Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The FRAND transparency paradox: non-discrimination, confidentiality and comparable licences in standard essential patent litigation

The FRAND transparency paradox: não discriminação, confidencialidade e *Comparable Licences* nos litígios sobre standard essential patents

Cesar Beck[1]*; Juliana Oliveira Sobieski*[2]

Abstract

Standard Essential Patent (SEP) litigation increasingly relies on comparable licenses to determine fair, reasonable and non-discriminatory (FRAND) terms. Yet the contractual information required for comparison is frequently protected by confidentiality clauses, non-disclosure agreements, trade secrets and procedural restrictions on access. This article examines how the non-discrimination limb of FRAND can remain legally verifiable under those conditions. Using a qualitative, comparative, and doctrinal legal approach, it analyses recent EPO, WIPO, and UKIPO materials together with a deliberately limited set of judicial decisions, particularly *InterDigital v. Optis*, *Samsung v. ZTE,* and *MediaTek v. Huawei*, complemented by recent Brazilian SEP litigation. The article identifies a *FRAND Transparency Paradox*: the law increasingly requires comparison while simultaneously protecting the information necessary to perform it. It argues that resolving this tension does not require unrestricted disclosure of comparable licenses, but rather institutional verifiability—procedural conditions under which materially relevant confidential information can be examined and meaningfully challenged without unnecessary public disclosure. The article proposes three parameters for that architecture: protected access, contextual verification and public reasoning. Confidentiality may remain legitimate; it should not operate as evidentiary blindness.

Keywords: Standard Essential Patents; FRAND; Non-Discrimination; Comparable Licenses; Confidentiality; Institutional Verifiability.

1. PhD Candidate in Law (Digital Law and AI Governance) School of Law, ATITUS University, Passo Fundo, Brazil. Email: ocesarbeck@gmail.com | ORCID: https://orcid.org/0000-0002-8625-6503
2. PhD Candidate in Law (Digital Law and New Technologies) School of Law, ATITUS University, Passo Fundo, Brazil. Email: julianasobieski.js@gmail.com | ORCID: https://orcid.org/0009-0001-3419-3168

[Recebido/Received; Aceito/Accepted; Publicado/Published: 01/09/2026]
DOI: https://doi.org/10.18256/2238-0604.2026.v22i.5407

Resumo

Os litígios envolvendo Patentes Essenciais a Padrão (Standard Essential Patents — SEPs) dependem cada vez mais de licenças comparáveis para a determinação de condições justas, razoáveis e não discriminatórias (FRAND). Entretanto, as informações contratuais necessárias à comparação frequentemente se encontram protegidas por cláusulas de confidencialidade, acordos de não divulgação, segredos comerciais e restrições processuais de acesso. Este artigo investiga como a dimensão de não discriminação de FRAND pode permanecer juridicamente verificável nessas condições. Por meio de uma abordagem jurídico-dogmática, qualitativa e comparativa, analisam-se materiais recentes do EPO, WIPO e UKIPO, juntamente com um conjunto deliberadamente restrito de decisões judiciais, especialmente as de *InterDigital v. Optis*, *Samsung v. ZTE* e *MediaTek v. Huawei*, complementado por jurisprudência brasileira recente sobre SEPs. Identifica-se um *FRAND Transparency Paradox*: o Direito exige, crescentemente, a comparação, ao mesmo tempo em que protege as informações necessárias para realizá-la. Sustenta-se que a solução dessa tensão não exige a divulgação irrestrita das licenças comparáveis, mas a verificabilidade institucional — condições processuais que permitam examinar e contestar, de forma significativa, informações confidenciais materialmente relevantes, sem divulgação pública desnecessária. Propõem-se três parâmetros para essa arquitetura: acesso protegido, verificação contextual e fundamentação pública. A confidencialidade pode permanecer legítima; não deve operar como cegueira probatória.

Palavras-chave: Patentes Essenciais a Padrão; FRAND; Não Discriminação; Licenças Comparáveis; Confidencialidade; Verificabilidade Institucional.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

Introduction

In January 2026, during the trial of *Samsung v. ZTE* before the English Patents Court, determining the value of a global FRAND license required an unusual degree of procedural choreography. A substantial part of the hearings took place in private. Representatives of the companies themselves belonged to different confidentiality clubs and, as the material under consideration changed, so too did the group of people permitted to remain in the courtroom. Samsung representatives, for example, did not have access to documents concerning negotiations between *ZTE* and *Apple*; participants moved in and out of the room, while remote-access links were activated or suspended to protect confidential information. Mr Justice Meade described the arrangement, without much ceremony, as very complex (*Samsung v. ZTE*, 2026, paras. 82–84).

There is something paradoxical about the scene. In proceedings intended to establish fair, reasonable and non-discriminatory terms, not everyone could know all the information being used to determine what was fair, reasonable and non-discriminatory. This might seem merely a procedural eccentricity of litigation between technology giants—a kind of musical chairs, except with lawyers, economists and multimillion-dollar contracts. It was not. Both parties had constructed their valuation models around comparable licensses, and the Court would ultimately use a licence between *ZTE* and *Apple* as its principal reference in setting the value of a global FRAND cross-license at US$392 million (*Samsung v. ZTE*, 2026, paras. 9–11, 48). To decide the case, the Court needed access to commercial relationships that had sound business reasons for remaining outside public view. That is where the difficulty begins.

Standard Essential Patents (SEPs) protect technologies necessary to implement particular technical standards. Once incorporated into a standard, these patents occupy a peculiar position between exclusivity and interoperability: the patent holder retains its rights over the invention, but its commitment to a Standards Development Organization (SDO) to license the technology on FRAND terms constrains the manner in which that exclusivity may be exercised. Standardization enables products and technologies from different manufacturers to operate together, even though a single technological environment may incorporate hundreds or thousands of exclusive rights (BARBOSA, 2014, p. 81; ZIBETTI, 2012).

