brand. Even more surprising was the statement by Vodafone that it does not know if the products implement the mobile telephony standard and an internal check did not provide any insights.

One comment from the LG Düsseldorf, which we have seen only in this case, relates to the timeliness of the infringement notice by SLC to Vodafone. The risk of a “torpedo”, which is the possibility for the alleged infringer to file a suit for negative declaratory relief - for the German patent in suit - in another EU country, was not considered by the CJEU in the Huawei case. The plaintiff could reduce that risk, according to the LG, by filing the suit but delaying the payment of the court fees. Even for non-transitional cases, the LG stated that the infringement alert can be given after filing the complaint, but has to be given before paying the court fees in order to meet the requirements of the Huawei decision.

Also this case is a transitional one, and so the court decided that there are no consequences out of the late notice by SLC. Because the Orange Book decision was the applicable law at the time of filing this case, SLC had no reason to notify Vodafone about the infringement in advance. As a result, a formalistic application of the Huawei rules is not appropriate. The Huawei decision does not forbid rectifying the omission of the notice during the case, which was done by SLC. And a detailed notice of infringement shortens the time for checking the offer and declaring willingness to take a license. So the 5 months for the reply by Vodafone were considered too long. (As you can see from the DT case above, the LG Mannheim even considered 3 months to be too long.)

The court noted that there is a strong assumption that the offered fees are FRAND if numerous licensing agreements with similar conditions have been concluded by the SEP owner. Moreover, if those licenses included a world-wide portfolio license, there’s a strong assumption that such a licensing practice is FRAND, too. A single patent license in Germany (as offered by HTC) could then result in discrimination. SLC presented 55 press releases about license agreements in the electronic and mobile industry, out of which 53 dealt with world-wide licenses. Even though a German patent gives the patent holder rights only in Germany, still a FRAND counteroffer must to be according to usual business practices which may require a world-wide license.
As reimbursement for paid royalties is not usual in license agreements, the patent user needs to pay a license fee even if a nullity action is pending. The option, in an offer from SLC, for a review of the license fee by a court prevents the patent user from paying excessive fees. If SLC would not have satisfied its obligations under antitrust law with respect to HTC, then HTC mobile phones would not be subject to the injunction; but as Vodafone was sued instead of HTC this rationale is not applicable in this case.

The court also found that a counteroffer made only after oral proceedings in a parallel case seems to show delay tactics, and a license fee of 0.033 USD seems to low, and would result in discrimination, as higher fees are accepted in the market. Under these circumstances, a SEP owner can enforce an injunction until a FRAND license has been concluded.

Finally the court noted that the right of the patent owner to select against whom to enforce the patent is not limited by antitrust law. (This statement by the LG Düsseldorf is different to the Sisvel v. Haier Appeal decision by the OLG Düsseldorf, which explicitly asked Sisvel to explain why it had sued a specific potential infringer and not others, as this could hint towards discrimination.)

The court saw the problem of pressure if the plaintiff attacks the network operator, but did not think it is a real issue as “this is mostly compensated due to the fact that the patent holder has the same antitrust obligations towards the manufacturers, and those have also the right to get a license for the patent in suit. If the SEP owner denies them a license, then the manufacturers can rely on the compulsory nature of the grant of the license which protects any following distribution level” (that is, a later participant in the distribution chain can claim exhaustion of rights).

1. St. Lawrence v. Vodafone and HTC Appeal

Roughly a month later the appeals court, the OLG Düsseldorf decided not to stay the injunction granted by the LG Düsseldorf as it saw no evident error in the decision. This is the only OLG decision we are aware of to date that has upheld the lower court’s injunction. (Of course, as noted, we are limited to publicly available cases.)

A willing defendant always has the chance to comply with its obligations during the case and thereby avoid an injunction, as depending on the details of the case a rectification of any omission should be possible during the proceedings. (This statement of the OLG Düsseldorf is in contrast to the decision by the LG Mannheim, which decided in Philips v. Archos I (see below) that such a rectification is not possible. But Philips v. Archos I is a non-transitional case.) As infringement cases in Germany usually last for at least one year there is enough time for all parties to comply with their obligations.

The OLG Düsseldorf also noted that there are difficult legal questions which are unresolved as of today and therefore need to be discussed in detail in the further proceedings at
the OLG\textsuperscript{46}. (But as of today no additional decision in this case has been published.) One of those questions concerns the issue if and under what conditions a SEP holder needs to comply with its Huawei obligations (in advance, exclusively or cumulatively?) also towards the manufacturer (HTC), when the SEP owner is seeking an injunction against the supplier of infringing devices (Vodafone). So the OLG Düsseldorf has not issued its final opinion on this question, while the LG Düsseldorf has said that “the manufacturers can rely on the compulsory nature of the grant of the license which protects any following distribution level”.

