The ETSI IPR Policy

The ETSI IPR Policy: A key element for the success of ETSI’s globally-applicable standards

(the views expressed are personal views of the author and are not necessarily those of ETSI)

TABLE OF CONTENT

A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
ETSI IN A NUTSHELL

- ETSI = European Telecommunications Standards Institute
- created in 1988 in Sophia Antipolis (France)
- recognised European Standardisation Body (Directive 98/34/EC)
- independent, non-profit organization established under French law
- >650 member companies from more than 51 countries
- leading body for globally applicable standards for telecommunication and other ICT related services
- Home of world class standards: GSM, UMTS, DECT, DVB, TETRA
- Funding partner of the 3rd Generation Partnership Project (3GPP)
IPRs and Standards

- IPRs and Standards are opposed:
  - IPRs are destined for private exclusive use
  - Standards are intended for free, collective use

- Tension leading to conflicts whenever the technical content of a standard falls within the scope of a patent as defined by its claims

- Essential IPR = implementation of a standard is requiring the use of protected technology
CHALLENGE

- solve the tension between IPRs and standards by striking the proper balance between all the different interests involved

- Interests involved:
  - IPR owner: has the right to exploit its IPR commercially
  - third parties: have the right to make and sell standard compliant products under reasonable conditions
  - public use: not to lock users and consumers into a specific technology platform
  - SDO: avoid wasting effort on the elaboration of a Deliverable which could subsequently be blocked by an essential IPR
A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
MAIN CHARACTERISTICS

- No technical reservation for the inclusion of IPRs in standards

- Early identification and disclosure of essential IPRs

- Ensuring the future applicability of the standards in full respect of the rights of the IPR owner by requesting FRAND licensing declaration (\textit{FRAND = fair, reasonable and non-discriminatory})

- No involvement of ETSI in any legal and commercial discussion on IPR matters (i.e. terms and conditions of the licenses to be determined by the parties of the agreement)
A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
OBLIGATION TO DISCLOSURE

- **Importance of the obligation**
  - Enabling participants in standards making process to take informed decisions
  - Preventing hold-up situations
  - Bringing ETSI in a position to clarify the question of availability of licences under FRAND conditions

- **Extent of the obligation**
  - Disclosing essential IPRs relating to own technical proposal + using reasonable endeavours to inform ETSI of all IPRs in a timely fashion
  - No obligation to conduct IPR searches
  - Granted IPRs and applications therefore

- **ETSI’s role**
  - Call for IPRs
  - No patent landscaping
  - No checking of validity or essentiality of the disclosed IPRs
  - Publication of disclosed IPRs through the ETSI IPR Database
    - [http://webapp.etsi.org/IPR/home.asp](http://webapp.etsi.org/IPR/home.asp)
A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
FRAND licensing declaration

- FRAND = Fair, Reasonable and Non-Discriminatory

- ETSI requesting IPR owner to give undertaking to grant licences under fair reasonable and non-discriminatory (FRAND) terms and conditions

- Importance:
  - avoiding blocking of standard following a refusal to license after creation of standard
  - ensuring access to standard

- But: IPR owner has the free choice to give or to refuse FRAND licensing declaration
  - inclusion of IPR in a standard requires the explicit consent of the IPR owner

- ETSI disposes of a procedure in case of a refusal
  - Distinguishes between situations pre and post publication of a standard, between members and third parties + is taking into account the availability of alternative technologies
FRAND licensing declaration

- Terms and conditions of the licenses to be determined bilaterally by the parties of the agreement + enforcement based on existing legal system
  - Then: subsequent licensing negotiations were largely unproblematic
  - Now: increase of cases where licensing parties have a different understanding of the meanings of FRAND (e.g. unreasonable licensors asking for excessive royalties, discriminatory licensing practice of IPR owner), resulting in an increase of litigation