Much of the debate surrounding SEPs has focused on the meaning of *fair*, *reasonable and non-discriminatory*, on *hold-up* and *hold-out* strategies, and on the circumstances in which injunctive relief should be available. In recent years, however, a less abstract question has moved closer to the center of the debate: not only what FRAND means, but how FRAND is to be determined. In June 2026, a European Patent Office (EPO) study examined 65 decisions from seven jurisdictions, handed down between 2013 and 2025, and identified comparable-license analysis as the predominant method courts used to determine FRAND terms. Selecting the appropriate license, reconstructing its economic content—or *unpacking* it—and adjusting it to the circumstances of the case are among the central difficulties of this methodology (EPO, 2026). The World Intellectual Property Organization (WIPO) takes a similar approach, treating comparable agreements as a market-based valuation method: previous transactions may inform the value of a new license, provided that the rights, products and commercial circumstances are sufficiently comparable (WIPO, 2026).

Non-discrimination makes that comparison more difficult. It does not necessarily require identical prices or contractual terms for every implementer. Two licensees may operate at different scales, negotiate different portfolios, participate in different geographic markets, or maintain cross-licensing relationships that justify different contractual terms. Before asking whether discrimination has occurred, one must first determine who can properly be compared with whom. The EPO places the identification of similarly situated licensees precisely at the intersection between *comparability* and *non-discrimination* (EPO, 2026). Price alone tells only part of the story. And this is where the impasse emerges.

The greater the weight placed on comparable licenses, the greater the dependence on contractual information that does not ordinarily circulate freely. Royalties, discounts, portfolio valuations, negotiating strategies and cross-licensing structures may be protected by confidentiality clauses, non-disclosure agreements (NDAs), trade secrets, confidentiality clubs, private hearings or redactions in the judgments themselves. There are legitimate economic reasons for such protection. But can a relational obligation be legally assessed when the very elements required for comparison remain shielded from those who need to examine them? From this tension emerges the research question addressed in this article: how can the FRAND non-discrimination obligation remain legally verifiable when the comparable licenses necessary for the comparison are protected by confidentiality, trade secrets, or procedural restrictions on access?

This article describes that tension as the *FRAND Transparency Paradox*. The paradox does not presuppose that private agreements should become public. The hypothesis is narrower: where assessment of the non-discriminatory dimension of FRAND depends upon comparative information, some degree of institutional verifiability is required. Confidentiality may continue to protect commercially sensitive information; it should not, however, make it impossible to subject that information to the scrutiny necessary to assess the obligation that it helps to define. This hypothesis also requires a distinction that will run throughout the article: comparable licenses may operate as economic evidence for determining a FRAND rate or, in a relational sense, as evidence for assessing non-discrimination. The same agreements may perform both functions, but the functions are not equivalent.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The general objective of this article is to investigate how the confidentiality of comparable licenses affects the verifiability of FRAND non-discrimination and to identify procedural parameters capable of reconciling the protection of commercially sensitive information with effective legal scrutiny. Three specific objectives structure the inquiry: first, to examine the relationship between non-discrimination, comparability and information; second, to identify how confidentiality regimes constrain the procedural use of comparable licenses; and third, to assess controlled-disclosure mechanisms capable of sustaining minimum conditions of institutional verifiability.

The research adopts a qualitative, comparative and doctrinal legal approach. Its theoretical framework brings together Barbosa and Zibetti on technical standardization and intellectual property; Contreras on SEP/FRAND licensing and non-discrimination; and contemporary scholarship on confidentiality and informational asymmetries in licensing, particularly Brinkman. The documentary research draws upon recent materials from the EPO, WIPO and UKIPO, together with a deliberately limited set of judicial decisions selected for the particular role each performs in the argument. *InterDigital v. Optis* [2025] EWCA Civ 1263 provides a basis for examining third-party licences, the redaction of confidential information and open justice; *Samsung v. ZTE* [2026] EWHC 999 (Pat) exposes problems of comparability, segmented access and the economic reconstruction of licensing agreements; and *MediaTek v. Huawei* [2025] EWHC 1857 (Pat) provides an example of disclosure targeted according to evidentiary utility. *TCL Communication v. Ericsson* (2019) is used more narrowly to delimit the identification of similarly situated licensees. The purpose, therefore, is not to undertake a comprehensive survey of SEP case law, but to place in dialogue decisions that make different dimensions of the same problem visible.

The relevance of the inquiry also lies in its timing. FRAND adjudication is becoming increasingly dependent upon information generated within private commercial relationships at precisely the moment when courts must decide which parts of that information may circulate, among whom and for what purpose. The old question—*what is FRAND?*—has not disappeared. It has simply acquired a less elegant, and perhaps more difficult, companion: who needs to know what in order to verify that FRAND has been complied with? The answer proposed here begins with a distinction that appears simple but carries important procedural consequences: publicity, disclosure and verifiability are not synonyms. The challenge is not to choose, in the abstract, between transparency and secrecy. It is to determine how much secrecy the law can preserve without blinding the very mechanism entrusted with reviewing what lies behind it.

1 Non-discrimination does not operate in a vacuum: comparable licences and the relational structure of FRAND

Non-discrimination is perhaps the least intuitive component of the FRAND acronym. *Fair* and *reasonable*, although equally indeterminate, at least permit a question to be framed by reference to the license itself: do the terms offered adequately remunerate the technology without capturing value attributable solely to its incorporation into the standard? The "ND" element shifts the perspective. To determine whether a particular implementer has been discriminated against, it is not enough to examine the license it received. One must look sideways: how were others treated and, before that, which of them may legitimately serve as comparators?

