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The Fair Standards Alliance

Response to TRAI consultation paper on ‘Promoting Local Telecom Equipment Manufacturing’.

The Fair Standards Alliance (FSA) is an association that has been incorporated to promote a number of Key Principles regarding the licensing of standards-essential patents (SEPs) on a fair and reasonable, and non-discriminatory (FRAND) basis. We believe that FRAND means something. It means that patent owners are entitled to reasonable compensation for their contributions to the standard, while standard implementers are entitled to licenses on fair and non-discriminatory terms. Behaviours that support these fundamental principles should be encouraged; abuses that undermine these fundamental principles should be discouraged.

The FSA membership constitutes a broad range of industry stakeholders. Our member companies work in different markets, different technologies and different levels of the supply chain. The FSA includes companies that individually spend millions (or in some cases, billions) of Euros annually developing technologies, participating in standards development and licensing SEPs to others. Together, our members own more than 300,000 patents, and spend more than \$100 billion in annual R&D.

The FSA’s membership includes prominent product companies and consumer brands, that develop, market and sell standardized goods, and who may license SEPs from others. Indeed, most of our member companies are both patent holders and implementers. Each of our members favours balanced approaches to SEP issues that address the legitimate interests of both SEP holders and of potential licensees.

We would like to thank the Telecom Regulatory Authority of India (TRAI) for providing this opportunity for public comment. We do not offer joint answers on each of the detailed questions in the consultation (though some members may choose to submit their own, more detailed individual responses). We instead offer some balanced views on key matters that the FSA finds important to emphasize.

Fundamentally, we believe that the core principles of an equitable, effective and enforceable licensing methodology for SEPs for which a FRAND commitment has

been provided should be designed to facilitate good-faith negotiations and to reduce the need for parties to seek recourse to courts or arbitrators.

The lack of an umbrella of common expectations of what FRAND means will not only hamper good-faith negotiations, but also puts good-faith patent holders and implementers at risk of losing out on legitimate claims and defenses against bad-faith behavior.

While it would not be appropriate for TRAI to set a single pre-defined methodology to calculate the value of a FRAND royalty, or to determine a closed set of FRAND terms, we suggest TRAI establishes the criteria and guidelines for licensors and licensees to consider when designing and reviewing licensing offers under a FRAND commitment.

Such guidelines should reflect at minimum the following points:¹

- *FRAND should mean Fair and Reasonable and Non-Discriminatory to ALL.* Holders of FRAND-encumbered SEPs should offer licenses on fair and reasonable and non-discriminatory terms to all companies, organizations, and individuals at all levels of the supply chain of an end product who implement, or wish to implement, the relevant standard or respective portions of the standard. Refusing to license implementers of a SEP simply because of its position in the product supply chain, or under the pretext of more efficient licensing or under an alleged necessity to track and identify final usage amounts to a breach of a FRAND commitment, and violates the basic commitment to license on a non-discriminatory basis.^{2/3} Tolerating discriminatory refusals to license SEPs threatens to undermine incentives for a wide variety of standard-setting participants, who will be prevented from licensing the standard they helped to develop. Deviating from this principle or allowing for exceptions will create confusion, and simply be wrong. We also refer to the FSA's position paper on the topic for further details.⁴
- *Patents should be valued based on the claimed invention.* As patents should be valued based on the claimed invention, in most circumstances, FRAND

¹ See in particular the FSA position paper "Key Principles" (12 November 2015), available at <http://www.fair-standards.org/wp-content/uploads/2016/08/FSA-POSITION-PAPER-June2016.pdf>.

² It also disturbs the supply of products in the established value chain. In practice, there are contractual obligations in the value chain for the supplier to deliver products free of legal faults, so that they can be used without infringing patents. Suppliers will not be able to fulfill their responsibilities in case SEP holders have no legal obligation to provide a FRAND license to any user in the value chain. Unclear licensing behavior of SEP holder and lack of rules result in interferences of the synergy between supplier and implementer. The unpredictable warranty risks bears the risk of delivery stops of the suppliers and increased product prices.

³ Such licensing approach may be considered "effective" and "convenient" to a SEP licensor, but such "convenience" is only marginal when compared to the efficiencies created by making FRAND licenses available throughout the supply chain.

⁴ The FSA position paper "SEP licenses available to all" (24 June 2016), available at <http://www.fair-standards.org/wp-content/uploads/2016/09/160624-FSA-Position-Paper-SEP-licenses-available-to-all.pdf>.

licensing rates should be determined with reference to the device, or the part of the device, that implements the patented invention; this ensures that the patent holder obtains fair compensation for what it actually invented, and not compensation for the value of others' work or contributions. It is important to not blindly base royalty rates for SEPs on the overall value of an end device that makes use of the SEP's invention, but to rather carefully consider the actual value that the SEPs contribute to the technology addressed by the invention. Often, that assessment can greatly be aided by considering the smallest component that actually implements the patented invention. When that part can be isolated as a separately saleable unit (e.g., a brick for building various types of buildings), a fair royalty rate will typically bear a relation to the price of that unit.

- *Fair and reasonable royalties for a SEP must not exploit the fact that the standard cannot be implemented without licensing the SEP.* A FRAND royalty must reflect only the value of the SEP, not the additional value conferred on it by its inclusion in the standard. The value of the standard reflects contributions from the entire community that developed the standard, and from the ecosystem having adopted the standard, rather than by the SEP holder alone.
- *Fair and reasonable royalties for a SEP must take into account the actual and potential aggregate royalty demands for other SEP's.* A FRAND rate must consider royalties for other patents required to implement the standard. The goal of widespread adoption of a standard cannot be achieved if these aggregate demands are not considered when determining a FRAND rate, or else a "royalty stack" will be created that makes implementing the standard uneconomical.
- *Enhanced transparency regarding FRAND-encumbered SEP licensing.* SEP holders that are willing to provide demonstrably non-discriminatory rates should be open and transparent about the rates they seek to charge for their SEPs, what patents are being licensed, and their basis for believing that the patents are essential, valid SEPs. By requiring extensive secrecy from all licensees, some SEP holders seek to prevent prospective licensees from knowing the terms that have been offered to others, and thereby from reliably evaluating whether the terms they are negotiating are FRAND. While voluntary provisions regarding confidentiality certainly are permissible, the use of SEP leverage to *force* potential licensees to accept excessive secrecy is improper. In addition to harming the particular licensees involved, such practices harm the public interest in ensuring a robust and

fair SEP licensing ecosystem. We refer to the FSA's position paper on the topic for further details.⁵

- *Injunctions Should Be Available Only in Limited Circumstances, and requests be reviewed in accordance with the principles of equity and proportionality.* The ability of a SEP holder to threaten a good-faith implementer with an injunction distorts licensing negotiations to the detriment of that implementer. Therefore, when deciding on the appropriateness of injunctive relief in respect of one or more SEPs, factors such as the market participation of the patent holder, proportionality, and the interests of the general public should be taken into consideration. Under these considerations, and especially when a SEP holder has voluntarily committed to license its patents under Fair, Reasonable and Non-Discriminatory terms, a ruling made in favour of damages or a licence as opposed to injunctive relief will often provide for a more proportionate remedy. We refer to the FSA's position paper on the topic for further details.⁶
- *A FRAND promise should extend to a transferee if the SEP is sold.* If a FRAND-encumbered SEP is transferred, the initial transferee and all subsequent transferees must remain bound by the FRAND commitment.
- *No Patent Tying – Only Relevant Patents should be Required to be Licensed.* While some parties may voluntarily and mutually agree to broader licenses, a holder of a FRAND-encumbered SEP should not be able, as a condition of granting a FRAND license to the SEP, to require implementers to (i) take licenses to patents that are not essential to the standard, or that are invalid or not infringed by the implementer; or (ii) grant a license to the implementer's patents that are not essential to the standard.

Our members are united in the view that unfair and unreasonable SEP licensing practices pose a significant risk to the innovation eco-system, create barriers to entry for new market players, threaten to stifle the full potential for economic growth across major industry sectors, and ultimately harm consumer choice.

We believe that our experiences with licensing behaviours, successes and abuses in connection with SEPs can provide the TRAI with valuable insight as it reviews the SEPs, FRAND issues, and considers possible updates and clarifications.

⁵ See the FSA position paper "Transparently FRAND: The Use (and Misuse) of Confidentiality Obligations in FRAND Licensing Negotiations" (15 February 2017), available at <http://www.fair-standards.org/wp-content/uploads/2017/02/170213-FSA-Position-PaperTransparency-FRAND-1.pdf>.

⁶ The FSA position paper "Injunction in accordance with the principles of equity and proportionality" (23 January 2017), available at <http://www.fair-standards.org/wp-content/uploads/2017/01/FSA-Injunction-Position-Paper-23-January-1.pdf>.

Providing clarity on licensing of SEPs on FRAND terms based on the principles identified above will enhance and strengthen the Indian Market by providing much improved harmonization across jurisdictions and a more unified framework for companies doing businesses in India, under the Digital India, Make in India programs and promote local telecom equipment manufacturing.

We hope that the TRAI finds our perspectives helpful, and thank the TRAI for its efforts to promote a healthy telecom ecosystem that promotes innovation, and benefits Indian markets, industries and consumers.