G. Philips v. Archos I

In our list of cases, this is the first non-transitional case. Furthermore, Philips is the first plaintiff that was denied, an injunction, against Archos, as Philips failed to explain its royalty rate. The court, LG Mannheim, found the general presentation of the UMTS licensing program did not include information that could have satisfied the requirement to explain the $1 royalty rate. Still Archos needs to render accounts, including information about cost of production and profits, because the claims for rendering of accounts and damages are not affected by a successful FRAND defense.

Archos asked the court to stay this case until a parallel case\textsuperscript{47} in The Hague, Netherlands, would be decided, but the court denied this request. Just a few weeks ago (8 February 2017) the Dutch court confirmed that Archos has not shown that Philips` offer was not FRAND. But the LG Mannheim considered a simple “factor” for the calculation of the royalty rate as not being sufficient and dismissed Philips` request for an injunction. (This was also the approach adopted by the OLG Karlsruhe in Pioneer v. Acer Appeal. See above.)

Archos made an exhaustion allegation, as the Qualcomm chips it uses are licensed by Philips. But the exhaustion allegation was rejected as Archos also uses chips from company “M”.

In contrast to the OLG Düsseldorf in SLC v. Vodafone and HTC Appeal (see above), the LG Mannheim decided that further information during pending proceedings is too late. So it has to be seen which interpretation will prevail in the end. But it seems that the LG Mannheim opinion has some merit in the long run, as non-transitional cases, \textit{i.e.}, cases that were filed after the Huawei decision, may be strict in that regard.

\textsuperscript{46} All first OLG decisions we cite in this paper are preliminary orders; the final decisions are rendered 12-18 months after the preliminary orders.

H. Philips v. Acer Appeal

Note that the LG Mannheim decision is not public, but just the appeal decision of the OLG Karlsruhe. This Philips case, as well as the Pioneer v. Acer case above and the Sony v. Acer case below, are all related to the RedOne Pool. Here, the technology in question is DVD subtitling (and not telecommunications technology, the basis for most of the other cases in this paper).

The court stated a couple of guiding principles:

- It has not yet been decided whether an Article 101 TFEU defense is available against a claim based on a SEP.
- In addition, it has not been decided whether, and under which circumstances, the FRAND declaration can limit a claim for damages and a demand for accounting information necessary to determine a FRAND royalty.
- An exploitation of the patent via a patent pool does not directly lead to a bar of an injunction.

Out of these principles, the OLG Karlsruhe decided to not stay the enforcement of the LG Mannheim decision by payment of a security. As far as we can see, the LG Mannheim decision was only about providing information and not about an injunction. Or the injunction request had been denied.

The court noted that some literature calls for an enforcement bar for SEPs, but these academic views only concern the injunction but not the damages claim or the request for information. It is justified that a SEP owner asks the infringer to provide information about the cost of production and the profit obtained as well as the advertisement done.

I. Sony v. Acer Appeal

Here again, the lower court decision, from the LG Mannheim is not public. Information on the case is from the appeal decision of the OLG Karlsruhe; but some of the reasons provided by the LG Mannheim can also be found in the OLG decision. The LG Mannheim granted an injunction as it considered Acer to not being a willing licensee. The OLG granted Acer’s request for stay, but only in respect of the recall and removal of products; the other aspects of the request for stay - stopping in Germany to offer, sell, or use the infringing devices, rendering of accounts and paying damages - were denied. The main reason for the stay was that the LG Mannheim only checked if the offer from Sony was obviously “not non-FRAND” and did not check the offer in full detail. This is the same reasoning as we saw in Sisvel v. Haier Appeal of the OLG Düsseldorf and Pioneer v. Acer Appeal of the OLG Karlsruhe above. Concerning this aspect of SEP/FRAND cases at least these two OLGs in Germany are in sync. Unfortunately we could not find any public case of the OLG Munich so far.
The OLG Karlsruhe stated a guiding principle that there is no reason to stay the enforcement of providing information by the infringer in a FRAND case, even if asking for information on profits made by the infringer to calculate damages. But the question concerning the scope of the information request and rendering of accounts needs to be decided in the final decision by the OLG.

The court also noted that the expiration of old patents under the license does have a significant impact on deciding whether the license fees are reasonable or not.

Sony and Acer negotiated for three years.

**J. Philips v. Archos II**

This case is consistent with *Philips v. Archos I*: no injunction was granted on the basis that Philips failed to explain its royalty rate. As this decision is in most parts exactly identical to *Philips v. Archos I*, except the patent in question, we refrain from reiterating that decision.

**K. OLG Düsseldorf on confidentiality**

The OLG Düsseldorf issued two orders that did not involve an injunction. In those orders, the court explained the possible safeguards for the material that is marked as “Strictly Confidential” (SC), which was provided by the SEP owner that was required to make a FRAND offer. In the first order, the court rejected the SEP owner’s request for confidentiality that would not let the defendants and the intervening party access all the details of the SC material. The SEP owner had two options, either give the defendants full access, or the court would render its decision based only on the information available to the defendants. The court set a three-week deadline for the SEP owner to decide and designate the material in question.