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The issue stems from the peculiar position occupied by Standard Essential Patents (SEPs) within technical standardization processes. Standards allow products, services and infrastructures supplied by different market participants to operate interoperably, yet they may incorporate technologies protected by exclusive intellectual property rights. Barbosa observes that the collective development of a standard may encompass technological fields covered by tens, hundreds or thousands of patents held by different owners (BARBOSA, 2014, p. 81). Zibetti (2012), in turn, identifies within this relationship between standardization and intellectual property a tension between private appropriation of technology and the collective economic function performed by the standard. The FRAND commitment seeks to manage precisely this intersection: it preserves remuneration for the patent holder without allowing the incorporation of an invention into a standard to become an unrestricted freedom to determine who may use the technology and on what terms.

This tension is not unique to essential patents, although SEPs give it particular intensity. The patent system already operates, in its ordinary structure, through a compromise between appropriation and circulation: temporary exclusivity seeks to preserve economic incentives for innovation, while disclosure of the invention and the possibility of licensing enable its subsequent incorporation into new productive activities. In examining patent rights, innovation and technological investment, Pimentel and Boff (2025) recover this architecture through the TRIPS Agreement as well: intellectual property protection should contribute to technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to a balance of rights and obligations. In the SEP context, the FRAND commitment does not abandon this logic; it simply makes its demands more exacting. Once patented technology becomes necessary to implement a standard, the question is no longer merely whether the patent holder may exclude or license. It also becomes one of the factors in determining the conditions under which the exercise of that exclusivity remains compatible with interoperable access to the technology.

It is at this point that non-discrimination acquires an autonomous role. Contreras observes that, although its precise content remains contested, one premise is widely recognized: SEP holders should treat similarly situated licensees similarly (CONTRERAS, 2022). That sounds straightforward—until one has to decide who is actually similarly situated to whom. Two implementers may use the same standard yet differ in sales volume, geographic reach, license duration, portfolio composition, the existence of cross-licensing arrangements, position within the supply chain or the timing of negotiations. UKIPO guidance follows the same logic: implementers in comparable positions should receive similar terms, although price differences may be justified by the scope of the license or by value attributable to cross-licensing arrangements (UKIPO, 2024). Non-discrimination, therefore, does not mean imposing uniform terms across the market.

The everyday analogy is imperfect, but useful. Two passengers may occupy adjacent seats on the same flight and have paid markedly different fares without that fact alone establishing discrimination: they may have booked at different times, under different fare classes, or with different cancellation and baggage conditions. FRAND licensing plainly involves much more. The legal logic, however, bears a resemblance. A price difference is evidence that requires context, not a conclusion that dispenses with it. The problem is not to eliminate every difference, but to determine which differences can be objectively justified between genuinely comparable parties.

Hence the importance of comparable licenses. A transaction provides useful information only insofar as its characteristics are sufficiently close to the circumstances under examination.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

WIPO regards an agreement as genuinely comparable where the factors materially determining price and value are sufficiently similar to those of the license being assessed. Material commercial differences may weaken the comparison; conversely, materially different prices in genuinely like-for-like transactions may raise concerns as to non-discrimination (WIPO, 2026). The relevant question, therefore, is not simply *how much did the other licensee pay?*, but rather *who was that licensee, how much did it pay, and under what circumstances?*

This caution is particularly important because comparable licenses perform two functions that should not be conflated. They may serve as economic evidence to estimate a FRAND rate based on observed market transactions, without the court necessarily examining whether a particular implementer has been discriminated against. Where the dispute concerns non-discrimination, however, identifying similarly situated licensees and understanding why their contractual terms differ become part of the legal inquiry itself. The document may be the same; its evidentiary function is not.

TCL Communication v. Ericsson illustrates the latter situation well. The analysis first required identifying which licensees could be properly compared with *TCL*. *Huawei*, *LG*, *HTC* and *ZTE* were accepted by the parties as comparators, while the parties disputed whether Apple, *Samsung* and other companies belonged within the same comparative universe. Among the factors considered was the geographic scope of their operations, which was relevant to distinguishing global players from predominantly local ones (*TCL Communication v. Ericsson*, 2019). Before comparing royalties, the court first had to decide who belonged in the comparison. There is a curious inversion here: before measuring the difference, the court had to construct the ruler.

The issue has become still more significant as courts have increasingly relied on comparable licenses. In a study published in June 2026, the EPO surveyed decisions from seven jurisdictions and identified comparable licenses as the principal methodology used by courts to determine FRAND terms, while top-down approaches appeared less frequently and often served as cross-checks (EPO, 2026). This does not make comparable-license analysis the only legitimate methodology. It does, however, show that the question of what makes two licenses comparable is no longer peripheral.

The EPO itself identifies three critical operations: selecting the agreements, reconstructing their economic content by *unpacking them*, and making the adjustments required for comparison. Not every prior agreement entered into by the patent holder constitutes a reliable comparator. Licenses concluded under materially different litigation pressures, transactions involving different assets, or agreements negotiated in substantially different economic circumstances may carry reduced evidentiary weight. Nor do numerically similar royalties establish economic equivalence by themselves. Comparison is not a matter of finding two similar numbers in a spreadsheet.

Samsung v. ZTE, decided by the English Patents Court in 2026, makes the difficulty concrete. Both parties constructed their valuation models using comparables, yet disagreed precisely over which agreements deserved to occupy a central position in the analysis. Samsung relied principally on its earlier license with *ZTE* and, alternatively, on the 2020 ZTE–Apple license; ZTE advanced a different set of comparators and used a top-down methodology as an additional cross-check (*Samsung v. ZTE*, 2026, paras. 9–10). Finding a previously negotiated rate was not enough. The Court had to determine which contractual relationship provided economically reliable information for the new license.

