

Patent pools should have a central role in European SEP policy

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The recent European Commission move to withdraw the SEP regulation was a welcome development. However, this is not because the aims of the proposed legislation were misplaced. No-one reasonable seriously objects to greater transparency, predictability and efficiency in standard essential patent licensing.

The Commission was right to identify them as major issues. Where it went wrong, though, was in suggesting solutions that placed an unfair burden on SEP holders in ways that would have primarily benefited major auto manufacturers and Big Technology companies, many of them based outside the EU.

Now, though, there is a chance for a rethink. This is good news. Hopefully, as Commission officials and EU member states consider what, if anything, should happen next, they will give much more thought to the positive role patent pools can play in delivering the balanced licensing market everybody of good faith wants.

Back to the future

In fact, one of the truly surprising aspects of the SEP regulation was how little attention it paid to pools, given that the current **TTBER and Guidelines** state in Section 4.4: “Technology pools can produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation.”

It continues: “The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent, and licences need to be obtained from a significant number of licensors in order to operate on the market.”

The Commission further recognised the positive role that pools can play in 2017. Its Communication to the European Parliament on 29th November that year - “**Setting out the EU approach to Standard Essential Patents**” - was enthusiastic: “The creation of patent pools or other licensing platforms, within the scope of EU competition law, should be encouraged. They can address many of the SEP licensing challenges by offering better scrutiny on essentiality, more clarity on aggregate licensing fees and one-stop-shop solutions. For IoT industries, and particularly SMEs, newly exposed to SEP licensing disputes, this will bring more clarity to licensing conditions of SEP holders in a specific sector.”

Everything the Commission said then – and all that was set out in the TTBER and Guidelines – remains the case today. If you want transparency, predictability and efficiency in SEP licensing, patent pools have a major role to play.

Everyone wins

Best-in-class pools benefit both patent owners and implementers, so enabling widespread technology adoption. Not only do they incentivise R&D through the royalties they generate for those who invest in cutting-edge innovation, but by offering a single, transparent licence to an array of patents held by multiple entities they also enable implementers to bring products to market. As a result, society as a whole benefits.

Transparency is at the heart of it all: licensees must have confidence in what they are being offered. Pool administrators understand this and focus on providing as much information as possible. They do it in multiple ways:

- Comprehensive lists of patents included in the pool.
- Clear identification of participating patent owners.
- Patent brochures that explain how the SEPs offered through the pool are utilised in products complying with the standard. These brochures identify the relevant sections of the standard, so providing a clear understanding of where a pool's patents fit in.
- Making the pool's full licence terms publicly accessible.

Alongside transparency, it is also vital for licensees to be clear about the essentiality of the patents offered through a pool. This means they must pass a two-part test:

First, they have to have undergone substantive examination at a patent office in advance of being granted. Second, following grant the patent owner must provide the pool administrator with an assessment of essentiality made by an independent and accredited third-party.

Transparency and essentiality deliver the peace of mind implementers will always rightly require before agreeing pool licences. With these covered, the other benefits of aggregated licensing programmes come into play:

- **Efficiency:** a "one-stop shop" pool licence provides significant cost benefits by streamlining the licensing process compared to negotiating multiple bilateral licensing deals individually. Not only do licensees save on administrative costs, but they also benefit because the cost of a single pool licence tends to be significantly lower than the sum of the equivalent bilateral agreements.
- **Market sensitive royalty rates:** many patent pools have licensors that are also licensees, meaning they have accepted the royalty rates the pool levies. This is an important validation of realistic pricing.
- **Predictability:** As pools publish their rates and also identify their licensors, licensees know what they are going to get and can plan accordingly. There are no surprises.

Strong foundations in law

Underpinning all of this is the robust legal structure provided by the TTBER Guidelines. These require:

- A transparent pool creation process.
- That only complementary patents and patents relevant to the standard are included in the pool.
- The participation of independent evaluators to determine the patents truly essential to a particular standard.
- Strong safeguards against the exchange of sensitive information.
- Licensing terms that are fair, reasonable and non-discriminatory (FRAND).
- The freedom to challenge validity of the patents in a pool, as well as whether they are truly relevant to the standard.
- The freedom to develop competing products and technologies.
- Independent dispute resolution mechanisms.
- That licensees must always have the choice to license bilaterally from individual pool licensors.
- Retention of highly experienced legal counsel by pool administrators to ensure full compliance with all applicable antitrust laws.

Simple, fast and efficient

When you factor in the multiple benefits of what they deliver, as well as the strict legal regime under which they must operate, it is clear pools have a huge amount to offer in terms of simplifying, speeding-up and reducing the cost of the SEP licensing process. They offer the transparency, the efficiency and the essentiality checks the Commission put at the heart of the SEP regulation. These issues are particularly important for rapidly evolving, complex technology areas such as the IoT, wireless communications and AI.

For all these reasons, any future SEP policy initiatives in the European Union should put incentivising both licensor and licensee participation in pools at their heart. It goes without saying that pool administrators would be pleased to provide all the information the Commission might need to be able to do this.



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