- Recent cases
  - German Federal Court, Docket n° KZR 40/02: “Tight-Head Drum”
  - District Court Düsseldorf, Docket n° 4b O 346/05: “Video Signal Encoding I”
  - Court of Appeal Karlsruhe, Docket n° 6 U 174/02: “Orange Book-Standard”
  - District Court Düsseldorf, Docket n° 4a O 124/05: “Zeitlagenmultiplexverfahren”
  - 3rd U.S. Circuit Court of Appeals, Docket n° No. 06-492: “Broadcom Corp. vs. Qualcomm Inc.”
  - U.S. District Court for the Eastern District of Texas, Docket n° No. 6:06-CV-324: “CSIRO vs. Buffalo Technology Inc.”
A. Introduction

B. Main characteristics of the ETSI IPR Policy

C. Obligation to disclose

D. FRAND licensing declaration

E. ETSI’s reaction to a changing environment

F. Conclusion
EX ANTE DISCLOSURE OF LICENSING TERMS

= mechanism about submitting anticipated licensing terms for a given standard draft before the contribution is locked-in as a standard

☐ Can bring pro-competitive benefits subject to appropriate safeguards

➢ Europe:  - EC Guidelines on TTBE
          - EC Press Release, 12 December 2005
          - EC letters to ETSI (09.12.2005 and 21.06.2006)
          - Articles
            = Piesiewicz, Schellingerhout, IPRs in standard setting, EC Competition Policy Newsletter 3/2007
            = Madero, Banasevic, Standards and Market Power, Global Competition Policy, 05/2008
          - Speech Commissioner Neelie Kroes, OpenForum Europe Breakfast Seminar, 10 June 2008

➢ USA:    - DoJ Business Review Letter to VITA (30.10.2006)
          - DoJ/FTC Report on Antitrust enforcement and IPRs (April 2007)
EX ANTE DISCLOSURE OF LICENSING TERMS

- **Benefits**
  - enables competition on the basis of technology and price before the standard is approved
  - fostering the creation of a fair market price
  - avoiding the possibility of ex-post monopoly pricing once lock-in has occurred
  - permits quick market entrance after standard is adopted

- **Costs**
  - antitrust risk
    - discussions as to the terms including price, costs, limitations or other negotiations can be very sensitive
    - group discussions of disclosed licensing terms may lead to group boycott conduct, buyer cartell behaviours or other anti-competitive conduct
  - additional overhead, i.e. may cause delay in standardisation while members are considering terms
EX ANTE DISCLOSURE OF LICENSING TERMS

How are ex ante disclosures working in ETSI:

- Ex ante disclosure is fully voluntary; i.e.
  - no obligation to disclose licensing terms of essential IPRs
  - lack of disclosure is not creating any implications
  - FRAND licensing declaration is sufficient for the inclusion of an IPR into a standard
  - Disclosure of licensing terms is left to the usual free market mechanisms

- Appropriate safeguards
  - New ETSI Antitrust Guidelines
  - ETSI is not involved to a large extent in the disclosure of licensing terms
  - No discussion/negotiation of specific licensing terms within ETSI
  - ETSI is not responsible for determining whether the licensing terms disclosed ex ante are FRAND
A. Introduction
B. Main characteristics of the ETSI IPR Policy
C. Obligation to disclose
D. FRAND licensing declaration
E. ETSI’s reaction to a changing environment

F. Conclusion
CONCLUSION

- ETSI IPR Policy is a key element for the success of ETSI’s globally-applicable standards
  - fair balance of all the interests involved
  - allowing Members to fully reserve their IPRs was/is an incentive for high technology companies to participate in the standardization process enabling ETSI to draft excellent and high-quality standards

- Self-regulation by the ETSI IPR Policy
  - can not prevent all cases of abuse,
  - but is suitable to solve the bigger part of the problems already at the onset

- ETSI is effectively facing the new challenges

- ETSI will continue to lead the debate on IPRs and Standards
Thank you for listening