Possessing the agreement, therefore, does not end the inquiry. A license may combine cellular and non-cellular rights, cover different territories, provide for aggregate payments or

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

incorporate consideration whose economic equivalence is not immediately apparent from the face of the document. Turning it into a comparator requires those variables to be reconstructed. Comparison, in this sense, does not search for identity; it searches for contextual equivalence.

The consequence for non-discrimination is direct. If the obligation does not require literally identical terms, its assessment necessarily depends on the factors that explain why two licenses differ. A royalty differential may reveal discriminatory treatment; it may also result from differences in portfolios, markets, volumes or consideration exchanged. The rate in isolation tells us little. And perhaps this is the most counterintuitive point: determining whether a difference is legally significant often requires knowing what justifies it as well.

Comparable licenses thus offer an important advantage over purely abstract models because they begin with relationships that were actually negotiated in the market. But the market does not deliver comparability ready-made. The decision-maker must determine whether those transactions can meaningfully speak to one another. As the EPO notes, negotiating circumstances, litigation pressure, characteristics specific to patent pools or even a lack of awareness of FRAND obligations may reduce the value of a particular agreement as a comparator (EPO, 2026).

The relational structure of non-discrimination then becomes clearer. One identifies the treatment afforded to the implementer, seeks relationships sufficiently similar to serve as comparators, and then examines whether the identified differences have an economic and legal justification. Non-discrimination does not operate in a vacuum.

But that conclusion opens a difficulty greater than the one it resolves. To determine who received which terms, why those terms differed, and whether the respective licensees were genuinely comparable, one needs access to a considerable body of contractual and economic information. Much of it is not public. At times, it cannot even circulate freely between the parties to the litigation themselves. Comparison, therefore, depends on information. What happens when precisely that information must remain secret?

2 The frand transparency paradox: confidentiality, information asymmetry and the limits of verifiability of comparable licences

If non-discrimination requires comparison, the next step may initially appear almost bureaucratic: locate the relevant agreements. The difficulty is that these agreements are not merely out of reach; they are often deliberately structured to remain so. SEP licenses may reveal royalty rates, discounts, portfolio valuations, cross-licensing structures, volumes, and negotiating strategies that can affect future bargaining positions. Confidentiality is therefore not an anomaly of the licensing market. It serves a legitimate economic function.

It is precisely that legitimacy that makes the problem harder. Brinkman observes that during negotiations or litigation, an implementer may need access to comparable licenses to assess whether it has received less favorable terms than other licensees, while the patent holder may simultaneously be bound by non-disclosure agreements entered into with third parties (BRINKMAN, 2025, pp. 203–204). There is no obvious villain in this story: the party seeking access may need it in order to exercise a legal right; the party resisting disclosure may be complying with a different legal obligation. The tension predates 2026. What the most recent case law offers is something else: an almost microscopic view of how that tension begins to reorganize the proceedings themselves.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

InterDigital v. Optis [2025] EWCA Civ 1263 is particularly revealing. The issue before the Court of Appeal did not directly concern patent validity or infringement, but the extent of redactions applied to confidential third-party information relied upon in a FRAND judgment. The underlying proceedings between *Optis* and *Apple* had required an examination of a number of earlier licenses, some of which were entered into with companies that were not parties to the litigation. *InterDigital*, *Qualcomm*, *Nokia*, *Google*, *Huawei*, and *LG* were among the third parties whose commercially sensitive information was included in the material before the court (*InterDigital v. Optis*, 2025).

The movement of a private agreement into judicial proceedings changes the nature of the problem. A licence originally concluded to govern the relationship between two companies becomes evidence used to determine the terms applicable to another legal relationship. The informational circle expands. At that point, confidentiality ceases to operate solely as a contractual clause and becomes a question of procedural design: who may know the content, for what purpose, and to what extent may it appear in the judgment?

The Court of Appeal had to address those questions through the principle of open justice, that is, the public character of adjudication and of the reasons on which judicial decisions rest. The Court nevertheless accepted that disclosure of certain financial information could materially prejudice the commercial position of its holders in future negotiations. Protection was not limited to figures reproduced verbatim from the agreements. Values derived from the economic reconstruction of the licenses, per-unit rates, and information that could allow confidential terms to be reverse-engineered could also justify redaction (*InterDigital v. Optis*, 2025).

It is here that the paradox becomes sharper. The more fully a judgment explains why a particular agreement was treated as a reliable comparator, the greater the risk of revealing information that the third party had legitimate reasons to keep confidential. Yet the more that is concealed, the harder it becomes to reconstruct the path between the evidence relied upon and the conclusion reached. The issue is therefore not simply whether the agreement itself should be made public. It reaches the public quality of judicial reasoning.

There is a small irony in this. A reader may know both the outcome and the methodology and still be unable to reproduce the calculation in full. It is rather like being given a mathematical proof in which several lines have been blacked out for sound commercial reasons: the answer may well be correct, but the possibility of checking it has diminished. Legally, that does not mean every claim to secrecy must yield to publicity. It means that transparency in adjudication and protection of confidential information may come into tension precisely because the latter helps constitute the reasoning that the former is expected to expose.

Samsung v. ZTE [2026] EWHC 999 (Pat) reveals the same difficulty from a different angle. The proceedings concerned the terms of a global FRAND cross-license, and both parties constructed their valuation models around comparables, with ZTE also relying on a top-down methodology as an additional cross-check (*Samsung v. ZTE*, 2026, paras. 9–10). The volume of protected material led to the adoption of different confidentiality designations for information belonging to both the parties and third parties, and a significant portion of the hearings took place in private.

