



在 SEP 许可谈判中什么样的行为会被认为是违反 FRAND 原则【法规篇】

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近年来，由于牵涉巨大的商业利益，SEP 在全球范围内成为一个热议的话题。其中，在涉及 SEP 的诉讼中是否可以发出禁令成为焦点之一。在中国北京市高级人民法院于 2017 年 4 月发布的《专利侵权判定指南》、欧盟于 2017 年 11 月发布的《Setting out the EU approach to Standard Essential Patents》、中国广东省高级人民法院于 2018 年 4 月发布的《关于审理标准必要专利纠纷案件的工作指引（试行）》以及日本专利局新近于 2018 年 6 月发布的《GUIDE TO LICENSING NEGOTIATIONS INVOLVING STANDARD ESSENTIAL PATENTS》中，都涉及了是否可以发出禁令。总的来说，在这 4 个文件中对于禁令的发布的规则基本类似，即考虑到 SEP 的特殊性质，通常情况下不应该发布禁令，但是在专利权人没有违反 FRAND 原则而实施者违反了 FRAND 原则的情况下，法院可以发布禁令。

那么，在 SEP 许可谈判中什么样的行为会被认为是违反了 FRAND 原则？对此，中国的《专利侵权判定指南》、《关于审理标准必要专利纠纷案件的工作指引（试行）》以及日本的《GUIDE TO LICENSING NEGOTIATIONS INVOLVING STANDARD ESSENTIAL PATENTS》中例示了一些具体行为。下述的表格以对比的方式示出了中国、日本的上述 3 个文件中例示的行为，其中性质类似的行为被置于同一行。由下可以看出，三个文件中针对违反 FRAND 原则的行为的规定没有冲突，大部分一致，但是日本专利局的指南中对于违反 FRAND 原则的行为的描述更加具体。以签订保密协议为例，日本专利局的指南中根据要披露的信息是否包括保密信息，来确定实施者拒绝签订保密协议是否会违反 FRAND 原则。

	北京市高级人民法院 《专利侵权判定指南》	广东省高级人民法院《关于 审理标准必要专利纠纷案件 的工作指引（试行）》	日本专利局《GUIDE TO LICENSING NEGOTIATIONS INVOLVING STANDARD ESSENTIAL PATENTS》
专 利	▪未以书面形式通知被 诉侵权人侵犯专利权，	▪未向实施者发出谈判通知， 或虽发出谈判通知，但未按	

<p>权利人</p>	<p>且未列明侵犯专利权的范围和具体侵权方式</p>	<p>照商业惯例和交易习惯列明所涉专利权的范围</p>	<ul style="list-style-type: none"> ▪ Not disclosing its documents identifying the SEPs and documentation mapping SEP claims to the standards and/or products such as claim charts, when offering licensing negotiations to an implementer, such that the implementer can understand the rights holder's claims ▪ Not disclosing the content of a portfolio to the implementer (the technologies, number of patents, regions, etc., covered by the portfolio)
	<ul style="list-style-type: none"> ▪ 在被诉侵权人明确表达接受专利许可协商的意愿后，未按商业惯例和交易习惯以书面形式向被诉侵权人提供专利信息或提供具体许可条件的 	<ul style="list-style-type: none"> ▪ 在实施者明确表达接受专利许可谈判的意愿后，未按商业惯例和交易习惯向实施者提供示例性专利清单、权利要求对照表等专利信息 	<ul style="list-style-type: none"> ▪ Making an offer that sets a time limit that does not allow a reasonable period of time for consideration
	<ul style="list-style-type: none"> ▪ 未向被诉侵权人提出符合商业惯例和交易习惯的答复期限 		
	<ul style="list-style-type: none"> ▪ 在协商实施许可条件过程中，无合理理由而阻碍或中断许可协商 	<ul style="list-style-type: none"> ▪ 无正当理由阻碍或中断谈判 	
	<ul style="list-style-type: none"> ▪ 在协商实施许可过程中主张明显不合理的条件，导致无法达成专利实施许可合同 	<ul style="list-style-type: none"> ▪ 未向实施者提出具体许可条件及主张的许可费计算方式，或提出的许可条件明显不合理，导致无法达成专利实施许可合同 	<ul style="list-style-type: none"> ▪ Presenting an initial offer that is clearly unreasonable given court rulings and comparable licensing terms, and sticking to that offer during the negotiation process
		<ul style="list-style-type: none"> ▪ 未在合理期限内作出答复 	
			<ul style="list-style-type: none"> ▪ Claiming that it will not provide documentation mapping SEP