We thank you for your time and attention to our submission, and our organization remains available for any follow up questions, discussions or other input. We would be pleased to make ourselves available should you have any follow-up questions or wish to have further insight regarding our perspectives.

Sincerely,

The Fair Standards Alliance

Committed to Innovation

Further information about the alliance is available at www.fair-standards.org/.

Q.3 Are the existing patent laws in India sufficient to address the issues of local manufacturers? If No, then suggest the measures to be adopted and amendments that need to be incorporated for supporting the local telecom manufacturing industry.

The current provisions in Indian laws may provide adequate opportunity to address issues of local manufacturers and deter SEP abuses, if they are applied in a proportionate, fair and reasonable manner. For example, the *Specific Relief Act, 1963* (Section 41(h))⁷ expressly bars injunctions when an alternate efficacious remedy is available. This principle can be read to mean that requests for injunctions should be declined when a patent holder has already agreed to monetary terms such as FRAND royalties.

Likewise, *The Patents Act, 1970* (Section 10(4)(c)) defines the scope of an invention.⁸ It defines the scope of the patent monopoly, and should be read to mean that the royalty that can be demanded by a licensor must correspond to the same scope. That is, it should be a matter of common sense that a patent holder should not demand a royalty that exceeds the scope of what has been disclosed, invented and claimed and subsequently granted in the patent.

Similarly, the *Competition Act, 2002* provides adequate remedies for abuse of dominant position under Section 4. Section 3(5) does not enjoin a patent holder from asserting its rights and preventing infringement of the patent, but rather addresses abuses of the patent rights that occur in specific circumstances, such as with the violation of the FRAND promise.⁹

⁷ 41. Injunction when refused.—An injunction cannot be granted—

.....

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) **when equally efficacious relief can certainly be obtained by any other usual mode of proceeding** except in case of breach of trust;

.....

⁸ 10. (4) Every complete specification shall—

(a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;

(b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; and

(c) end with a claim or claims defining the scope of the invention for which protection is claimed;

(d) be accompanied by an abstract to provide technical information on the invention:

⁹ Competition Act. (3) (5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

... (b) the Patents Act, 1970 (39 of 1970);

Abuse of dominant position

4. [(1) No enterprise or group shall abuse its dominant position.]

Finally, the fundamental principles of *equity* and *proportionality* are built into the Indian legal framework, and should be used accordingly to limit patent abuses that seek to unfairly extend the scope of the patent monopoly. Fairness, equity and proportionality should be considered by judicial authorities before any injunction is issued in matters involving SEPs. The Alliance also believes in encouraging *transparency* in dealing with complex SEP licensing issues. As explained above, SEP holders that are willing to provide demonstrably non-discriminatory rates should be open and transparent about the rates they seek to charge for their SEPs, what patents are being licensed, and their basis for believing that the patents are essential, valid SEPs. Guidance from the right government authorities establishing criteria for licensors and licensees to consider when designing and reviewing licensing offers under a FRAND commitment based on the principles referred to above may provide additional benefit.

Q.5 Please suggest a dispute resolution mechanism for determination of royalty distribution on FRAND (Fair Reasonable and Non Discriminatory) basis.

Ideally, the market participants should be able to negotiate and reach agreement on the specifics of FRAND terms and conditions on a bilateral basis. However, in case of disagreement, parties may on a voluntary basis seek recourse to courts or Alternative Dispute Resolution (ADR) mechanisms, such as mediation or arbitration.

Agency guidelines framed under the principles of natural justice can provide helpful guidance for all parties. The agencies responsible could be the TRAI or the Ministry of Electronics and Information Technology (MEITY) or the Department of Industrial Policy (DIPP) or the Competition Commission of India or a combination of agencies as the issues involve technology, law, competition, telecom, semiconductors, etc.

Conflicts over SEP licenses under FRAND terms cannot be resolved by simply setting a FRAND rate based on an automatic assumption of essentiality, infringement, or validity of the SEPs the prospective licensor has asserted. Rather, as with any other infringement dispute, a SEP holder must prove its claims of validity, essentiality, and infringement if challenged by a prospective licensee. Such potential licensee must always have the right to employ the patent systems' traditional mechanisms for challenging validity or infringement, and to raise any

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.

other relevant defenses. Permitting challenges to the merits of a given patent is pro-competitive, and ensures that only true innovators are rewarded with patent rights.

As set out in the FSA's position paper on ADR,¹⁰ it is essential to provide incentives to both licensors and licensees to negotiate in good faith on FRAND terms rather than to litigate. However, in case parties do not come to an agreement, and need to resort to other means to solve their disputes, it is important that measures are in place to facilitate the fair and balanced settlement of SEP licensing disputes. The fact that those disputes occur on the basis of a specific FRAND commitment means that those measures may be different than those applicable to other litigation cases.

In instances where parties pursue ADR mechanisms for resolving SEP licensing disputes, the parties should each be entitled to employ at least the following FRAND principles in the procedural rules of the mediation/arbitration procedure:

- *Voluntary nature*: Both parties must be able to freely agree whether to arbitrate/mediate the FRAND dispute (including on the rules of those proceedings) instead of litigating in courts;
- *Consideration of the merits under the traditional rules concerning the burden of proof*: The potential licensee's rights under patent laws to challenge the validity, essentiality, or infringement of the alleged SEP cannot be compromised in the name of licensing efficiency. The SEP holder should have the burden of proving its entitlement to FRAND royalties through a showing that it owns infringed patents actually essential to the standard (and whether the used features of the standard are mandatory or optional) and withstanding any challenges to validity, enforceability, or any other defenses. ADR should not simply be a matter of setting a rate if the licensee contests the SEP holder's claims;
- *Ability to appeal*: All aspects of arbitral findings are appealable to a court, in accordance with the relevant review standards;
- *Appropriate Openness*: While there are certainly aspects of an arbitration that should be confidential, or that parties should be able to keep private, in order to provide transparency and allow potential licensees to verify claims of fairness and non-discrimination, some aspects of a FRAND arbitration should be made public, including findings of validity, infringement, and the FRAND terms and conditions. The more data points regarding FRAND terms that are publicly available, the less often parties need to resort to litigation as both will have a better understanding of the likely outcomes; and

¹⁰ The FSA position paper "Facilitating the Fair and Balanced Settlement of Disputes on SEPs" (15 February 2016), available at <http://www.fair-standards.org/wp-content/uploads/2017/02/170213-FSA-Position-Paper-Facilitating-the-Fair-and-Balanced-Settlement-of-Disputed-on-SEPs.pdf>.

- *Balanced Composition and Process:* The composition of the panel should favor neither the SEP holder nor the potential licensee.

Regarding proceedings at court or similar tribunals, measures to reinforce the principles of fairness, equity, and proportionality by law, as well as harmonizing the law and its application, will facilitate fairness and balance of dispute resolution. Lawmakers and courts should make sure that these principles are applied in any decision concerning injunctive relief, provisional remedies, potential alternative measures, or damages.

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Note: The positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.



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FAIR STANDARDS ALLIANCE AN INTRODUCTION

The Fair Standards Alliance is a European based association that has been incorporated to promote in the European Union and beyond a number of Key Principles regarding the licensing of standards-essential patents (SEP's) on a fair and reasonable, and non-discriminatory (FRAND) basis.

Our membership is broad and diverse, ranging in size from multinationals to SME's, and coming from different levels of the value chain across a diversity of industry sectors. Our members significantly contribute to European innovation and the European economy. For 2014, the aggregate turnover of the Alliance founding members was more than 430 Billion Euros, and in aggregate our members spent more than 32 Billion Euros on R&D and innovation. Alliance members directly employ more than 390,000 people within the EU alone, and have more than 164,000 patents that are either granted or pending.

Standards are important enablers for a competitive and dynamic European market where innovation and interoperability go hand in hand. In order for standards to be successful and widely taken up by the market, the Alliance believes that it is crucially important to ensure not only that SEP holders are appropriately compensated for their contributions to innovation, but also that there are fair, balanced, and rational practices in the licensing of standards-essential patents.

FRAND – which is a commitment to license on Fair, Reasonable and Non-Discriminatory terms – must have a clearer meaning in order for standards to promote innovation, economic growth, competition, and consumer choice. The Alliance believes that FRAND should, for example, mean the following (but not in any order of importance):

- (1) A license for a SEP should be available at any point in the value chain where the standard is implemented, and the important terms of those licenses should be transparent to other companies implementing the same standards;
- (2) A FRAND royalty should reflect the value of the invention. In most cases that means that it should be based on the smallest device that implements those patents, and additionally it should take into account the overall royalty that could be reasonably charged for all patents that are essential to that standard;
- (3) Injunctions and similar legal threats should be a last resort;
- (4) A FRAND commitment made in respect of a SEP should not fall away simply because the SEP is sold to another company.

Our members are united in the view that unfair and unreasonable SEP licensing practices pose a significant risk to the innovation eco-system, create barriers to entry for new market



players, threaten to stifle the full potential for economic growth across major industry sectors, and ultimately harm consumer choice.

This paper further outlines the importance of these issues and the views of the Alliance.

A Background – Why FRAND matters

In today's connected ecosystems, different products made by different companies must be able to work together. Without standards creating that interoperability, the ability of companies to provide meaningful innovative products to consumers is limited. Standards provide common, interoperable platforms which companies can use as the basis for competitive differentiation. Such platforms not only generate competitive mass markets, but also enable the supply chain efficiencies needed for industry to provide leading-edge innovation to consumers at affordable prices.

