

1.2 The Role of SSOs and Rational Behind the FRAND Commitments

In general, standards come in a variety of forms. This paper is primarily concerned with market-defining standards, because this type of standards most clearly demonstrates the very material anticompetitive effects that successful standardization may lead to.

One way to create new standards is through private standardization setting organizations. The organizations are open to all members of the markets wishing to take part in the creation of a single standard. In order to address the tension between standard-essential patents and effective competition within the market, SSOs make use of IPR and patent licensing policies. Such policies attempt to support a wide market implementation of standards and to solve, at least to some extent, antitrust conflicts through self-regulation. Since a very significant and important part of today's global standardization relies on FRAND commitments, the main purpose of self-regulation is to anticipate the *ex post* effects of standardization on licensing negotiations between implementers and holders of standard-essential patents.³³

Although there are several dozen of SSOs that rely on FRAND type licensing policies, for the purposes of this paper the best example is the IPR policy developed within ETSI, and therefore the scope of this paper is limited hereto. ETSI is a leading international body for telecommunication technology standardization and the body responsible for the creation of harmonized standards in Europe.³⁴ As of today, ETSI has nearly 800 members drawn from 63 countries across 5 continents worldwide.³⁵ ETSI's IPR Policy implementation guidelines illustrate very clearly the fundamental issues arising from the intersection between IPR and antitrust law, *i.e.* the inherent conflict of numerous individual companies trying to impose their technologies in the standards in order to achieve commercial advantages as well as the strategic and business significance of defensive or offensive use of patent rights.

33 Timo Ruikka, "*FRAND* Undertakings in Standardization- A Business Perspective", N.Y. Fordham IP Conference, March 28, 2008.

34 ETSI Guidelines for Antitrust Compliance, adopted on 27 November 2008, available at: http://www.etsi.org/WebSite/document/Legal/ETSI_Guidelines_for_Antitrust_Compliance.pdf (as of July 2009).

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The ETSI IPR Policy can briefly be characterized as follows: The inclusion of a standard essential IPR plays a vital role, especially in the telecommunications sector where unprotected technology rarely exists.³⁶ According to Section 4.1 of Annex 6 of the IPR Policy Guideline, each participating member should identify and disclose its essential patents as early as possible in the process, including its patent applications.³⁷ It is important to note, that this obligation does not limit patent holders legitimate entitlement to exploit their IPRs, including the right to refuse the granting of license if the patent holder decides to “*opt out*” its patents from a given standard. The IPR Policy explicitly states that if certain essential patents or licenses are not available under FRAND terms, the specification has to be modified in order to avoid the use of such IPRs or then a specification cannot be adopted.

Contrary, in the scenario where a patent holder agrees to include his essential patents in a given standard, there is no reason for the standardization body not to integrate the patent in question in the standard. In return, so as to ensure the unhindered implementation of standards, ETSI will in conformity with Section 6.1 of the IPR Policy request that each holder of standard essential IPRs irrevocably declare that he will license the essential patent in question to third parties on fair, reasonable, and non-discriminatory terms.³⁸ In essence this means that the patent holder undertakes a commitment to respect FRAND licensing requirements in future bilateral negotiations with all concerned licensees. However, ETSI IPR Policy remains silent as regard what licensing on FRAND terms exactly means. Not surprisingly, this matter is left entirely to the licensor and licensee as a part of their regular business negotiation process.

Even though the standardization body does not provide an authoritative definition of what FRAND means, it is certain that the “*fair and reasonable*” requirement prohibits the licensor from unreasonably misusing his bargaining power in future licensing negotiations. When taking into account the purpose of ETSI IPR Policy, it is apparent that in order for the FRAND system to function and to achieve its purpose commitments undertaken by companies need to be binding and enforceable. Today, however, it is crucial to keep in mind that the binding nature of these obligations is purely of contractual nature. The enforcement

36 See ETSI Guide on Intellectual Property Rights (IPRs), adopted on 27 November 2008, available at http://www.etsi.org/WebSite/Objectives_and_Benefits_of_Standardization_e/document/Legal/ETSI_Guide_on_IPRs.pdf (as of July 2009).

37 ETSI IPR Policy, adopted on 26 November 2008, available at: http://www.etsi.org/WebSite/document/Legal/ETSI_IPR-Policy.pdf (as of July 2009).

38 Ibid.

measures under the ETSI IPR Policy are rather limited and therefore the successful functioning of standards today rather depends on the involved patent holders' own attitude.

In particular, this aspect I had the pleasure of discussing during a personal interview with *Mr. Timo Ruikka* held in March 2009. *Mr. Ruikka* has been with Nokia since 1988 and has extensive experience in standardization and industry policy issues. Also, he has represented Nokia in multiple litigations touching upon the issues discussed in this paper. During the interview *Mr. Ruikka* also highlighted how difficult and burdensome it is for licensees to challenge an offered royalty rate with reference to FRAND commitments, even if it is quite apparent that such commitments have been violated.³⁹

1.3 Criticized Pitfalls of the Current FRAND Regime

While the SSOs have significantly contributed to the development of an effective standardization process, concerns remain as the current FRAND commitments are not deemed sufficient to reduce the risk of anti-competitive behaviour. For the purposes of this paper, the main conceptual difficulties under the current framework can be discerned into two different concepts. The owner of relevant standard-essential patents has in theory the ability to block the standard. Firstly, the standard-essential patent holder can choose not to disclose his essential patents and simply block the standardization process (also known as patent-hold up or patent ambush). Secondly, the standard-essential patent holder can take part in the standardization process and then block it subsequently by demanding royalties for his patents that are significantly higher than the royalties he could have charged before his IPRs were included into the standard (also known as royalty stacking).

1.3.1 The Patent Hold-Up Problem

In short, so-called patent hold-ups generally refer to a situation where a company holding a patent relevant for a specific standard emerges only after the standard has already been set and start to demand high royalty rates *ex post*. As described by *Shapiro* in his article "*Injunctions, Hold-Up, and Patent Royalties*", in this

39 Interview: Timo Ruikka, Nokia Corporation, Strategy Advisor of IPR Legal Department, personal interview, 28 March 2009.