CEN

WORKSHOP

AGREEMENT

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English version

Core Principles and Approaches for Licensing of Standard Essential Patents

This CEN/CENELEC Workshop Agreement has been drafted and approved by a Workshop of representatives of interested parties, the constitution of which is indicated in the foreword of this Workshop Agreement.

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EUROPÄISCHES KOMITEE FÜR NORMUNG

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European foreword

CWA 95000:2019 was developed in accordance with CEN-CENELEC Guide 29 "CEN/CENELEC Workshop Agreements" and with the relevant provisions of CEN/CENELEC Internal Regulations - Part 2.

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This Workshop Agreement, including its Annexes (CWA) has been drafted and approved by a Workshop of representatives of interested parties on 2019-01-16, the constitution of which was supported by CEN and CENELEC following a public call for participation. The Workshop's Kick-Off meeting took place on 2018-02-12.

Organizations which supported the consensus represented by this CWA were drawn from the following economic sectors: Semiconductor; Automotive; Telecommunications; IoT; Wireless; Technology Equipment; Legal; Software; Technology SME; and Manufacturing.

The formal process followed by the Workshop in the development of this CWA has been endorsed by the National Members of CEN/CENELEC but neither the National Members of CEN/CENELEC nor the CEN-CENELEC Management Centre can be held accountable for the content of the CWA.

Public consultation for this CWA started on 2019-01-29 and ended on 2019-03-28.

The final review for this CWA before publication was started on 2019-04-24 and was successfully closed on 2019-05-02. The final text of this CWA was submitted to CEN for publication on 2019-05-03.

Below is a list of companies/organizations that developed and approved this CWA:

— **ACT The App Association**

— **AirTies Wireless Network**

— **Apple Inc.**

— **Bayerische Motoren Werke AG**

— **Cisco Systems, Inc**.

— **Creo Group**

— **Denso International Europe**

— **Deutsche Telekom AG**

— **Fair Standards Alliance**

— **Groupe Renault**

— **Honda Motor Co., Ltd.**

— **Juniper Networks**

- **Multispectral Limited**
- **N&M Consultancy**
- **Nordic Semiconductor ASA**
- **Ponti & Partners SLP**
- **Sequans Communications**
- **SolidQ**
- **TapTap**
- **Telit Communications SpA**
- **Volkswagen AG**
- **Wyres SAS**

In addition, while the following companies/organizations did not participate in the drafting of this document they are expressing their general support for its content:

- **ACEA (European Automobile Manufacturers' Association)**
- **Andaman7**
- **BadVR**
- **Barefoot & Co.**
- **Blue Badge Insights**
- **Bullitt Group**
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- **Fairphone**
- **Ford**
- **High Tech inventors Alliance**

- **Hitachi ltd.**
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- **IP2Innovate**
- **Kamstrup A/S**
- **Lenovo**
- **MotionMobs**
- **Nationsorg**
- **Nouss**
- **PSA Groupe**
- **Sagemcom**
- **Sierra Wireless**
- **Sigao Studios**
- **Sky**
- **Southern DNA**
- **Synesthesia**
- **Toyota Motor Corporation**
- **U-Blox**
- **Valeo**

The Participants to the CWA encourage that any interested stakeholders please provide feedback and comments to the CWA, and expect that such feedback, as well as future legal and business developments, may lead to future updates to the CWA. The Participants encourage that any suggestions for additional or updated content can be submitted through the CWA's Secretariat (DIN).

This Workshop Agreement is publicly available as a reference document from the National Members of CEN/CENELEC: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and United Kingdom.

Introduction

Technical standards help to drive the modern global economy. As industry continues to develop and evolve in Europe and worldwide, new standards are directed to the so called "Internet of Things" (IoT), the "5G" suite of standards, and other next generation standardized technologies. It is anticipated that more and more industries will incorporate these types of standardized technologies and the interoperability that they provide.

