World Class Standards

The interface between Standards and IPRs

The ETSI IPR Policy

The Standards Edge Conference: 'Building Economic Strength and Social Benefit', Beijing, 17-18 April 2007

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The context

THE CONTEXT

- Growing importance of standardisation
- Inherent tense relationship between IPRs and Standards:
  - IPRs and Standards are diametrically oposed
    - IPRs destined for private exclusive use ./. Standards intended for free, collective use
  - This tension is leading to conflicts
    - whenever the technical content of a standard falls within the scope of a patent as defined by its claims, the patentee has the potential to block the implementation of the standard

What ETSI is doing

PURPOSE OF ETSI's IPR POLICY

- **Providing transparent rules**
- **Facilitating standards making process within ETSI by fairly balancing all the interests involved**:
  - **IPR owner: right to fully benefit from its IPR**
  - **third parties: rights to make and sell interoperating products**
  - **public use: not to lock users into specific technology platforms**
  - **SDO: avoid wasting effort on the elaboration of a Deliverable which could subsequently be blocked by an essential IPR**

MAIN CHARACTERISTICS

- Early identification of essential IPRs
- Full respect of rights of the IPR holder →consent of Members and third parties needed to use an IPR in a standard
  - ETSI ensuring beforehand availability of licences by requesting a irrevocable undertaking to grant licences under fair reasonable and non-discriminatory (FRAND) terms and conditions for essential IPRs
- No involvement of ETSI in any legal and commercial discussion on IPR matters
  - Terms and conditions of license to be determined by the parties of the agreement

EARLY DISCLOSURE

- **Importance of obtaining knowledge of IPR-landscape before lock-in of standard:**
  - **Increasing transparency**
  - **Ability to take informed decisions in standards making process**
  - **Being in a position to clarify the question of availability of licences under FRAND conditions**

- **Strong obligation to inform ETSI on essential IPRs in a timely fashion**
  - **But, no obligation on Members to conduct IPR searches**
  - **No patent landscaping by ETSI**

- **Public visibility of declared essential IPRs through the ETSI IPR Database**
  - **Users/Implemensters of Standards can easily access information on essential IPRs at http://webapp.etsi.org/IPR/home.asp**

FRAND COMMITMENT

- **Importance for ETSI: avoiding blocking of standard following a refusal to license after creation of standard**
- **Requesting the IPR owner to give an irrevocable undertaking to grant licences under fair reasonable and non-dicriminatory (FRAND) terms and conditions**
  - **Free choice of IPR owner to refuse inclusion of its IPR in a standard by refusing to give the requested undertaking**
  - **In case of refusal a transparent and refined procedure is initiated**
    - Differencing between prior and after publication, members and third parties + taking into availability of alternative technology
- **Determination of terms and conditions of license agreement up to the parties**
  - **License agreement is a mutual agreement between licensor and licensee**
  - **discussion of commercial issues shall not take place within ETSI**

RECENT DISCUSSIONS IN ETSI

- **Concern that FRAND-commitment might be insufficient in some few particular cases**

  ↳ **call for more predictability**

- **Reasons:**

  - **Proliferation of essential patents and patent owners → many contributions implies many rewards (17.500 IPR-Declarations from 127 companies in ETSI IPR Database: ~4.700 for GSM, ~7.700 for UMTS and ~3.500 for 3GPP).**
  - **Many different complementary technologies in one standard → Cumulative fees for multiple technologies**
  - **Higher functionality is increasing IPR volumes.**

RECENT DISCUSSIONS IN ETSI

- **November 2005: ETSI GA established ad hoc group to review the ETSI IPR policy (IPR R AHG)**
  - **One preparatory meeting and six meetings (80-100 participants and 15-25 documents per meeting)**
  - **All decisions made by consensus**
  - **16 recommendations unanimously endorsed by ETSI GA (Nov. 2006)**
  - **Recommendation now already implemented in ETSI Directives**

TRANSPARENCY OF LICENSING TERMS

- **What ex ante disclosure of licensing terms is:**
  - **mechanism about submitting anticipated licensing terms for a given standard draft before the contribution is locked-in as a standard**
  - **fostering competition on the basis of technology and price before the standard is approved**
  - **can bring pro-competitive benefits subject to appropriate safeguards**
    - **Para. 225 of the EC Guidelines on TTBE**
    - **EC Press Release, 12 December 2005**

TRANSPARENCY OF LICENSING TERMS

- **What ex ante disclosure of licensing terms is not:**
  - **'Disclosure of IPRs' = notification to ETSI of essential IPRs**
  - **'Licensing declaration' = notification to ETSI of intent to grant licenses on FRAND terms (FRAND-commitment)**
  - **Ex ante collective royalty cap = fixing in advance a cap shared between licensors according to their strict mathematical proportion of essential patents**
    - **EU Commission: not acceptable (Letter to ETSI 21 June 2006)**

TRANSPARENCY OF LICENSING TERMS

- **How ex ante is working in ETSI:**
  - **It is fully voluntary, i.e. not mandatory as in VITA**
    - **lack of disclosure is not creating any implication**
  - **No detailed licensing terms available from ETSI → ETSI may act only as a depository.**
  - **Disclosed terms do not represent ETSI's interpretation of FRAND**
  - **ETSI not responsible for determining whether the licensing terms disclosed ex ante are FRAND.**
  - **No discussion/negotiation of specific licensing terms within ETSI.**

⇨ **Increasing predictability by using market mechanisms**

Conclusion

CONCLUSIONS

- IPR Policy is one of the key elements for the success of ETSI's globally-applicable standards

⇨ Allowing Members to fully reserve their IPRs was beneficial to the drafting of excellent and high-quality standards

  - incentive for high technology companies to participate in the standardization process

⇨ Recent developments on ex ante disclosure of licensing terms is increasing transparency without bringing the fair balancing of interests out of equilibrium

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Thank you for listening

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