Access was not uniform. Mr Justice Meade records that representatives of the parties belonged to different confidentiality clubs depending on the material under consideration, and that certain participants had to enter and leave the courtroom so that the hearing could continue within the applicable restrictions (*Samsung v. ZTE*, 2026, paras. 82–84). The scene appeared in the Introduction because of its illustrative power; its significance here is more precise. Information asymmetry does not arise only between the proceedings and the public. It may be legally organized within the proceedings themselves.

Confidentiality clubs should not, for that reason, be treated as enemies of adversarial fairness. In many complex disputes, they are precisely what makes it possible to introduce information that would otherwise remain outside the evidentiary record. But the solution raises its own question: if evaluating a comparator requires selecting it, reconstructing its economic content, and adjusting for material differences, who needs to know what in order to meaningfully challenge those operations?

That question reveals why a comparable license cannot be reduced to a royalty rate. *Samsung v. ZTE* devotes substantial attention to the negotiating histories of licenses, differences between portfolios, and the adjustments required to convert distinct agreements into economically useful benchmarks. The Court ultimately assigned a central role to the *2020 ZTE–Apple* license, but only after considering factors that altered the economic meaning of that transaction (*Samsung v. ZTE*, 2026). Access to the document was necessary. However, access alone was not sufficient.

The word "transparency," therefore, conceals several distinct problems. First, there is a problem of access: knowing that a particular license exists and what its content is. Second, there is a legal problem of circulation: NDAs, trade secrets and procedural orders may limit who is entitled to use it. Third, there is an economic problem: even when available, the agreement may require reconstruction of aggregate payments, cross-licensing arrangements, portfolios and territorial scope. Finally, there is a question of comparability: once the transaction has been understood, one must still determine whether it is in fact a suitable reference for the dispute at hand.

This distinction avoids an attractive but mistaken conclusion: that simply opening the agreement solves the problem. It does not. A royalty rate in isolation may create the appearance of transparency while revealing very little about whether two transactions are genuinely comparable. It would be like comparing two financing arrangements solely by looking at the monthly installment while ignoring the term, down payment, interest rate, and principal amount. The number is visible; the comparison remains poor. In non-discrimination analysis, what explains the difference may matter as much as the difference itself.

The asymmetry, moreover, does not begin in court. In its 2025 consultation on SEPs, the UKIPO recognized that licenses are privately negotiated and that pricing information frequently remains protected by NDAs, making it difficult for a prospective licensee to assess the terms agreed in earlier transactions (UKIPO, 2025). Opacity, therefore, affects both adjudication and the earlier stage in which the parties attempt to determine whether the offer on the table is FRAND.

Brinkman identifies a similar tension in discussing the first SEP/FRAND ruling of the Mannheim Local Division of the Unified Patent Court: by requiring justification of an offer's non-discriminatory character, the court brings the discussion of comparables into the negotiation stage itself (BRINKMAN, 2025, pp. 203–204). The earlier justification is required, the earlier the question arises as to what information may be disclosed without violating obligations owed to third parties.

Reducing the controversy to a conflict between a patent holder who prefers concealment and an implementer who prefers disclosure would therefore be convenient—and wrong. Third parties also have legal and economic interests at stake. Publication of their agreements may reveal negotiating strategies, weaken future bargaining positions, or conflict with valid confidentiality obligations. The patent holder may not merely wish to preserve secrecy; it may be legally required to do so. The other half of the problem nevertheless remains: a non-discrimination obligation loses substance if there is no institutionally adequate way to test differences in licensing terms.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

It is this combination that this article describes as the *FRAND Transparency Paradox*. The paradox does not lie in the banal fact that private agreements contain secrets. It arises when three elements operate simultaneously: FRAND contains a relational non-discrimination dimension; its application increasingly depends on information drawn from earlier licenses; and that very information is subject to contractual and procedural structures that restrict access and circulation. Put simply, the law requires comparison while protecting the information required to perform it.

That does not imply that every license must become public. The opposition between *disclosing everything* and *disclosing nothing* is far too comfortable for a problem that the cases themselves reveal to be graded. Information may remain inaccessible to the market while still being available to counsel, experts or the court under tailored safeguards. It may also appear only partially in judgments, without the full disclosure of commercially sensitive terms.

The relevant question therefore changes in character. Instead of asking whether FRAND licenses should be transparent, the inquiry becomes one of determining who needs to know what, to what extent, and under which safeguards, so that non-discrimination remains legally verifiable. The issue is no longer transparency in the abstract, but institutional verifiability. Secrecy may survive. The legal test must survive with it.

3 Secrecy without blindness: controlled procedural access, evidentiary proportionality and institutional verifiability

The FRAND Transparency Paradox does not necessarily require comparable licenses to be made public. That would be far too simple a response to a problem that is anything but simple. Licensing agreements may reveal negotiating strategies, portfolio valuations, discounts, cross-licensing structures and information belonging to third parties who never consented to its public disclosure. Protecting such material has both legal and economic justification. The issue, therefore, is not whether the agreements should be opened to the public, but whether secrecy can be prevented from making them impossible to examine when they are relevant to adjudication.

MediaTek v. Huawei [2025] EWHC 1857 (Pat) provides a useful starting point. MediaTek sought access to infrastructure-related licenses because other agreements already disclosed in the proceedings concerned devices or combinations of devices and infrastructure. The Court did not order a wide-ranging review of Huawei's licensing universe. It required disclosure of four additional licenses because there was a reasonable prospect that they would assist in determining FRAND terms (*MediaTek v. Huawei*, 2025). The number of documents matters less than the criteria applied: relevance, evidentiary utility and carefully delimited access.