Standardized technologies are commonly developed by standard development organizations (SDOs),[1] where industry participants and other stakeholders come together to develop and agree upon technical specifications. While there are hundreds of significant SDOs, a few prominent European and international SDOs include:

— the European Telecommunications Standards Institute (ETSI), which focuses on telecommunications standards;

— the Institute of Electrical and Electronics Engineers (IEEE), which is the world's largest technical body and focuses on both wireless and wired communications, as well as other industry solutions;

— the International Telecommunication Union (ITU), which is a United Nations (UN) agency focused on standardization in telecommunication, video and audio technologies, and which commonly works in partnership with two other key SDOs, the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC);

— the European Committee for Electrotechnical Standardization (CENELEC), which is responsible for European standardization in the area of electrical engineering, and the European Committee for Standardization (CEN), which is responsible for European standardization in other areas; *and*

— Various national standards organizations, such as the German Institute for Standardization (Deutsches Institut für Normung or DIN), which is the German national organization for standardization and delegate for participation in ISO.

In developing technical standards, SDOs can develop specifications that incorporate technologies that may, in many situations, be the subject of patents (or pending patent applications) either held by the contributor to the specification or by other third-parties. Patents that are necessary in order to implement a standard are referred to as standard-essential patents (SEPs).[2] In SDOs, it is commonly the case that companies participate both as contributors to the development of standards, as well as market participants that intend to market products implementing the standard once finalized. Efforts to create sharp divisions between so called "contributors" and so called "implementers" are generally incorrect, and tend to mischaracterize the interests of the SDO participants in developing strong, usable and successful standards. Furthermore, there are many companies that are both "contributors" as well as "implementers" of standards.

[1] SDOs may also be referred to as "standard setting organizations" or SSOs. The terms are meant to be used interchangeably herein.

[2] SDO patent policies may provide more specificity or information in defining SEPs subject to the particular policy. Moreover, it is important to note that a patent is not a SEP simply because the patent holder asserts so. Where there are disputes about essentiality, infringement, validity or the like, the national courts are generally the appropriate body to determine whether a patent is, or is not, a SEP.

Patents reward innovation, and it is important that SDOs have the ability to incorporate innovative new technologies. The challenge is to guard against potential abuse of the lock-in effect, when competitors select patented technology for standardization thereby creating an inability to design around such technology.

To address these standardization "hold up" issues, as they are often termed, SDOs such as those listed above commonly adopt patent policies providing for licensing of SEPs on specified fair, reasonable and non-discriminatory (FRAND) terms.

SDOs differ to some extent regarding their policies for SEP licensing, and licensing terms may be a factor considered when stakeholders decide whether to participate in a given standardization effort. For example, some SDOs provide for FRAND royalty free (FRAND-RF or FRAND-Zero) licensing of SEPs applicable to their standards. Other SDOs have adopted policies that provide for licensing on FRAND terms, which may include royalties. The focus of this CWA will be on those SDOs operating under policies involving FRAND licensing obligations that may include royalties.[3]

Under FRAND policies, standards participants voluntarily promise to license their patents on fair and reasonable terms. This secures for patent holders an ability to obtain reasonable and non-discriminatory value for patents contributed to SDOs, while also addressing – provided the FRAND commitment is upheld – SDO and SDO participant interests to mitigate the possibility of SEP hold up.

In recent years, there have been quite a lot of debates, disputes, court litigation and, more recently, governmental and regulatory investigations involving disagreements around obligations that arise from the voluntary FRAND commitment (or "FRAND obligations"). These issues are of increasing importance as standardized technologies, including wireless communication technologies, move into new industries such as automotive, industrial, energy, finance, transportation, warehousing, infrastructure and security.

This CWA seeks to (a) provide educational and contextual information regarding SEP licensing and the application of FRAND, (b) identify and illustrate some of the questions that negotiating parties may encounter, and (c) set forth some of the key behaviors and "best practices" that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation. Our hope is that this CWA can assist both experienced and inexperienced SEP negotiators and inform any other interested stakeholders how to more effectively reach fair agreements and to better promote the goals and interests of industry, standardization and, ultimately, consumers.

To develop this CWA, which was organized under the auspices of CEN-CENELEC and with DIN serving as the Secretariat, a public call for participation was published by CEN-CENELEC. More than fifty parties joined a "kick off" meeting at DIN's headquarters in Berlin to begin the development process. The participants exchanged multiple drafts, each of which was subject to comment and edit by the full participant group. Ultimately, this agreed-upon CWA was developed.