Successful standards provide market players with the confidence required to invest in implementing those standards (for example, by making the necessary investments in developing, manufacturing and marketing standard-implementing products) and to add their own unique, product-differentiating technologies to standardised features. Consumers benefit from the availability of such distinctive, yet interoperable, products at reasonable costs.

Policy makers have long recognized the importance of standards for innovation and competitiveness and have put regulatory and legislative frameworks in place to foster successful standardisation. The European Commission's recently published Digital Single Market and Single Market Strategies both emphasize the importance of a strategic approach to standardisation for boosting the European Union's further economic growth, and elevates the recognition of the importance of standards to a matter of primary concern.

However, it is equally broadly recognised that only *fair* standards practices can deliver on the potential for enabling innovation and growth. There are a number of aspects that make a standard fair. The majority of successful standards-setting organisations today have adopted such fair standards in their by-laws. However, common adherence to one important attribute of fairness in standards has failed to keep pace with developments in competitive market ecosystems – namely fairness in the licensing of standards-essential patents.

Standards-essential patents, or SEPs, are patents that cover inventions that are required to practice the standard, so that one cannot build a standards compliant device without implementing the invention covered by a SEP.

Because the core objective of standardisation is the wide-spread adoption of the technologies it describes, participants in most standards-setting organisations voluntarily agree to grant licenses to their SEPs on "Fair, Reasonable and Non-Discriminatory" (FRAND) terms. These FRAND commitments accomplish two goals: Firstly, implementers of a standard can feel secure that they can get licenses on fair and reasonable terms, and secondly, the SEP holders can receive appropriate remuneration for their patented inventions.

Abuses of commitments to license standards-essential patents on fair, reasonable and non-discriminatory terms are the Fair Standards Alliance's primary concern. Where such abuses occur, or where the possibility for them to occur is tolerated, the ability of standards to contribute to innovation and economic growth at large is at risk.



B. Key Principles for FRAND licensing

1 FRAND should mean Fair and Reasonable and Non-Discriminatory to All

Many standards setting organisations provide in their intellectual property rights policy (IPR Policy) that SEP's shall be available for license by any company wanting to manufacture and sell equipment.

However, some SEP holders say they will only grant licenses at the end-product level, presumably in the hope that they can tax a much larger royalty base than just the price of the component supplying the patented functionality. Some SEP holders even seek royalties from **users** of such end products; this has gone as far as demanding royalties from coffee shops, restaurants, or hotels that offer WiFi-based wireless connectivity to their customers. When inappropriately seeking royalties only from parties at the higher end of the value chain, SEP owners are potentially rewarded for innovations that have nothing to do with their SEPs.

The SEP holder seeking FRAND compensation for its valid and infringed SEPs should receive the same royalty regardless of where it licenses in the supply chain. For example, if the SEP's value is €X, that value remains the same even if the component incorporating the SEP is bundled in a complex multifunction device or if applied in an end-user application.

The Alliance believes that SEP holders breach their FRAND commitment when they refuse to license implementers simply because of their position in the product supply chain. Such refusals violate the basic commitment to license on a non-discriminatory basis. Tolerating discriminatory refusals to license threatens to undermine incentives for a wide variety of standard-setting participants, who will be prevented from licensing the standard they helped to develop.

Therefore, the Alliance believes that holders of FRAND-encumbered SEPs should offer licenses on fair and reasonable and non-discriminatory terms to all companies, organisations, and individuals at all levels of the supply chain of an end product who implement, or wish to implement, the relevant standard, in accordance with the terms of the applicable IPR Policy of the relevant standards setting organisation.

2 Injunctions Should Be Available Only in Limited Circumstances

Nobody can implement a standard without implementing the SEPs associated with that standard. If a product is to meet the requirements of the standard, it is not possible to design around it, the implementer therefore being 'locked-in'. This puts SEP holders in powerful positions because, if the patent is valid and infringed, the SEP holder has the right under patent law to apply at Court for an injunction to stop the product being sold.

The ability of a SEP holder to threaten a good-faith implementer with an injunction distorts licensing negotiations to the detriment of that implementer. A rational implementer can be coerced into accepting to pay higher-than-reasonable royalties just to avoid the risk of being barred from selling its product.

An owner of a SEP who has voluntarily committed to provide licenses to its SEP is acting unfairly, and is reneging on its FRAND commitment, when threatening such an implementer with an injunction. Good-faith implementers who are willing to license the SEP they use should not be faced with that risk. Simply asserting defences, questioning the validity or



essentiality of SEPs, or asserting counterclaims should not mean that a potential licensee is acting in bad faith or is an 'unwilling' licensee.

The Fair Standards Alliance welcomes the fact that the Court of Justice of the European Union reviewed some of the issues relating to SEP injunctions in the case of *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH* and the Alliance hopes that SEP holders and national Courts will interpret and implement the decision in accordance with the Alliance's Key Principles.

The Alliance's view is that a SEP holder must not be allowed to seek or enforce an injunction or other exclusionary remedies in relation to that SEP except in extremely limited circumstances.

3 Enhanced transparency regarding FRAND-encumbered SEP licensing

Many SEP holders operate their licensing programs under cloaks of secrecy, requiring potential licensees to enter into confidentiality agreements. These confidentiality agreements prevent companies from discussing the proposed or existing financial terms of the licenses (such as upfront payments or royalty rates) with any other companies. At the same time, during negotiations of licenses, SEP holders represent to potential licensees that other companies have accepted the financial terms of the proposed license. Because of the confidentiality restrictions imposed on the prospective licensee (and other licensees) the prospective licensee is unable to verify if what the SEP holder has represented is true.

By making SEP licensing information transparently available, a level playing field will be created and companies will benefit from enhanced cost predictability for their products, irrespective of size or negotiating power, and end-users will be able to make more informed purchase choices.

The Alliance therefore wishes to encourage SEP holders to be open and transparent regarding, amongst other things, which companies in the supply chain are licensed, the FRAND royalties that are charged, how they are calculated and other licensing conditions.

4 A FRAND promise should extend to a transferee if the SEP is sold

In recent years a practice has developed where some SEP holders divide up or 'fragment' their portfolios of patents. Transferring ownership of SEPs in principle should not present a problem in the context of SEP and FRAND licensing, and parties generally should be free to transfer patents as they see fit - provided the recipient respects the previously committed licensing obligations.

Problems can arise if SEPs are transferred to new owners that do not abide by the FRAND commitments made by the former owner. If the licensing commitments do not transfer with SEPs, SEP acquirers may refuse to offer FRAND terms to implementers of the relevant standards. Furthermore, the diffusion of SEP portfolios over more and more independent owners can exacerbate the problem of royalty stacking – namely that the royalties independently demanded by multiple holders of SEPs on the same standard do not account for the presence of other SEPs on the same standard and thereby lead to an inappropriately high overall royalty.



The Alliance believes that if a FRAND-encumbered SEP is transferred, the initial transferee and all subsequent transferees must remain bound by the FRAND commitment. The Alliance would like standards-setting organisations, policy makers and regulators to remain vigilant in addressing such circumstances, and to ensure that patent assertion entities are not utilized as mere proxies to obscure behaviour that seeks to get around FRAND commitments and that would be more obviously abusive if pursued directly.

5 No Patent Tying - Only Relevant Patents should be Required to be Licensed

Portfolio licensing (whether for SEPs to a particular standard, all patents relevant to a particular type of device, or to a company's entire patent portfolio) can be an attractive choice for companies because it can reduce costs and administrative burdens. Rather than having to license patents piecemeal, a portfolio-wide license can provide stability and predictability and can promote "patent peace" between companies for a number of years. .

However, these business incentives for entering into portfolio licenses should not mean that a licensee must be *required* to license a SEP holder's entire patent portfolio if it does not practice all of the inventions.

It is important to maintain the right of a potential licensee to only license the patents it needs from a SEP holder, including taking a license to less than a full portfolio. For example, a provider of cellular phones or components likely will have no need for a license for network infrastructure SEPs. Likewise, a company that operates only in a particular country or geographic region should not be required to pay for worldwide rights that it does not need.

While some parties may voluntarily and mutually agree to broader licenses, a holder of a FRAND-encumbered SEP should not be able, as a condition of granting a FRAND license to the SEP, to require implementers to (i) take licenses to patents that are not essential to the standard, or that are invalid or not infringed by the implementer; or (ii) grant a license to the implementer's patents that are not essential to the standard.

6 Fair and Reasonable Royalties

The calculation of a FRAND royalty in any specific case can be complex and may reflect many case-specific factors. Nevertheless, there are also many generic factors that should always be considered when determining what constitutes a fair and reasonable royalty or licensing fee. Taking such generic factors into account will aid the efficiency of licensing negotiations between SEP licensors and licensees, and could reduce the need for parties to resort to litigation to establish a FRAND royalty.

Owners of SEPs should receive fair and reasonable compensation for the contributions they make to innovation by making their inventions available to a standard. However, they should not receive compensation based on anything beyond the inventive value of the patented invention itself.

Royalty rates for SEPs that do not take into account the value of innovation and investment added by implementers of standards unjustly enrich SEP owners based on the contributions made by others. This artificial burden on innovation will ultimately stifle industry's ability to offer value-for-money to consumers.