That logic helps separate two ideas that are sometimes improperly conflated. Transparency suggests a broader condition of visibility; procedural access may be specific as to the document, the recipient and the purpose for which access is granted. Not every implementer needs to know every license ever concluded by an SEP holder. That would be as disproportionate as demanding someone's complete bank statement in order to verify a single transfer. The opposite extreme is equally problematic: a potentially decisive license should not be excluded from consideration merely because it contains sensitive information, even when the procedure provides mechanisms to protect it.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

Samsung v. ZTE illustrates both the usefulness and the cost of that solution. The proceedings employed different confidentiality clubs, private hearings and specific categories of protected information. More revealing still, the US$731 million offer made by ZTE in October 2024 preceded its access, through disclosure in the proceedings, to the so-called ENI licenses. Once disclosed, those licenses became part of the construction of ZTE's comparative case (*Samsung v. ZTE*, 2026, paras. 22–25). The episode does not prove that more information automatically produces a correct answer—it would be rather convenient if law and economics worked that way. It shows something more basic: the quality of the argument a party can advance depends, at least in part, on the material available to it.

Nor is access alone enough. As already noted, a comparable license may need to be selected, economically reconstructed, and adjusted before it can serve as a meaningful benchmark. A regime under which only the judge may see the agreement, while the parties are unable meaningfully to challenge its economic interpretation, may preserve secrecy and still leave the evidentiary inquiry incomplete. The question is no longer simply: who may see? It is also: who needs to understand, question and, where necessary, contest?

At this point, the concept of institutional verifiability is proposed. The term describes the capacity of an adjudicatory structure to subject an obligation that depends on confidential information to effective evidentiary scrutiny, allowing proportionate access to those whose participation is necessary for the analysis without requiring unrestricted disclosure to the market. This is not a new substantive requirement added to the FRAND commitment. It operates on a different plane: as a criterion for assessing whether the procedure supplies the minimum conditions necessary for non-discrimination to be meaningfully tested. Three elements appear particularly important.

The first is protected access. Materially relevant information must be capable of entering the proceedings under safeguards appropriate to its commercial sensitivity. Confidentiality clubs, access restricted to external counsel or experts, specific protective orders and private hearings may all perform that function. The particular mechanism will vary by jurisdiction; the underlying criterion does not. Trade secrecy should not entail the automatic exclusion of relevant evidence.

The second element is contextual verification. Access to the agreement alone does not resolve the problem. The procedure must permit adequate examination of the factors that justify treating it as a comparator: scope, portfolio composition, territorial reach, cross-licensing arrangements, negotiating circumstances and relevant economic adjustments. A royalty rate may be perfectly accurate and still support a poor comparison when stripped of context. Numbers are objective; the uses made of them are not always so.

The third is public reasoning. To the extent compatible with the legitimate protection of trade secrets, a judgment should make it possible to understand why a particular comparator was accepted, rejected or adjusted. It is not necessary to disclose every confidential figure for the structure of the reasoning to remain intelligible. There is, however, a limit: the more decisive elements that are withheld, the less opportunity there is for external scrutiny of the judgment itself.

InterDigital v. Optis [2025] EWCA Civ 1263 exposes precisely that limit. The Court of Appeal recognised both the value of open justice and the commercial harm that might result from disclosure of third-party financial information. In some circumstances, numbers and reasons are so closely intertwined that concealing the former inevitably affects the intelligibility of the latter. For that reason, the proposition that "confidential data can coexist with public reasons" should operate as a guiding principle, not as an absolute formula.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The same caution is required in relation to the burden of proof. It would be unreasonable to presume discrimination whenever an implementer lacks knowledge of other licences. Confidentiality cannot be converted into a form of involuntary admission. Yet an equally uncomfortable situation arises where information indispensable to verification remains under the substantially greater control of the party whose conduct is being examined. If that party can invoke secrecy as sufficient reason to prevent any access, information asymmetry begins to generate evidentiary consequences in its favor.

Brazilian experience provides a particularly useful counterpoint because it moves the difficulty from the abstract level to the concrete allocation of the burden of proof. In examining the judicial resolution of SEP disputes in Brazil, Pimentel, Morais and Pacheco (2026) identify a body of case law that is still taking shape but is increasingly attentive to the need to demonstrate not only patent infringement but also compliance with the FRAND commitment. In *JVC v. Multilaser and Hisense*, the 6th Business Court of Rio de Janeiro went further. Because the patent had been declared essential, the Court placed upon the patent holder the burden of demonstrating compliance with FRAND licensing, "particularly as regards its non-discriminatory character", linking that allocation precisely to the implementer's difficulty in proving discrimination where it lacks access to the patent holder's other licensing agreements (PIMENTEL; MORAIS; PACHECO, 2026).

The example matters because it shows that the FRAND Transparency Paradox may produce procedural consequences even before any debate over full publicity of comparable licences arises. If a party must prove that it received discriminatory treatment, but the comparators capable of revealing that treatment are controlled by the counterparty and protected by confidentiality, a formally neutral allocation of the burden of proof may transform information asymmetry into procedural disadvantage. The Brazilian response need not be transplanted wholesale as a general rule for other jurisdictions. It nevertheless demonstrates something more important for the argument advanced here: confidentiality of licensing agreements and allocation of the burden of proof are not independent problems. Where the information necessary to test non-discrimination is concentrated on one side of the relationship, deciding who must prove already means, to some extent, deciding who must make the treatment afforded to comparators verifiable.

For that reason, mechanisms such as targeted access, reallocation of the burden of proof or procedural inferences may be justified where certain conditions are present: a plausible allegation of discriminatory treatment, the existence of a potentially relevant comparator, significant information asymmetry and the possibility of adequately protecting third-party interests. The point is not to penalize confidentiality. It is to prevent confidentiality from operating, by itself, as a presumption of compliance.