			claims to the standards and/or products such as claim charts to the implementer unless the implementer concludes a confidentiality agreement, even though the documentation does not include confidential information
			▪ Demanding injunctive relief before or immediately after sending a warning letter to the implementer, or immediately after opening a negotiation
			▪ Seeking an injunction against an implementer who has expressed its willingness to obtain a license on FRAND terms before offering a license on those terms, for the purpose of gaining leverage in the licensing negotiations
			▪ Sending letters warning that the rights holder will seek injunctive relief (cease-and-desist letters) to business partners of an implementer who has expressed its willingness to obtain a license on FRAND terms, despite ongoing negotiations
			▪ Not explaining how the royalty is calculated or not demonstrating that the license offer is on FRAND terms

<p>实施者</p>	<ul style="list-style-type: none"> 收到专利权人的书面侵权通知后，未在合理时间内积极答复的 	<ul style="list-style-type: none"> 拒绝接收标准必要专利权人的谈判通知，或收到谈判通知后未在合理时间内作出明确答复； 未在合理期限内对标准必要专利权人提供的示例性专利清单、权利要求对照表等专利信息作出实质性答复 	<ul style="list-style-type: none"> Not giving any reason for a very late reply or refusing to negotiate at all, even while continuing to use the infringing (or potentially infringing) technology
	<ul style="list-style-type: none"> 收到专利权人的书面许可条件后，未在合理时间内积极回复是否接受专利权人提出的许可条件，或在拒绝接受专利权人提出的许可条件时未提出新的许可条件建议的 	<ul style="list-style-type: none"> 收到标准必要专利权人许可条件后，未在合理期限内作出实质性答复 	<ul style="list-style-type: none"> Not providing any counteroffer on FRAND terms after a rights holder has presented specific grounds showing that its proposed licensing terms are FRAND
	<ul style="list-style-type: none"> 无合理理由而阻碍、拖延或拒绝参与许可协商的 	<ul style="list-style-type: none"> 无正当理由拖延或拒绝进行许可谈判 	<ul style="list-style-type: none"> Unreasonably delaying negotiations by, for example, persistently demanding that the rights holder provide information that cannot be disclosed due to a confidentiality agreement(s) with others Repeatedly making meaningless responses
	<ul style="list-style-type: none"> 在协商实施许可条件过程中主张明显不合理的条件，导致无法达成专利实施许可合同 	<ul style="list-style-type: none"> 提出的实施条件明显不合理，导致无法达成专利实施许可合同 	<ul style="list-style-type: none"> Presenting an initial counteroffer that is clearly unreasonable given court rulings and comparable licensing terms, and sticking to that counteroffer during the negotiation process
		<ul style="list-style-type: none"> 无正当理由拒绝签订保密协 	<ul style="list-style-type: none"> Completely refusing to conclude a confidentiality



		议, 导致无法继续谈判	agreement, while demanding that the rights holders provide claim charts, including detailed claim interpretations containing confidential information, or making repeated revisions to confidentiality agreement conditions to delay negotiations
			▪ Claiming it will not start negotiation unless all grounds for essentiality and validity of the SEPs are first provided
			▪ Colluding with multiple other implementers in obstinately refusing to obtain a license on the grounds that others have not obtained it
			▪ Not explaining how a proposed royalty is calculated or not demonstrating that the counteroffer is on FRAND terms