In order to implement this principle, the following (non-exhaustive) list of considerations should be taken into account, and appropriately applied to each specific case:

(a) Fair and reasonable royalties for a SEP must not tax features of a product that are unrelated to the patented invention

Some SEP holders suggest that licensing rates should be based on downstream uses of standardised technology. Licensing policies that seek to charge such rates are unfair – they violate the FRAND commitment because they seek compensation for unpatented technologies or technologies that the patent holder did not invent or create. For example, when a smartphone has an innovative user interface that helps drive consumer demand for that device, the owner of a patent essential to a cellular standard should not be permitted to use that patent to appropriate any portion of the value of the user interface. Instead, in most circumstances, FRAND licensing rates should be determined with reference to the device, or the part of the device, that implements the patented invention; this ensures that the patent holder obtains fair compensation for what it actually invented, and *not* compensation for the value of others' work or contributions. In other words, the price of a brick should be independent of whether that brick is used for building a garage or a mansion – and the royalty for a SEP associated with a standard that enables an Internet of Things (IoT) device to be wirelessly connected to other IoT devices (or the cloud) should be independent of whether that first IoT device is a smart watch, a refrigerator or a car.

That is why it is so important to not blindly base royalty rates for SEPs on the overall value of an end device that makes use of the SEP's invention, but to rather carefully consider the actual value that the SEP contributes to that end device. Often, that assessment can greatly be aided by considering the smallest component that actually implements the patented invention. When that part can be isolated as a separately saleable unit (a brick for building various types of buildings), a fair royalty rate will typically bear a relation to the price of that unit.

(b) Fair and reasonable royalties for a SEP must not exploit the fact that the standard cannot be implemented without licensing the SEP

A FRAND royalty must reflect only the value of the SEP, not the additional value conferred on it by its inclusion in the standard. The value of the standard reflects contributions from the entire community that developed the standard, and from the ecosystem having adopted the standard, rather than by the SEP holder alone.

Standards have inherent value attributable to the common agreement for all to use the same technology to ensure interoperability between manufacturers' products. SEP owners greatly benefit from having their patents included in a standard because adoption of their invention is no longer driven only by the merit of that invention in itself, but by the commercial imperative for market players to make their products interoperate with the ecosystem of all other products using the same standard. Market players will therefore implement the SEP, even when it only covers a small detail of the standard's functionality that does not present a significant technical challenge, but where the technical specification simply required choosing one of several possible solutions for completeness. Standardisation can transform the



potential licensing revenue of a patent dramatically if each and every device complying with the standard will necessarily use it.

Standardisation can also significantly lower the patent holder's cost involved in finding out who is using their patent and can be approached for compensation.

In choosing to make a FRAND commitment, a SEP holder willingly makes a trade-off in return for these benefits. Unlike the more general patent holder, the SEP holder has voluntarily accepted as part of the quid pro quo of standardisation that the per-unit royalties it may earn will be constrained by the "fair, reasonable, and non-discriminatory" commitment.

A FRAND license must not reward SEP holders for the value associated with the standard itself but for only the technical contribution of the SEP to the standard. Seeking value attributable to standardisation would be unjust and an attempt to co-opt the work of others and of the standardisation process.

(c) Fair and reasonable royalties for a SEP must take into account the actual and potential aggregate royalty demands for other SEP's

A FRAND rate must consider royalties for other patents required to implement the standard. The goal of widespread adoption of a standard cannot be achieved if these aggregate demands are not considered when determining a FRAND rate, or else a "royalty stack" will be created that makes implementing the standard uneconomical.

Some SEP licensors have suggested that royalty stacking is merely theoretical. But as a practical matter, no rational SEP licensee views a single SEP licensing negotiation in isolation; rather, the licensee necessarily views the current negotiation in the context of past and future negotiations for all SEPs needed to practice the standard (or at least those for which it is reasonably foreseeable that will be demanded).

Accordingly, the rational willing licensee will not agree to pay royalties for a single license that would make it uneconomical to sell a product that implements the standard. It follows that the licensee necessarily will need to take into account the potential royalty stack, even in its first negotiation.

Moreover, taking action to address royalty stacking only **after** a prohibitively expensive royalty stack has been created necessarily will not prevent harmful effects from royalty stacking. If the first royalty is not set in light of the potential aggregate demands to come, a disproportionate share of royalties would go to those SEP holders first in line, without regard to the relative value of their SEP, simply because they acted quickly and aggressively to demand higher than appropriate royalties.

(d) Fair and reasonable royalties for a SEP must take into account the fact that prices come down over time and that SEP holders may be remunerated for use of their technology in other parts of the value chain

Many licensors seek to charge fixed prices per unit, or provide fixed monetary caps or minimums, as part of their licensing programmes. These programmes often do not sufficiently take into account the fact that the prices of products reduce over time.



Similarly, SEP licensing programmes should take account of the fact that the SEP holder may also be financially benefiting in other parts of the eco-system and value chain from use of standardised technology.

12th November 2015

Notes

The list of issues and points raised in this note is not exhaustive. The Alliance will be preparing further Papers with more detailed positions on these and other issues in the SEP/FRAND debate. The positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.



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POSITION PAPER - SEP LICENSES AVAILABLE TO ALL

Synopsis

Today's increasingly connected world demands cooperation and interoperation among many different products. Such interconnection requires common understanding of interfaces across products from multiple companies. To achieve this, industry players cooperate through Standards Setting Organisations (SSOs) to establish shared specifications, standards. To ensure widespread adoption, SSOs obligate contributors to license Standards Essential Patents (SEPs) on Fair, Reasonable and Non-discriminatory (FRAND) terms. However, some SEP holders are failing to comply with the Non-discriminatory requirement of FRAND and are refusing to license subsystems manufacturers. This paper addresses the negative impact of such discriminatory licensing practice on the product ecosystem and on consumers. This practice is not acceptable and FRAND SEP licenses must be available to all entities, regardless of their role within the product supply chain.

Introduction

Today's consumers enjoy many technological advances. These advances are so pervasive and commonplace that we have all grown accustomed to relying on them. Sometimes we forget that these advances are not the product of a single entity. Instead, many of these advances are built from extremely complex systems. Most of these systems result from the cooperation of many different organizations. For example, the very document that you are reading involved the generation of the paper it is printed on, the manufacture of the printer that put the ink onto the paper, and the computer hardware and software that allowed the author to format his/her thoughts, which were then sent to the printer. All this and more to allow delivery of the author's ideas, i.e., the author's copyrighted work, to the ultimate consumer, the reader. To ensure this process operates smoothly, the paper needs to be the correct size and shape for the printer to use. Similarly, the interface used to transfer the page contents and formats between the computer system and the printer has to be properly understood by both machines. In order to ensure these interactions among the various systems function properly, common specifications, or standards, need to be used by the different systems.

Standards Setting Organizations' main goal: widespread adoption of robust technical specifications

Due to the wide variety of different technologies that benefit from and require such standardization, multiple companies have cooperated in establishing technical standards through various SSOs. Standards are most useful when they are widely adopted and these SSOs recognise this as their primary mission. To achieve this goal, SSOs must ensure that there are no blockages that impede the use of the standard. One such concern is that the standard must not be hampered by unreasonable licensing of the patents that are embedded within. Towards this end, some SSOs establish royalty-free licensing regimes, while others obligate the participants/contributors to license any patents essential to the implementation of the standard, the SEPs, on FRAND terms.

FRAND does not discriminate

In this paper, we will focus mainly on the non-discriminatory portion of the FRAND obligation. However, it is also important to note that discriminatory behaviour can reveal itself through unreasonable or unfair licensing practices. More on this later.

First, the non-discriminatory obligation is easy to comprehend. Discrimination means treating one segment of the licensee population in a manner significantly different from that of another part of the licensee population. In other words, any entity that requests a license to SEPs should be provided with a Fair and Reasonable license offer.

During the early development of the digital cellular telephony market, this obligation was well observed. SEP holders established licenses with manufacturers of all types of equipment when requested. Manufacturers in all parts of the product supply chain were able to obtain SEP licenses. These licensees were then able to offer licensed products, whether they were complete end-use products or intermediate subsystem products, to their customers. Indeed, this allowed the establishment of an ecosystem whereby some manufacturers were able to supply subsystems that implement the standards to downstream manufacturers, thus freeing the downstream manufacturers from dealing with the complexities of the standards based technologies. The downstream manufacturers were then able to focus their efforts on the innovations that they add in the implementation of the final product. This system indeed eased the widespread adoption of the standard technologies, a primary goal of the SSO.

Licensed subsystems provide effective solutions to end-product manufacturers

So, why are end product manufacturers interested in using licensed subsystems? Today's end products are getting increasingly complex. It is necessary to incorporate many different technologies into a product to enhance competitiveness. For example, it is no longer adequate to just provide a powerful motor to lift a garage door, many garage door openers now incorporate Wi-Fi and internet connectivity to allow remote status indication and remote operation. It would be cumbersome for the garage door manufacturer to design its own wireless connectivity solution when their expertise and value-add is in

the reliability and quietness of the motors. Therefore, these manufacturers use wireless communications subsystems supplied by manufacturers that are well versed in the continual development of the wireless connectivity standards. Furthermore, since the end-product manufacturers are not well equipped to assess whether a patent is indeed a SEP, they rely on the subsystem manufacturers to provide indemnification against patent assertions on technologies implemented in the subsystems. Also, from a practicality and efficiency perspective, it would make obvious sense that the patent owner should talk to the implementer of the technology, the subsystem manufacturer, which is in a better position to judge whether the alleged patent assertion is justified or not. This is especially relevant in view of the fact that a majority of patents claimed to be SEPs turn out to not be essential to the standard. This has been borne out by numerous litigation outcomes.

