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POSITION PAPER - SEP LICENSES AVAILABLE TO ALL

Synopsis

Today's increasingly connected world demands cooperation and interoperation among many different products. Such interconnection requires common understanding of interfaces across products from multiple companies. To achieve this, industry players cooperate through Standards Setting Organisations (SSOs) to establish shared specifications, standards. To ensure widespread adoption, SSOs obligate contributors to license Standards Essential Patents (SEPs) on Fair, Reasonable and Non-discriminatory (FRAND) terms. However, some SEP holders are failing to comply with the Non-discriminatory requirement of FRAND and are refusing to license subsystems manufacturers. This paper addresses the negative impact of such discriminatory licensing practice on the product ecosystem and on consumers. This practice is not acceptable and FRAND SEP licenses must be available to all entities, regardless of their role within the product supply chain.

Introduction

Today's consumers enjoy many technological advances. These advances are so pervasive and commonplace that we have all grown accustomed to relying on them. Sometimes we forget that these advances are not the product of a single entity. Instead, many of these advances are built from extremely complex systems. Most of these systems result from the cooperation of many different organizations. For example, the very document that you are reading involved the generation of the paper it is printed on, the manufacture of the printer that put the ink onto the paper, and the computer hardware and software that allowed the author to format his/her thoughts, which were then sent to the printer. All this and more to allow delivery of the author's ideas, i.e., the author's copyrighted work, to the ultimate consumer, the reader. To ensure this process operates smoothly, the paper needs to be the correct size and shape for the printer to use. Similarly, the interface used to transfer the page contents and formats between the computer system and the printer has to be properly understood by both machines. In order to ensure these interactions among the various systems function properly, common specifications, or standards, need to be used by the different systems.

Standards Setting Organizations' main goal: widespread adoption of robust technical specifications

Due to the wide variety of different technologies that benefit from and require such standardization, multiple companies have cooperated in establishing technical standards through various SSOs. Standards are most useful when they are widely adopted and these SSOs recognise this as their primary mission. To achieve this goal, SSOs must ensure that there are no blockages that impede the use of the standard. One such concern is that the standard must not be hampered by unreasonable licensing of the patents that are embedded within. Towards this end, some SSOs establish royalty-free licensing regimes, while others obligate the participants/contributors to license any patents essential to the implementation of the standard, the SEPs, on FRAND terms.

FRAND does not discriminate

In this paper, we will focus mainly on the non-discriminatory portion of the FRAND obligation. However, it is also important to note that discriminatory behaviour can reveal itself through unreasonable or unfair licensing practices. More on this later.

First, the non-discriminatory obligation is easy to comprehend. Discrimination means treating one segment of the licensee population in a manner significantly different from that of another part of the licensee population. In other words, any entity that requests a license to SEPs should be provided with a Fair and Reasonable license offer.

During the early development of the digital cellular telephony market, this obligation was well observed. SEP holders established licenses with manufacturers of all types of equipment when requested. Manufacturers in all parts of the product supply chain were able to obtain SEP licenses. These licensees were then able to offer licensed products, whether they were complete end-use products or intermediate subsystem products, to their customers. Indeed, this allowed the establishment of an ecosystem whereby some manufacturers were able to supply subsystems that implement the standards to downstream manufacturers, thus freeing the downstream manufacturers from dealing with the complexities of the standards based technologies. The downstream manufacturers were then able to focus their efforts on the innovations that they add in the implementation of the final product. This system indeed eased the widespread adoption of the standard technologies, a primary goal of the SSO.

Licensed subsystems provide effective solutions to end-product manufacturers

So, why are end product manufacturers interested in using licensed subsystems? Today's end products are getting increasingly complex. It is necessary to incorporate many different technologies into a product to enhance competitiveness. For example, it is no longer adequate to just provide a powerful motor to lift a garage door, many garage door openers now incorporate Wi-Fi and internet connectivity to allow remote status indication and remote operation. It would be cumbersome for the garage door manufacturer to design its own wireless connectivity solution when their expertise and value-add is in

the reliability and quietness of the motors. Therefore, these manufacturers use wireless communications subsystems supplied by manufacturers that are well versed in the continual development of the wireless connectivity standards. Furthermore, since the end-product manufacturers are not well equipped to assess whether a patent is indeed a SEP, they rely on the subsystem manufacturers to provide indemnification against patent assertions on technologies implemented in the subsystems. Also, from a practicality and efficiency perspective, it would make obvious sense that the patent owner should talk to the implementer of the technology, the subsystem manufacturer, which is in a better position to judge whether the alleged patent assertion is justified or not. This is especially relevant in view of the fact that a majority of patents claimed to be SEPs turn out to not be essential to the standard. This has been borne out by numerous litigation outcomes.