The architecture proposed here can be condensed into three movements: protect the data, enable the test, expose the reasons. The first recognizes the legal and economic value of secrecy. The second preserves the possibility of adversarial testing and evidentiary scrutiny. The third seeks, as far as possible, to prevent the protection of information from turning adjudication into a result that must simply be accepted because someone authorized to see it was able to see what others could not.

The final distinction is important. Publicity, transparency, procedural access and verifiability are not synonyms. Information may remain outside the public domain and still be legally examinable. It may circulate among only a small number of people and still permit adequate adversarial challenge. The number of eyes on the agreement is not the proper measure. What matters is whether those who need to see it can do so, and whether those who need to challenge its use have a genuine opportunity to do so.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The *FRAND Transparency Paradox*, therefore, does not require a choice between total transparency and absolute secrecy. That opposition resolves imaginary debates rather well and real proceedings rather badly. The more useful legal question is different: who needs to know what in order for non-discrimination to remain verifiable? Protecting commercially sensitive information remains legitimate. Turning secrecy into evidentiary blindness does not.

Conclusion

Confidentiality is not an accidental defect of Standard Essential Patent licensing. Royalty rates, discounts, portfolio valuations, cross-licensing structures and negotiating strategies may possess competitive value precisely because they do not circulate freely. The difficulty examined in this article begins when that same information takes on another function: it becomes relevant to determining whether particular terms are FRAND and, more specifically, whether similarly situated licensees have received unjustifiably different treatment.

The research problem, therefore, was how to make the FRAND non-discrimination obligation legally verifiable when the comparable licenses required for comparison are protected by confidentiality, trade secrets, or procedural restrictions on access. The answer reached here is less radical than a defense of unrestricted transparency and, for that very reason, more demanding: it is not necessary to make every agreement public; what is necessary is to ensure that materially relevant information can be examined, understood and challenged by those who need to do so if legal scrutiny is to be meaningful.

That answer depends on distinguishing between two functions performed by comparable licenses. They may serve as economic evidence for valuing a FRAND rate by reference to prior market transactions, and they may serve a relational function when the question is whether similarly situated licensees have been treated non-discriminatorily. The same agreements may serve both purposes, but the inquiries are not identical. In the latter context, knowing that two prices differ is only the beginning. It is also necessary to understand who negotiated, what was licensed, on what terms, and why the difference arose. Comparing figures without reconstructing their context is precise only in appearance.

The cases examined show that courts are already attempting to deal with this difficulty. *InterDigital v. Optis* exposes the friction between confidential third-party information and the public character of judicial reasoning. *Samsung v. ZTE* demonstrates that information asymmetry may be legally organized within the proceedings themselves through confidentiality clubs, segmented access and the economic reconstruction of licensing agreements. *MediaTek v. Huawei*, in turn, points towards procedural access delimited by relevance and evidentiary utility. These decisions do not offer a uniform solution. They do, however, share an important intuition: secrecy may be preserved without requiring the evidence to disappear with it.

It is within that convergence that the *FRAND Transparency Paradox* is situated. The law protects commercial information whose use may be necessary to assess an obligation recognized by the law itself. The literature had already identified the tension between NDAs, comparables and non-discrimination. The contribution of this study is not to present that tension as a novel discovery, but to place it within the growing adjudicatory dependence on comparable licenses and to shift the focus from absolute transparency towards institutional verifiability. The question ceases to be "must the agreement be public?" and becomes instead: "does the confidentiality regime still permit the legal proposition for which the agreement is relied upon to be meaningfully tested?"

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

The hypothesis formulated in the Introduction is confirmed, subject to this qualification. Non-discrimination presupposes institutional verifiability, in which its assessment depends on comparative information, but that does not transform verifiability into a new substantive component of the FRAND acronym. It is a procedural condition of legal scrutiny. If invoking confidentiality were enough to generate a presumption of compliance, trade secrecy would acquire a curious evidentiary superpower that the law has never conferred upon it. The more defensible legal approach is different: protect sensitive content while preserving sufficient conditions for that content to be subjected to scrutiny.

Three parameters summarise this architecture. The first is protected access: materially relevant comparators must be able to enter the proceedings under safeguards proportionate to the sensitivity of the information at issue. The second is contextual verification: access to the agreement is insufficient where its use depends on understanding the portfolio composition, territorial scope, consideration, cross-licensing arrangements, and negotiating circumstances that can alter its economic meaning. The third is public reasoning: insofar as the legitimate protection of trade secrets allows, the judgment should reveal the criteria by which a particular comparator was accepted, rejected or adjusted. In short: protect the data, enable the test, expose the reasons.

These parameters do not eliminate the complexity of the FRAND regime. Controlled procedural access does not transform dissimilar agreements into comparable ones, does not by itself resolve economic disagreements over valuation, and does not ensure that every piece of information can be subjected to the same degree of adversarial scrutiny. In some cases, data and reasons will be so closely intertwined that public reasoning itself will necessarily be constrained. Institutional verifiability reduces informational blindness; it does not promise to cure it completely.

Perhaps that is precisely where the scope of the proposal becomes clearest. The FRAND Transparency Paradox does not require opening every door. It requires us to know which doors may remain closed, to whom and to what extent, without preventing meaningful scrutiny of what lies behind them. In a regime in which non-discrimination depends upon comparison, preserving secrecy may be legitimate. Turning secrecy into a barrier that makes comparison legally impossible is not.

References

BARBOSA, Denis Borges. Patentes, padrões técnicos e ofertas de licença FRAND em direito brasileiro. In: BARBOSA, Denis Borges. *Ensaios e estudos de propriedade intelectual 2014-2015*. v. II: Patentes. Rio de Janeiro: Denis Borges Barbosa Advogados, 2014. p. 78-93.