For several decades, subsystem manufacturers fulfilled this need. These manufacturers took on the task of tracking the evolution of the standardised technologies, contributed to their development, and implemented solutions that could be efficiently used by end product manufacturers. To satisfy the end-product manufacturers' desire to avoid patent assertion issues, these subsystem manufacturers often took on the risk of providing indemnification against patent assertions. To manage these risks, the subsystem manufacturers were able to obtain licenses with SEP holders. These subsystem manufacturers relied on the SEP holders' obligation to not discriminate against them as licensees.

Of course, this ecosystem did more than just satisfy the desire of end-product manufacturers to rely on subsystem suppliers to manage the patent assertion risks. The ability of subsystem suppliers to focus on the technologies embodied in the subsystems also resulted in more focused design and development efforts to ensure that the subsystems were optimally designed. Furthermore, these subsystem manufacturers could fully focus their attention on the evolution of these standards and ensure that the most effective and advanced capabilities were implemented. As well, with the subsystems being supplied to multiple end product manufacturers, economies of scale were brought into play to provide the most cost-effective and most robust solutions to the end products and, in turn, to the end consumers.

Ecosystem put at risk

Unfortunately, this effective and efficient ecosystem is being challenged. Some SEP holders are now refusing to license subsystem manufacturers. Some SEP holders argue that the value of SEPs are demonstrated in their use in the final product and therefore the SEP holders should be able to collect royalties on the final product. Other SEP holders claim that the SEPs cover functionality that requires cooperating components outside these subsystems and therefore royalties should not be collected at the subsystem level. However, the main driver for this change appears to be their belief of some SEP holders that they can extract higher royalty payments from the end product manufacturer than from the subsystem manufacturer.

Discriminating tax on a brick?

So, what are the errors in such arguments? First, SEP holders claim that their innovation has benefitted the end product and that therefore they should be allowed to tax the entire end product. This argument is akin to the assessment of Value Added Tax (VAT) on a brick being based on the price of the building that uses the particular brick. By this logic, the VAT on a brick used in a luxury mansion would be significantly higher than if the same brick were used to build a modest home.

This argument also ignores the fact that the patented claim benefits the subsystem and therefore subsystem manufacturer should be able to receive a license for those same patents. In fact, the proportionality of value that the patent brings to the subsystem is much more easily assessed than the value the patent brings to a much more complex end product that also incorporates many other technologies and innovations.

SEPs DO apply to subsystems

Second, the claim of some SEP holders that the patented technology is not fully implemented in the subsystem, and therefore that royalties should be calculated on the end product, this is also false. In order for a subsystem to be useful and efficient to an end product manufacturer, most, if not all, of the standardized technology relevant to the end product must be implemented in the subsystem. Therefore, most, if not all, of the SEP holder's claims only apply to the subsystem that implements the standard. While the subsystems may not implement every claim of every SEP of a standard, they fully implement a collection of the SEPs.

In the case of cellular data communications, the wireless data module (one common subsystem example) implements almost all of the wireless data SEPs associated with a mobile end product. While a small subset of SEPs in the mobile end product may claim functionality implemented outside the wireless data module, it is inappropriate to refuse to license wireless data module subsystem manufacturers for those patents that are fully implemented within the module. It is also inappropriate to bundle all the SEPs together and force the end-product manufacturer to be responsible for licensing of all patents, where some of them are fully implemented in the wireless data module and can be licensed by the subsystem manufacturer.

Discriminatory rates equivalent to unwillingness to license

Some SEP holders are adding a wrinkle to this scenario by using complex licensing structures to effectively refuse to license subsystem manufacturers while providing the image of being willing licensors. These SEP holders agree to negotiate with subsystem manufacturers but then set differential rates dependent on the application of the module. For example, a module sold for use in a high-priced end product will draw a much higher royalty than one sold for use in a low-priced end product. (Remember the brick? This is just an application of the tax at the source!) At times, this higher royalty may approach, or exceed, the market determined price of the subsystem itself! Not only does this make

the sale process and business model untenable, it has the potential of reducing the attractiveness of the standardised technology to the end-product manufacturer. In turn, this hinders the propagation of the standard and may deprive the end consumer of the benefit of the technology.

Conclusion

So, in conclusion, subsystem manufacturers fulfill a useful and important role in the deployment of standardised technologies. This ecosystem has traditionally been served by the ability of subsystem manufacturers to procure licenses to SEPs and sell licensed subsystems. The introduction of SEP holders' refusal to license subsystem manufacturers is a discriminatory practice that does not comport with their FRAND obligation. Furthermore, these discriminatory practices harm the efficient market mechanism that has helped propagate the standardised technology, a technology created by multiple industry participants to benefit both industry and end consumers. Therefore, FRAND SEP licenses must be available to all entities, regardless of their role within the product supply chain.

Note: the positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.



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TRANSPARENTLY FRAND:

THE USE (AND MISUSE) OF CONFIDENTIALITY OBLIGATIONS IN FRAND LICENSING NEGOTIATIONS

Summary

Some companies that claim to own standards essential patents (SEPs) demand that the companies they approach for licensing first must enter into broad non-disclosure agreements as a condition of receiving more detailed information about the relevant SEPs and proposed license terms. This paper addresses such practices, and explains that – in order to fairly and transparently assess whether a licensing proposal is or is not FRAND – a potential licensee should be entitled to obtain, without demands for excessive secrecy, details regarding the alleged basis and support for the patent holder's SEP licensing demands.

To be clear, *voluntary* provisions regarding confidentiality are certainly permissible. However, the practice of SEP holders *forcing* potential licensees to accept excessive secrecy (*e.g.*, requirements that the licensee accept extensive non-disclosure prohibitions as a condition of entering into negotiations) can be unfair and unreasonable. In addition to harming the particular licensees involved, such practices can interfere with FRAND's basic public interest function, and the goal of ensuring a robust, fair and transparent SEP licensing ecosystem.

Introduction

Technical standard setting permeates the modern economy. As more and more industries come to rely on digital communications, effective deployment of standards for wireless and wired communications and interfaces has become critical to industry, government and consumer interests.

When industry participants collaborate to create technical standards, inherent competition and public interest concerns must be considered. For instance, it could be highly problematic – both legally and economically – if standards participants were to misuse their advantageous position in establishing industry standards to “blacklist” some competitors (such as by refusing to offer access to standardized technologies) or to force customers to use only their own proprietary technologies. To combat potential misuse of the advantages that accrue to participants in the standardization effort, standard-setting organizations (SSOs) commonly require that participants commit to license any patents that will be essential to use of the standard (*i.e.*, SEPs) on fair, reasonable and non-

discriminatory (FRAND) terms. This commitment is designed to ensure that licenses to these patents are available, on reasonable terms, to all companies that wish to use the standard.

After a standard is developed and adopted, companies that hold associated SEPs can obtain significant market power as a result. While the FRAND obligation described above is designed to constrain and limit abuses of such power, some SEP holders attempt to impose excessive secrecy obligations to obscure information about their licensing practices. Such obfuscation makes it easier for SEP holders to violate their FRAND promises by imposing unfair, unreasonable or discriminatory licensing terms. For example, if a potential licensee cannot access basic information about a patent holder's existing licenses, it may be impossible for that potential licensee to determine whether or not the license terms proposed to them by such patent holder are discriminatory. By using successive demands of secrecy applicable to all licenses, an SEP holder can undermine a transparent and effective FRAND ecosystem.

Such secrecy demands also may interfere with industry expectations that SEP licenses are available on terms that are demonstrably compatible with FRAND. And such behaviour also interferes with the execution of FRAND license agreements (and thus may encourage costly litigation), as licensees quite understandably may choose not to enter into a license unless and until they have the information necessary to verify that the patent holder's proposed license terms comply with FRAND principles.

Of course, companies may often voluntarily elect to keep certain items relating to their negotiations or licenses as confidential. For example, some SSO policies expressly recognize that the voluntary use of certain NDA provisions can be appropriate. Accordingly, this paper addresses the reasonable use of NDA provisions as part of FRAND negotiations and licensing, and outlines various considerations and approaches to address the legitimate confidentiality interests of the parties while avoiding unnecessary secrecy and gamesmanship.

Secrecy in FRAND Negotiations

As part of normal commercial practice, companies may choose to exchange information that they regard as confidential. Sensitive business information, such as product technical details, sales volumes, sales projections, pricing, third-party confidential items, supplier relationships, product roadmaps and similar items can be legitimately confidential. Parties certainly may (and do) voluntarily agree to more extensive confidentiality obligations on a case-by-case basis, depending on what information is to be exchanged.