3 This CWA often refers generally to "standards", but it is noted that, depending on the context, various terms may be used to refer to standardized technologies. For example, Regulation (EU) 1025/2012 on European standardisation defines the meaning of the terms "standard" and "technical specification", both of which are relevant to this document. Likewise some SDOs may use terms such as "deliverables", "technical output", "recommendation", or other terms. In this CWA the term "standard" is used generally to refer to various types of standardized technologies regardless of the formal name that may be applicable in the particular context or organization. As noted, the focus of this CWA is addressing SDOs and standards involving FRAND licensing obligations that may include royalties.

While this CWA reflects practical approaches and policy views endorsed, on a general consensus basis, by the signatories, it is noted that the detailed corporate positions of each of the participants may not be reflected in each aspect of the draft, and it is recognized that such corporate positions may include additional or different best practices. Likewise, while the CWA offers guidance and practices that negotiating parties may choose to support in their own dealings, it is emphasized that all participants in this CWA, and all others, remain free to pursue their own individual licensing negotiations on a case-by-case basis, whether or not the approaches set forth herein are employed. While courts and other decision makers might take into account the policy issues, approaches and practices addressed herein, and while the CWA identifies a number of supporting legal decisions, legal approaches may often differ on a country-by-country basis, and nothing herein is intended to suggest that a particular court or other decision-maker will support each of the issues, approaches or practices set forth.

This CWA does not constitute legal advice. Parties should always consult with their own advisors and attorneys, as necessary, in connection with their specific dealings on a case-by-case basis.

1 Scope

This CWA addresses some of the key behaviors and "best practices" that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation, and in a manner that can be beneficial to innovation, industry, standardization and, ultimately, consumers. The CWA addresses SEP licensing practices in the 5G and IoT industries, as well as in other areas were SEPs are applicable. The CWA also provides educational and contextual information regarding SEP licensing and the application of FRAND.

2 Summary of Document and SEP Licensing Core Principles

This CWA includes an Introduction, six Sections and two Annexes, as follows:

— The **Introduction** provides a brief overview of the industry issues addressed, and important economic and business impact that standards and SEPs have on the European and International economy.

— **Section 1** identifies the scope of the document, and identifies areas that the CWA addresses.

— This **Section 2** summarizes the CWA, and lists the Core Principles for SEP licensing that have been identified and agreed upon by the CWA Participants.

— **Section 3** provides a practical summary of SEP licensing "best practices", which embody and support the Core Principles, and which can help to facilitate a FRAND process and result in conducting bi-lateral negotiations.

— **Section 4** offers a market background, as well as a summary of relevant competition law considerations important to understanding and applying the FRAND obligation.

— **Section 5** offers a more detailed legal review and analysis of the FRAND obligation, including extensive citation to applicable law, as an explanation of and support for the six Core Principles for SEP licensing set forth therein.

— **Section 6** provides a short conclusion to the CWA.

— **Annex A** lists Frequently Asked Questions (FAQs) and offers responses that may be helpful to parties engaged in SEP licensing.

— Finally, **Annex B** lists materials that should be readily available to negotiating parties, in the interests of transparency and to facilitate SEP licensing based on a common base of information and facts.

While negotiating parties may in some instances focus on the practical issues addressed in Section 3's "best practices" summary, it should also be understood that the six Core Principles summarized below – and the legal basis in background therefore as set forth in Section 5 – help to drive FRAND licensing practices and ground them in processes and approaches that facilitate FRAND results. The six Core Principles are:

Core Principle 1: *A FRAND SEP holder must not threaten, seek or enforce an injunction (or similar de facto exclusion processes) except in exceptional circumstances and only where FRAND compensation cannot be addressed via adjudication, e.g. lack of jurisdiction or bankruptcy. Parties should seek to negotiate FRAND terms without any unfair "hold up" leverage associated with injunctions or other de facto market exclusion processes.*

Core Principle 2: *A FRAND license should be made available to anybody that wants one to implement the relevant standard. Refusing to license some implementers is the antithesis of the FRAND promise. In many cases, upstream licensing can create significant efficiencies that benefit the patent holder, the licensee and the industry.*