For several decades, subsystem manufacturers fulfilled this need. These manufacturers took on the task of tracking the evolution of the standardised technologies, contributed to their development, and implemented solutions that could be efficiently used by end product manufacturers. To satisfy the end-product manufacturers' desire to avoid patent assertion issues, these subsystem manufacturers often took on the risk of providing indemnification against patent assertions. To manage these risks, the subsystem manufacturers were able to obtain licenses with SEP holders. These subsystem manufacturers relied on the SEP holders' obligation to not discriminate against them as licensees.

Of course, this ecosystem did more than just satisfy the desire of end-product manufacturers to rely on subsystem suppliers to manage the patent assertion risks. The ability of subsystem suppliers to focus on the technologies embodied in the subsystems also resulted in more focused design and development efforts to ensure that the subsystems were optimally designed. Furthermore, these subsystem manufacturers could fully focus their attention on the evolution of these standards and ensure that the most effective and advanced capabilities were implemented. As well, with the subsystems being supplied to multiple end product manufacturers, economies of scale were brought into play to provide the most cost-effective and most robust solutions to the end products and, in turn, to the end consumers.

Ecosystem put at risk

Unfortunately, this effective and efficient ecosystem is being challenged. Some SEP holders are now refusing to license subsystem manufacturers. Some SEP holders argue that the value of SEPs are demonstrated in their use in the final product and therefore the SEP holders should be able to collect royalties on the final product. Other SEP holders claim that the SEPs cover functionality that requires cooperating components outside these subsystems and therefore royalties should not be collected at the subsystem level. However, the main driver for this change appears to be their belief of some SEP holders that they can extract higher royalty payments from the end product manufacturer than from the subsystem manufacturer.

Discriminating tax on a brick?

So, what are the errors in such arguments? First, SEP holders claim that their innovation has benefitted the end product and that therefore they should be allowed to tax the entire end product. This argument is akin to the assessment of Value Added Tax (VAT) on a brick being based on the price of the building that uses the particular brick. By this logic, the VAT on a brick used in a luxury mansion would be significantly higher than if the same brick were used to build a modest home.

This argument also ignores the fact that the patented claim benefits the subsystem and therefore subsystem manufacturer should be able to receive a license for those same patents. In fact, the proportionality of value that the patent brings to the subsystem is much more easily assessed than the value the patent brings to a much more complex end product that also incorporates many other technologies and innovations.

SEPs DO apply to subsystems

Second, the claim of some SEP holders that the patented technology is not fully implemented in the subsystem, and therefore that royalties should be calculated on the end product, this is also false. In order for a subsystem to be useful and efficient to an end product manufacturer, most, if not all, of the standardized technology relevant to the end product must be implemented in the subsystem. Therefore, most, if not all, of the SEP holder's claims only apply to the subsystem that implements the standard. While the subsystems may not implement every claim of every SEP of a standard, they fully implement a collection of the SEPs.

In the case of cellular data communications, the wireless data module (one common subsystem example) implements almost all of the wireless data SEPs associated with a mobile end product. While a small subset of SEPs in the mobile end product may claim functionality implemented outside the wireless data module, it is inappropriate to refuse to license wireless data module subsystem manufacturers for those patents that are fully implemented within the module. It is also inappropriate to bundle all the SEPs together and force the end-product manufacturer to be responsible for licensing of all patents, where some of them are fully implemented in the wireless data module and can be licensed by the subsystem manufacturer.

Discriminatory rates equivalent to unwillingness to license

Some SEP holders are adding a wrinkle to this scenario by using complex licensing structures to effectively refuse to license subsystem manufacturers while providing the image of being willing licensors. These SEP holders agree to negotiate with subsystem manufacturers but then set differential rates dependent on the application of the module. For example, a module sold for use in a high-priced end product will draw a much higher royalty than one sold for use in a low-priced end product. (Remember the brick? This is just an application of the tax at the source!) At times, this higher royalty may approach, or exceed, the market determined price of the subsystem itself! Not only does this make

the sale process and business model untenable, it has the potential of reducing the attractiveness of the standardised technology to the end-product manufacturer. In turn, this hinders the propagation of the standard and may deprive the end consumer of the benefit of the technology.

Conclusion

So, in conclusion, subsystem manufacturers fulfill a useful and important role in the deployment of standardised technologies. This ecosystem has traditionally been served by the ability of subsystem manufacturers to procure licenses to SEPs and sell licensed subsystems. The introduction of SEP holders' refusal to license subsystem manufacturers is a discriminatory practice that does not comport with their FRAND obligation. Furthermore, these discriminatory practices harm the efficient market mechanism that has helped propagate the standardised technology, a technology created by multiple industry participants to benefit both industry and end consumers. Therefore, FRAND SEP licenses must be available to all entities, regardless of their role within the product supply chain.

Note: the positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member.