On the other hand, absent a voluntary agreement to broad confidentiality requirements, basic information that can be important to facilitate FRAND licensing negotiations, and to enable the assessment of FRAND compliance, often may not require confidentiality. In such situations, forcing potential licensees to keep secret basic information regarding FRAND licensing practices can facilitate misbehaviour. Examples of the type of non-confidential information that SEP holders generally should be willing to provide to prospective licensees, without excessive secrecy requirements, may include¹:

- A listing of the patents proposed to be licensed;

¹ Courts and agencies reviewing alleged misconduct by SEP licensors have required that much of the information identified below be provided to potential licensees. Examples include the European Court of Justice's decision in the *Huawei v. ZTE* case (C-170/13, Nov. 20, 2014), and the recent decisions by the NDRC (China) (Feb. 9, 2015) and the KFTC (Korea) (Dec. 28, 2016) in their respective investigations of Qualcomm.

- Detailed summaries of the basis for allegations of essentiality and infringement, such as claim charts;
- Details of the licensing terms which can assist the implementer of the standard in evaluating whether the terms offered are FRAND or not;
- Details of the basis upon which the FRAND offer (including any royalty rate) has been calculated;
- In the case of patent pool administrators or others that may claim licensing rights to patents owned by others, written authorities from the patent owners authorizing the administrator to enter into negotiations on behalf of the patent owner (and specifying any limits to the administrator's authority);
- Historical rate and licensing information (perhaps anonymized or otherwise limited to protect legitimate 3rd party confidentiality issues) and accounting for any "side agreements", "caps" or "rebates" as may be applicable;
- Details of any litigation, or other proceeding that is ongoing related to any asserted patents; and
- Information regarding prior licenses to suppliers or customers of the potential licensee, such that the potential licensee can determine whether any of its products may already be licensed (and avoid potential double payments)

As noted, some licensors may seek to hide their behaviour in FRAND negotiations by refusing to provide information about their patents, alleged infringement positions, or licensing terms absent extraordinary secrecy requirements. This may serve little purpose but to hide suspect behaviour, and – in particular cases of abuse – to shield non-compliance with the obligation to license on FRAND terms. Such behaviour may also require a potential licensee to incur costs in assessing the SEP holder's claims (either privately or in court), which can be used as leverage to force a licensee to accept a non-FRAND license. Indeed, imposing excessive secrecy requirements, or failing to provide relevant materials, may in some cases encourage licensees to pursue court resolution over private negotiation, so as to obtain the benefit of the procedures for information exchange available in court matters.

In fact, licensor abuse of secrecy terms has become a hot topic in recent litigation. There are multiple cases pending in which the plaintiffs allege that a particular SEP owner has violated competition law and FRAND commitments through its misuse of NDAs.² At least one SEP owner claims in litigation – against a European-owned telecommunications carrier – that a prospective licensee's refusal to agree to extensive NDA obligations constitutes "unwillingness" that authorizes injunctive relief against the carrier's network.³ While these issues are still being addressed by the courts, they raise clear red flags that some SEP owners may be taking things too far in demanding absolute secrecy to obfuscate their behaviour in FRAND negotiations.

² See, e.g., Complaint at ¶ 66, *Microsoft Mobile, Inc. v. InterDigital, Inc.*, No. 15-cv-723 (D. Del. Aug. 20, 2015) ("InterDigital requires secrecy with the purpose and effect of furthering its patent hold-up and discrimination. Secrecy enables InterDigital to extract supra-competitive royalties, engage in discriminatory licensing, and to further abuse its monopoly power. Transparency in licensing of SEPs would, in contrast, enable prospective licensees to assess more effectively InterDigital's non-compliance with its FRAND commitments and expose its pattern and practice of violating its FRAND obligations."); Complaint at ¶ 105, *Asus Computer Int'l v. InterDigital, Inc.*, No. 15-cv-1716 (N.D. Cal. Apr. 15, 2015) ("IDC ensures its ability to engage in discrimination by conducting licensing negotiations in secret, and by keeping secret the terms of the licenses it enters. IDC requires that potential licenses enter non-disclosure agreements for all negotiations and licenses. IDC does this to ensure that only IDC knows the terms and rates obtained by its licensees. Armed with this one-sided knowledge, IDC attempts to extract supra-competitive terms and obtain discriminator terms from each licensee.") (internal citations omitted).

³ Complaint, at ¶¶ 32-33 & 90, *Huawei Tech. Co., Ltd. v. T-Mobile US, Inc.*, No. 16-cv-52 (E.D. Tex. Jan. 15, 2015) (Seeking SEP injunction because "[t]o date, T-Mobile has refused to enter into a mutual non-disclosure agreement, and therefore, is unwilling to even open negotiations regarding a license. ... At least in view of the foregoing, and upon information and belief, T-Mobile is an unwilling licensee to the asserted patents and is unwilling to enter into good faith negotiations.").

Conclusion

SEP holders that are willing to provide demonstrably non-discriminatory rates should be open and transparent about the rates they seek to charge for their SEPs, what patents are being licensed, and their basis for believing that the patents are actual, valid SEPs. By requiring extensive secrecy from all licensees, some SEP holders seek to prevent prospective licensees from knowing the terms that have been offered to others, and thereby from reliably evaluating whether the terms they are negotiating are FRAND.

The FSA supports transparency in FRAND licensing. While voluntary provisions regarding confidentiality certainly are permissible, the use of SEP leverage to *force* potential licensees to accept excessive secrecy is improper. In addition to harming the particular licensees involved, such practices harm the public interest in ensuring a robust and fair SEP licensing ecosystem.

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INJUNCTION IN ACCORDANCE WITH THE PRINCIPLES OF EQUITY AND PROPORTIONALITY

Introduction

In Europe, the Intellectual Property Rights Enforcement Directive (IPRED) requires that remedies for violation of intellectual property rights must always remain equitable and proportionate.¹ Other jurisdictions have similar requirements. This paper considers issues of equity and proportionality in the application of injunctive relief in the context of standard essential patents (SEPs).

In order to address the subject of equity and proportionality in relation to injunctive relief, it is appropriate to go back a few steps in time, and review why and how patent law was developed. The oldest patent law was enacted in Venice in 1474 and already contained many of the key principles embodied in modern European patent laws. That law stated that certain innovators reporting a new, innovative and feasible design to an authority would be given several years of protection against imitations. Other patent laws were drawn up (e.g. in France, England and Germany) over the following centuries.

The key purpose of these laws is to serve economic development and foster innovation, by providing a patent holder with the exclusive right to exploit the invention protected by its patent for a certain period of time in return for public disclosure of the invention. Publishing the invention allows others to build upon the technology, or alternatively incentivizes them to build a competing 'work-around' solution to the problem solved by the invention.

As part of its exclusive right, a patent holder may be able to exclude others from using the patented technology (by, for example, obtaining an injunction against infringing products) or alternatively exploit its patent right by licensing others (e.g., by claiming payment of a royalty for the use of the patent technology).

In line with the development of patent protection, Europe has also been at the fore-front of developing technology standards. Such standards are defined for a range of technologies to ensure that these technologies are implemented by multiple participants and are able to achieve the requisite market penetration, to the ultimate benefit of consumer choice. For instance, the communication technology of today owes a great deal to the active participation of numerous companies in voluntary, consensus-based standards development organizations that created widely adopted standards. Patents that are

¹ Directive on the Enforcement of Intellectual Property Rights (2004/48/EC), Article 3.

essential to implementing a standard in real world products are referred to as Standard Essential Patents ("SEPs").

Just like patents, standards are tools for fostering innovation. But unlike patents - which can rely on exclusionary rights - standards foster innovation by making the same technology available for use by anyone wanting to implement the standard. This creates some tensions with patent law, such as:

- By "originally" exploiting a patent under the monopoly given by the exclusive right of the patent owner, it can differentiate its products from other products in the market. However, such differentiation is contrary to the basic intention of creating standards, the purpose of which is to foster wide adoption of the standardized technology (to enable, e.g., compatibility between products of different vendors). In this environment, differentiation between the vendors and their products takes place on top of the common standardized technology.
- While the original idea of the patent system is to give a monopoly to a single party (the patent owner), the commitment which given by holders of SEPs - namely to license these patents under Fair, Reasonable and Non-Discriminatory (FRAND) terms - aims to give access to all implementers of the standard.
- Under "original" patent monopoly, the economic need for third parties to design around a patent can generally lead to innovation, but designing around a SEP leads to fracturing of a standard whose success depends on consistent and widespread adoption.

Due to the fact that standards foster innovation by making underlying technologies available (and *not* because of the exclusionary nature of patents), injunctions for SEPs need to be considered carefully, in particular in terms of their effect on the overall innovation ecosystem. When considering whether an injunction for a SEP is or is not appropriate, a number of criteria should be taken into account in addition to those antitrust guidelines given e.g. for the EU by the Court of Justice of the European Union's decision ZTE/Huawei (Case C-170/13). For example, in Europe the IPRED's requirements of equity and proportionality must be addressed, as must similar requirements as may be applicable in other jurisdictions.

1. Injunction decisions should consider whether the patent holder brings to market products which implement the protected technology.

In the past few years, SEPs have been increasingly asserted before the courts against companies that use the protected technology in their products. In many of these cases, the SEP owners have sought injunctive relief against the producing companies.

One aim of patent laws can be to secure the sole marketing rights for the patent holder. Basically, injunctive relief provides the patent holder with an assurance that it can be the sole entity entitled to market and to generate profit with its products containing the protected technology. However, dynamics significantly change when the patent holder does not bring to market any products using the protected technology. In such scenarios, the patent holder's monopoly right is not used to foster innovation or to bring innovative products to the market, but rather to maximise the financial benefit of the patent holder.