BRINKMAN, Edger F. Confidentiality issues in SEP cases. *GRUR International*, Oxford, v. 74, n. 3, p. 203-204, Mar. 2025. DOI: 10.1093/grurint/ikae162. Available at: https://academic.oup.com/grurint/article/74/3/203/7951490. Accessed on: 2 Aug. 2026.

CONTRERAS, Jorge L. Technical standards: fair, reasonable and nondiscriminatory (FRAND) licensing. In: CONTRERAS, Jorge L. *Intellectual Property Licensing and Transactions: Theory and Practice*. Cambridge: Cambridge University Press, 2022. ch. 20, p. 637-670. DOI: 10.1017/9781009049436.021. Available at: https://www.cambridge.org/core/books/intellectual-property-licensing-and-transactions/technical-standards-fair-reasonable-an-

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

d-nondiscriminatory-frand-licensing/F8AA053A47752E11061D251677CCFDA9. Accessed on: 23 July 2026.

EUROPEAN PATENT OFFICE (EPO). *Methodologies for FRAND determination: evidence from global case law: a survey of court cases around the world involving the determination and assessment of fair, reasonable and non-discriminatory (FRAND) terms and conditions for the licensing of standard-essential patents*. Munich: European Patent Office, June 2026. Available at: https://link.epo.org/web/publications/studies/en-methodologies-for-frand-determination.pdf. Accessed on: 19 July 2026.

PIMENTEL, Luiz Otávio; BOFF, Salete Oro. Renewable energy: key aspects of patent rights to promote investment in innovation. In: ONCEL, Suphi S. (ed.). *A Green Vision Towards a Renewable Energy Future: Volume I: Challenges and Potentials*. Cham: Springer, 2025. p. 143-156. DOI: 10.1007/978-3-031-93760-6_5. ISBN 978-3-031-93759-0. Available at: https://link.springer.com/chapter/10.1007/978-3-031-93760-6_5. Accessed on: 17 Aug. 2026.

PIMENTEL, Luiz Otávio; MORAIS, Fausto Santos de; PACHECO, Gabriel Silveira. A solução de controvérsias no sistema de proteção jurídica de patentes essenciais a padrão de tecnologias de informação e comunicação no Judiciário do Brasil. *Revista Brasileira de Direito | Brazilian Journal of Law*, Passo Fundo, RS, v. 22, Edição Especial, 2026. DOI: 10.18256/2238-0604.2026.v22i.5366. Available at: https://seer.atitus.edu.br/index.php/revistadedireito/article/view/5366. Accessed on: 17 Aug. 2026.

UNITED KINGDOM. Court of Appeal (Civil Division). *InterDigital, Inc. and others v. Optis Cellular Technology LLC and others*. [2025] EWCA Civ 1263. London, 7 Oct. 2025. Available at: https://caselaw.nationalarchives.gov.uk/ewca/civ/2025/1263. Accessed on: 3 Aug. 2026.

UNITED KINGDOM. High Court of Justice. Business and Property Courts of England and Wales. Patents Court. *MediaTek Inc. and others v. Huawei Technologies Co. Ltd and another*. [2025] EWHC 1857 (Pat). London, 17 July 2025. Available at: https://caselaw.nationalarchives.gov.uk/ewhc/pat/2025/1857. Accessed on: 8 Aug. 2026.

UNITED KINGDOM. High Court of Justice. Business and Property Courts of England and Wales. Intellectual Property List (ChD). Patents Court. *Samsung Electronics Co., Ltd and another v. ZTE Corporation and others*. [2026] EWHC 999 (Pat). London, 1 May 2026. Available at: https://www.judiciary.uk/judgments/samsung-electronics-co-ltd-and-another--v-zte-corporation-and-others/. Accessed on: 15 July 2026.

UNITED KINGDOM. Intellectual Property Office (UKIPO). *Consultation on Standard Essential Patents*. London: Intellectual Property Office, 2025. CP 1357. ISBN 978-1-5286-5895-9. Available at: https://www.gov.uk/government/consultations/consultation-on-standard-essential-patents-seps/consultation-on-standard-essential-patents. Accessed on: 6 Aug. 2026.

UNITED KINGDOM. Intellectual Property Office (UKIPO). *Standard Essential Patent licensing*. London: Intellectual Property Office, 22 July 2024. Available at: https://www.gov.uk/guidance/standard-essential-patent-licensing. Accessed on: 25 July 2026.

UNITED STATES. Court of Appeals for the Federal Circuit. *TCL Communication Technology Holdings Ltd. et al. v. Telefonaktiebolaget LM Ericsson*. 943 F.3d 1360. Decided 5 Dec.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604

2019. Available at: https://law.justia.com/cases/federal/appellate-courts/cafc/18-1363/18-1363-2019-12-05.html. Accessed on: 27 July 2026.

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO). *FRAND Economics: Valuation Methods in Licensing Standard Essential Patents*. Geneva: WIPO, 2026. DOI: 10.34667/tind.59534. ISBN 978-92-805-3928-8. Available at: https://www.wipo.int/web-publications/frand-economics-valuation-methods-in-licensing-standard-essential-patents/en/index.html. Accessed on: 21 July 2026.

ZIBETTI, Fabíola Wüst. *Relação entre normalização técnica e propriedade intelectual no ordenamento jurídico do comércio internacional*. 2012. Tese (Doutorado em Direito Internacional) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2012. DOI: 10.11606/T.2.2012.tde-06062013-160840. Available at: https://teses.usp.br/teses/disponiveis/2/2135/tde-06062013-160840/pt-br.php. Accessed on: 17 July 2026.

Revista Brasileira de Direito | Brazilian Journal of Law | Edição Especial 2026 - Special Edition | ISSN 2238-0604