But the court also noted that as it is usual business practice to ask for an NDA for SC material. And the defendants have the obligation to facilitate FRAND negotiations, which includes agreeing to a confidentiality request by the SEP owner. Also, the defendants were given a three-week deadline to submit arguments on this issue.

The second order of the OLG Düsseldorf stated that, for the intervening party, only the party’s attorneys may review the SC material, as the intervening party had already agreed to such a procedure earlier during the case. The court also held that the defendant needs to agree to conclude an NDA that will be limited only to four designated employees of the defendant, who will be allowed to access the SC material. In case of breach, the defendant would need to pay a

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48 The two orders are inconsistent with regard to the number of defendants; sometimes they state plural, sometimes only singular.
one million Euro penalty. The court gave the defendant a three-week deadline to make an NDA offer to the SEP owner and then another two weeks for the SEP owner to agree to that offer.

VII. Conclusions

This paper discusses some of the recent, publicly available cases that involved SEPs and were decided by German courts after the CJEU decision in *Huawei v. ZTE*. All of the cases discussed, except for the two *Philips v. Archos* cases, were filed before but decided after the Huawei decision (*i.e.*, so-called transitional cases). In all cases, the defendant(s) asserted Article 101 or Article 102 TFEU, seeking denial of an injunction or even a finding of unenforceability or royalty free license.

The Regional Courts (“LG”) in Germany have generally treated the requirements set forth by the CJEU less strictly than the Higher Regional Courts (“OLG”). Hence, in most cases at the Regional Courts where an injunction was sought, the court granted the injunction. By contrast, at the Higher Regional Courts, with the exception of one case, all of the cases resulted in a stay of the injunction. If the patent owner did not fully satisfy its pre-filing obligations (*e.g.*, did not make a FRAND compliant offer), the Higher Regional Courts stayed the injunction. If, however, in the opinion of the Higher Regional Court the potential licensee was clearly unwilling to take a FRAND license an injunction was confirmed, even though the patent owner only satisfied its Huawei obligations during the case.

Our review of the publicly available cases shows that German courts have markedly changed their attitude towards SEPs in light of the Huawei decision. Although it was possible to file a complaint based on a SEP before the Huawei decision, without notifying the defendant, now, most likely, that would be considered an antitrust (Article 102 TFEU) violation that would result in the denial of an injunction. The same is true for offers by the patent holder that are (at least obviously) not FRAND or do not explain in some detail how the licensing fee is calculated. Moreover, the potential infringer should be prepared for any potential infringement claim, as the time it will have to respond to any FRAND offer from a SEP holder will be limited. If infringer’s response is too late, the infringer might be considered unwilling to take a FRAND license and cannot successfully bring a FRAND defense anymore.

As of the time of this paper, there were no public final decisions from any Higher Regional Court or any decision from the German Federal Court of Justice (“BGH”). There are still many open questions that the CJEU did not address.

- How much detail is necessary for the explanation of the royalty by the SEP holder to be considered sufficient by the court?
- Three months (we have even seen 2.5 months in a non-public decision) for a reply with a FRAND counteroffer by the potential licensee have been considered too long. But what will be the maximum timeframe for a reply?

- Often, an offer from a SEP holder will be considered by a court to be in the FRAND range, even if the potential licensee thinks that it is not. But when can a potential licensee be sure to be on the safe side when not replying with a counteroffer in a timely manner? (For example, it seems that the potential licensee should “bite the bullet” and deposit a reasonable security for any past infringing actions, so that it will be able to defend against a potential injunction).

Therefore it is still rather difficult to predict the outcome of a specific case. E.g. if a potential licensee tries to achieve a favorable solution while complying with FRAND requirements, it might be difficult to sort out which behavior and which offer is still within the FRAND range, without making too many concessions to the SEP holder. Also the SEP holder might be denied an injunction if it misses to explain one aspect of its offer.

But all in all the Huawei decision created a level playing field for both parties. Only if both parties act in good faith and promptly, they can be sure either not to be subject to an injunction (for a potential licensee) or to obtain one (for a SEP holder), if the other party does not act accordingly. And this result brings us exactly where we started - good faith discussions between the willing parties will typically result in a license and will keep both parties out of the courts, which was the intention of the CJEU decision in *Huawei v. ZTE*. 
## VIII. Appendix

### List of known public cases (as of 10 March 2017)

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Links to all cases


Articles 101 and 102 TFEU:

Article 101 TFEU (Treaty on the Functioning of the EU) (former Article 81 TEC49)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings,

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- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical
or economic progress, while allowing consumers a fair share of the resulting benefit, and which
does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the
attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial
part of the products in question.

**Article 102 (former Article 82 TEC):**

Any abuse by one or more undertakings of a dominant position within the internal market or in a
substantial part of it shall be prohibited as incompatible with the internal market in so far as it
may affect trade between Member States.

Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading
   conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby
   placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of
   supplementary obligations which, by their nature or according to commercial usage, have no
   connection with the subject of such contracts.