As such, patent holders that do not produce or market a competing implementation cannot justify using injunctions in order to protect their products. It should therefore be questioned what their real incentives are, since such holders of SEPs often use injunctive relief solely as leverage to demand inappropriately high licensing fees well in excess of what is FRAND. Since, by definition, a manufacturer of a standards-compliant implementation cannot circumvent the use of technology claimed in the SEP, the implementer can be held hostage to any unreasonable injunction-supported demand.

Patent holders that acquire SEPs but do not sell products implementing the standard can still play a role in helping compensate small inventors and companies for their innovative contributions, but care should be taken in granting injunctive relief to such entities as they do not suffer a competitive

disadvantage from the sale of products infringing the patent and hardly can claim to suffer irreparable harm from infringement of their patents. Alternative remedies available at law, such as monetary damages, will often be adequate and proportionate to compensate for any harm attendant to use of the technology.

2. Injunction decisions should consider the value of patent-protected technology in the product

A second key factor determining whether injunctive relief is appropriate involves considering the value of the patent-protected technology or innovation in the product as a whole on which the injunction is sought.

When the value of a product is closely associated with a single patented invention or a small number of patented inventions, the value affected by an injunction – namely the sales value of the product – is close to or identical with the value of the small number of patents that the product implements. In that situation, an injunction sought by the patent holder may be a proportionate remedy.

Such “single patent” circumstances were often the case when patent systems were first designed, when a single invention typically led to an entirely new product. Also today, some industry segments (e.g. pharmaceuticals) are still characterized by a paradigm of one or a handful of patents to one product. In that situation, an injunction may well be a proportionate remedy to patent infringement: the harm suffered by the infringer from an injunction should be proportionate to the harm suffered by the patent holder. Modern products however, are often completely different. Particularly in technology areas such as Information and Communication Technology (“ICT”) and Internet of Things (“IoT”), products are highly integrated and can use tens or hundreds of thousands of patents.

A smartphone is a good example of this fact, as it has been estimated that these devices contain technology claimed by ~250,000 patents (covering, for instance, connectivity technology such as 2G/3G/4G, Wi-Fi, Bluetooth, etc., touchscreen and control technology, position detection, navigation functionalities, media database management and much more). Communication functions, i.e. functions that enable the exchange of data, make up only a small portion of the innovations in a modern smartphone. The standardized technology 4G/LTE alone, is protected by thousands of Standard Essential Patents.

Another example of this clustering of multiple patented technologies in a single product is an automobile. Starting 2018, every new vehicle model in Europe will be required by law to have an integrated e-call function. Communications standards that use many SEPs apply to this functionality.

In the cases described above, injunctive relief for the use of any one single SEP may therefore prevent the sale of an entire smartphone or automobile, each of which contains thousands of other innovations. Allowing the holder of a single patent to threaten to remove third-party products from the market generally is not proportionate and does not serve innovation.

3. Injunction decisions should consider the public interest

When deciding on injunctive relief, apart from the interest of the patent holder, the impact on the general public should also be considered. More specifically, courts should consider the impact of an injunction on the customers of the alleged patent infringer, as well as the impact on jobs and the underlying ecosystem.

Granting injunctive relief for SEPs may result in manufacturers having to discontinue production or lay off employees because they are unable to pay excessive, non-FRAND royalties demanded by the SEP owner and cannot find any workaround to the SEP. It is likely that not just the producer would be affected by this, but their suppliers as well.

Communication technologies that are laden with many thousands of SEPs play a major role in everyday life today. They serve as a communication carrier for mobile telephony, the internet and connected services, not just for the acquisition of information, service functions and interconnectedness, but also for security-related and life-supporting functions. If, for instance, injunctive relief were granted against a network operator, their network would no longer be available for all these services – including security functions such as emergency call or rescue systems. Even if injunctive relief is limited to a certain period of time, the damage caused to the general population would be immeasurable.

In such cases, payment of pecuniary compensation instead of issuance of an injunction may be a more appropriate instrument. For example, although not expressly directed to SEPs, Article 12 of the IPRED provides for such a remedy where a person infringing IPR acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory².

As a further aspect, Germany's patent laws already provide for a mandatory licence, for instance. This is based on a sufficiently broad public interest in the availability of patented technologies.

Furthermore, patent infringement proceedings concerning SEPs for communication technologies demonstrate that there is room for extending and further developing the notion of public interest as a factor for consideration when deciding on requests for injunctive relief.

4. Injunction decisions on SEPs should consider the fact that the patent holder has voluntarily encumbered its SEP with a FRAND commitment.

A SEP holder that accepts to offer licenses under its SEP at FRAND terms voluntarily applies an encumbrance to its SEP. This SEP holder's decision renders such SEP different from other patents not subject to a FRAND encumbrance, i.e. the SEP holder has basically relinquished its right to exclude third party implementers of the relevant standard from practicing the FRAND encumbered SEP and instead has opted with formal commitment to license the SEP to the implementers. Accordingly, when applying the principles of equity, fairness and proportionality in injunction decisions, courts should consider if the affected patent is a FRAND-encumbered SEP. Therefore, in such situations, courts should have additional incentives to consider remedies alternative to injunctions, e.g. pecuniary compensation.

Summary

When deciding on the appropriateness of injunctive relief in respect of one or more SEPs, factors such as the market participation of the patent holder, proportionality, and the interests of the general public should be taken into consideration. Under these considerations, and especially when a SEP holder has voluntarily committed to license its patents under Fair, Reasonable and Non-Discriminatory terms, a ruling made in favour of damages or a licence as opposed to injunctive relief will often provide for a more proportionate remedy. In the interest of maximizing innovation, it would be highly desirable for lawmakers to take into consideration the particularities of SEPs and provide corresponding guidance.

Note: the positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.

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² E.g., Article 12 of the IPRED was introduced into the Danish Consolidate Patents Act dated January 28, 2009, Sect. 59. The German Copyright Act contains a paragraph (§ 100) which is similar to Art. 12 of the IPRED.



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FACILITATING THE FAIR AND BALANCED SETTLEMENT OF DISPUTES ON SEPs

Synopsis

The fair and balanced settlement of disputes regarding SEP licensing on FRAND terms outside of litigation must provide for voluntary participation, neutral rules, decision-makers who consider the merits under the traditional rules concerning the burden of proof, and some degree of transparency to the public.

A party should not be considered “unwilling” to reach an agreement or to enter into mediation or arbitration proceedings because it does not agree to the proposed procedural rules governing such mediation or arbitration, or to a proposed mediator or arbitration tribunal.

Where a judicial decision is taken finding an infringement of a SEP, the judiciary should always consider the requirements of fairness, equity and proportionality before issuing an injunction against an infringer.

Introduction

During the past several years, the number of court actions concerning the licensing of Standard Essential Patents (SEPs) under Fair, Reasonable and Non Discriminatory (FRAND) terms has increased substantially¹.

In April 2016, the European Commission published a Communication on “ICT Standardisation Priorities for the Digital Single Market”², which states that:

“ICT standardisation requires a balanced IPR policy, based on FRAND licensing terms. Various debates at European and international level are currently taking place with varying approaches being considered... With the many technologies involved in implementing complete digital value chains, notably in the area of IoT, there is uncertainty

¹ See e.g. Competition Policy Brief, Issue 8, published by the European Commission, April 2014.

² Communication COM (2016) 176 on “ICT Standardisation Priorities for the Digital Single Market”, available at: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15265

in particular in relation to: ... (iv) the regime regarding the settlement of disputes.”³

In the same Communication, the European Commission also announced an action on dispute resolution for SEPs, stating that:

“The Commission will work in collaboration with stakeholders including ESOs, EPO, industry and research, on the identification, by 2017, of possible measures ... to facilitate the efficient and balanced settlement of disputes.”⁴

The FSA welcomes this action.

In general, conflicts over SEP licenses under FRAND terms cannot be resolved by simply setting a FRAND rate based on an automatic assumption of essentiality, infringement, or validity of the SEPs the prospective licensor has asserted. Rather, as with any other infringement dispute, a SEP holder must prove its claims of validity, essentiality, and infringement if challenged by a prospective licensee. Such potential licensee must always have the right to employ the patent systems’ traditional mechanisms for challenging validity or infringement, and to raise any other relevant defenses. Permitting challenges to the merits of a given patent is pro-competitive, and ensures that only true innovators are rewarded with patent rights.⁵

In this paper, the FSA provides its position on fair and balanced settlement of SEP related disputes, either through negotiation, mediation or arbitration, or court litigation.

Upfront, it is important to highlight a key principle that is common to all alternative dispute resolution (ADR) mechanisms, namely that ADR must be voluntary. Mandating the use of ADR mechanisms is highly problematic, as ADR processes may short-circuit built-in safeguards against invalid or non-infringed patents and alter the traditional rules on burden of proof. Potential SEP licensees should not be forced to submit to ADR in the name of “licensing efficiency”, particularly where the applicable ADR procedures would not afford the traditional safeguards mentioned above. Each party must retain the freedom to choose to have a dispute resolved in a court or similar tribunal. This does not exclude, however, that both parties may agree to procedural rules of arbitration that an award decision of the agreed-upon procedure will be final.

In the following, the paper will discuss the different means of reaching a licensing agreement.

Negotiation

Negotiation is the customary way of resolving inter-party conflicts and should therefore be favored as the primary method to reach a license agreement.

In negotiations for the licensing of SEPs *under FRAND conditions*, specific conditions apply.

³ See Section 3.2, page 13.

⁴ See page 14.

⁵ As stated in the European Commission’s Guidelines on Technology Transfer Agreements, „*In the interest of undistorted competition and in accordance with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it*” (Guidelines on the application of Article 101 TFEU to technology transfer agreements, [2014] OJ C89/03, para 134).

As a consequence of its FRAND commitment, when licensing its SEP portfolio to multiple licensees, a licensor must offer fair and reasonable license terms, including reasonable royalties, and not discriminate against any licensee.

The specific circumstance of a licensing negotiation for FRAND-encumbered SEPs also has consequences from the prospective licensee's perspective, namely:

- The prospective licensee has no alternative to licensing the SEPs to comply with the relevant standard;
- The prospective licensee usually needs licenses to various portfolios of SEPs from many different patent owners in order to implement the standard; and
- The prospective licensee usually does not know under which terms and conditions a given licensor has previously granted licenses for the same SEP portfolio⁶.

Against this background, negotiations will only be fair and balanced when an SEP licensor provides a transparent explanation as regards its FRAND offer, including how the rate is calculated and why the terms are non-discriminatory. Although in many cases there may be pre-existing commercial or business relationships between the SEP licensor and prospective licensee, published license terms to the respective licenses may serve as a starting point for reaching an agreement containing fair, reasonable and non-discriminatory terms and hence be useful for creating a level playing field for all implementers of the standard.

Therefore, fostering public availability of license terms and conditions for respective SEPs can serve as a measure for fair and balanced dispute resolution. Such publication could be performed by the licensor, or through the licensing of SEPs through a patent pool which publishes such license terms and conditions.

Mediation

Mediation may be initiated after individual negotiations fail, or at any other time as voluntarily agreed by the parties. In a mediation process, parties typically agree on certain procedural rules relating to timing, cost, scope, etc. One or more mediators guide and facilitate the dispute in order for the parties to reach an agreement, but with the parties continuing to have control over the resolution. If the parties do not come to an agreement, the mediation ends without any further effect, since the mediator has no power of issuing an award to any of the parties.

Disputes in SEP cases can get very complex, particularly when many patents are involved, owned by different patent holders, when the validity and essentiality of the SEPs is disputed, and/or many geographic regions are involved. Mediation can thus be very resource-intensive – without there being any guarantee of a successful outcome.

Therefore, in order to enhance the efficiency of mediation in SEP-related disputes, it would be helpful to foster the formation of mediation entities that are highly specialized in specific standards (i.e., that have in-depth knowledge about the related technology, the SEPs of the standard and about usual licensing practices in the related industries of the parties, etc.).

⁶ See also our Position Paper “Transparently FRAND: The Use (and Misuse) of Confidentiality Obligations in FRAND Licensing Negotiations”.

Furthermore, because mediations are generally conducted under non-disclosure agreements, there is little transparency and guidance available for parties to resolve their disputes. For example, to the extent no explanations have been provided by the SEP holder, it remains impossible for potential licensees to determine whether the proposed terms are non-discriminatory. Therefore, measures that foster non-confidential, transparent mediation procedures can help to improve the efficient resolution of SEP licensing disputes.

Arbitration

As with mediation, parties may seek to enter into arbitration on a voluntarily basis. However, unlike mediation, arbitral tribunals generally have the power to issue enforceable awards, and arbitration awards can generally be enforced very efficiently in various jurisdictions.

In many arbitration proceedings, the agreed-upon procedural rules (e.g., with respect to term of the arbitration procedure, relevant evidences, place of arbitration, applicable law, extent of disclosure/discovery and scope of matters in dispute) play a key role. Several organizations offer standardized arbitration rules⁷, and individual procedural rules enable both parties to adapt to the needs of their individual case. However, in certain cases parties may not reach agreement on procedural rules and arbitration may fail. In such instances, a party should not be considered “unwilling” to find an agreement or to enter into arbitration proceedings simply because it does not agree to proposed rules of arbitration or a proposed arbitration tribunal.

Arbitration proceedings can be held at any place agreed to by the parties (e.g., in a specific country and under a law of the parties’ choice). This can serve as a means to arbitrate in a neutral framework which does not favor either party.

In order to foster the fair and balanced resolution of SEP related disputes by arbitration, the following principles should be promoted:

- Procedural rules adapted to circumstances of the SEP dispute at hand;
- Arbitration procedures that are cost-efficient, conducted in a competent and fair manner, and resulting in equitable and proportionate judgments;
- The reuse of expertise and skills of arbitrators in cases with overlapping subject matter (e.g. for the same standard or some same patents in dispute); and
- Transparency, including the disclosure of arbitration decisions.

As with mediation, the use of arbitration should require the agreement of both parties. If no agreement can be reached on conducting mediation and/or arbitration, it shall not take place and the parties shall be entitled to initiate court action, as appropriate.

Actions at Court or Other Public Tribunals

In litigated SEP licensing disputes (as opposed to other patent disputes), procedures may be rather short due to the fact that the patent owner can reuse many relevant facts and evidentiary

⁷ E.g. UNCITRAL Arbitration Rules, published by the United Nations Commission on International Trade Law, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html , or WIPO Arbitration Rules, published by the World Intellectual Property Organization Arbitration and Mediation Center, available at <http://www.wipo.int/amc/en/arbitration/rules/> .

statements such as essentiality claim-charts for different litigations. However, time constraints placed on the procedure usually redound to the advantage of the patent holder. While such short court proceedings may be considered “efficient”, they also may risk jeopardizing a fair and balanced dispute resolution procedure. In addition, reusability of many relevant facts and evidentiary statements should not mean that the patent holder does not have to provide evidence of infringement of an accused product, i.e. more than just by a reference to the standard.

Furthermore, injunctions are treated in a disparate manner throughout the EU – automatic in certain jurisdictions, and subject to principles of fairness, equity and proportionality in other. To facilitate the fair and balanced settlement of disputes, where a judicial decision is taken finding an infringement of a SEP, the judiciary should always consider the requirements of fairness, equity and proportionality before issuing an injunction against an infringer⁸.

When deciding on injunctive relief based on infringed SEPs, courts may also take into account if a party is willing to accept a third party determination of the FRAND licensing terms, e.g. by an arbitration tribunal.

Measures to foster fair and balanced court actions should also consider harmonizing laws and case law in different regions and countries. The number of court actions, in particular parallel court actions regarding the same patent portfolio (if the same or different patents of the portfolio are asserted) and forum shopping could thereby be reduced.

Conclusions

It is essential to provide incentives to both licensors and licensees to negotiate in good faith on FRAND terms rather than to litigate. However, in case parties do not come to an agreement, and need to resort to other means in order to solve their disputes, it is important that measures are in place to facilitate the fair and balanced settlement of SEP licensing disputes. The fact that those disputes occur on the basis of a specific FRAND commitment means that those measures may be different than those applicable to other litigation cases.

In instances where parties pursue ADR for resolving SEP licensing disputes, the parties should each be entitled to employ at least the following FRAND principles in the procedural rules of the mediation/arbitration procedure:

- *Voluntary nature*: Both parties must be able to freely agree whether to arbitrate/mediate the FRAND dispute (including on the rules of those proceedings) instead of litigating in courts;
- *Consideration of the merits under the traditional rules concerning the burden of proof*: The potential licensee’s rights under patent laws to challenge the validity, essentiality, or infringement of the alleged SEP cannot be compromised in the name of licensing efficiency. The SEP holder should have the burden of proving its entitlement to FRAND royalties through a showing that it owns infringed patents actually essential to the standard (and whether the used features of the standard are mandatory or optional) and withstanding any challenges to validity, enforceability, or any other defenses. ADR should not simply be a matter of setting a rate if the licensee contests the SEP holder’s claims;

⁸ See also our Position Paper “Re. EC’s public consultation on the evaluation and modernization of the legal framework for the enforcement of intellectual property rights...”, available at http://www.fair-standards.org/wp-content/uploads/2016/09/FSA_Position_Paper_IPR_Enforcement_Directive.pdf

- *Ability to appeal*: All aspects of arbitral findings are appealable to a court;
- *Appropriate Openness*: While there are certainly aspects of an arbitration that should be confidential, or that parties should be able to keep private, in order to provide transparency and allow potential licensees to verify claims of fairness and non-discrimination, some aspects of a FRAND arbitration must be made public, including findings of validity, infringement, and the FRAND terms and conditions. The more data points regarding FRAND terms that are publicly available, the less often parties need to resort to litigation as both will have a better understanding of the likely outcomes;
- *Balanced Composition and Process*: The composition of the panel should favor neither the SEP holder nor the potential licensee.

Regarding proceedings at court or similar tribunals, measures to reinforce the principles of fairness, equity and proportionality by law as well as harmonizing law and case law will facilitate fairness and balance of dispute resolution. Lawmakers and courts should make sure that these principles are applied in any decision concerning injunctive relief, provisional remedies, potential alternative measures, damages and rights of information as addressed e.g. in Articles 8, 9, 11, 12 and 13 of the European IPR Enforcement Directive^{8,9}.

Note: the positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.

⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.