

31 December 2018

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RE: Concerns and Issues Regarding CEN-CENELEC CWA1 Draft Licensing Practices

Dear CWA Chair, Proposers and Participants,

We write regarding your recently published draft CEN-CENELEC Workshop Agreement titled “Principles and guidance for licensing Standard Essential Patents in 5G and the Internet of Things (IoT), including the Industrial Internet” (referred to herein as “CWA1”). We believe that the practices set forth in CWA1 would enable – rather than counteract – patent hold up, diminish the use and promulgation of next-generation standards, and undermine research, development and innovation throughout the supply chain. We urge you to revisit the harmful approaches to SEP licenses advocated by CWA1, and in particular to revisit the CWA1’s support for licensing practices that have been found by courts and agencies to violate

the law and breach the agreement to license on fair, reasonable and non-discriminatory (FRAND) terms.

Collectively, our members spend tens of billions of euros annually in research and development, and employ over one million people in Europe alone. We hold hundreds of thousands of patents, many of which are standard essential patents. Many of our members are headquartered in Europe, and all of them do business in Europe. We represent diverse industries, and are not mere “implementers” of standards. Rather, we contribute technologies to standards and drive research, development, investment and innovation throughout the value chain. Our members participate in the 5G and Internet of Things (IoT) industries, and many are small companies (SMEs) that would be particularly harmed if the practices advocated in CWA1 were to be followed by owners of standard essential patents (SEPs).

As noted, we are concerned that the licensing practices set forth in CWA1 will be harmful to innovation, business and consumers. We address some of our concerns with CWA1’s six “Principles” briefly below:

- Refusals to License Violate FRAND: CWA1 should not support practices whereby some companies are refused licenses for SEPs based on their position in the supply chain. CWA1’s first “Principle”, which appears to support licensing at only one “point in the supply chain”, is contrary to applicable law, and such approaches have been expressly rejected as violative of the FRAND contract by a number of courts. Indeed, we note that certain of the CWA1 Participants, including one of the Proposers, have claimed in filings with the European Commission in the past that such refusals to license are not only a breach of the FRAND contract, but a competition law violation. We urge CWA1 to disclaim any support for approaches that would deny FRAND licenses to willing licensees.

- Patent Applicability and Validity are Critical to FRAND Negotiations: CWA1 appears to suggest that negotiating parties should not address challenges to the essentiality or validity of patents as part of their FRAND negotiation, but instead should address such challenges (if at all) only “in parallel to the negotiation”. Limiting technical challenges as part of FRAND negotiations would invite abuses by patent owners seeking payments for large portfolios of inapplicable patents. Companies should never be obligated to pay royalties for patents they believe to be invalid or otherwise inapplicable, and where there are disputes on those issues, it is the patent owner – not the potential licensee – that has the obligation to demonstrate that its technical analysis of the patent is correct. To the extent that CWA1’s second “Principle” seeks to separate patent applicability and validity from FRAND negotiations, it should be rejected and revised prior to final publication.

- FRAND Requires Transparency, Not Blanket Secrecy: CWA1 appears to suggest that parties may be required to enter into blanket confidentiality agreements as a condition to obtaining information needed to evaluate proposed FRAND terms. While parties may always voluntarily decide to enter into an NDA, such secrecy is not a necessary aspect to FRAND negotiations. CWA1 should instead revise its third “Principle” to require that a SEP owner be willing to provide a potential licensee information that is reasonably necessary for the licensee to evaluate whether the proposed offer is FRAND regardless of whether the licensee elects to sign an NDA.

- Compensation is Based on the Patented Technology, Not Unpatented Uses: CWA1 misrepresents FRAND royalty calculation methodologies. The methodology suggested

in CWA1 would inappropriately require that SEP owners obtain compensation based *not* on the value of their own innovations, but rather calculated based on the value of downstream technologies and innovations made by others. This is a classic “SEP hold up” approach, resoundingly condemned by courts and policy makers. Such “value transfer” from downstream innovators to upstream SEP owners deters innovation and investment by market participants. CWA1’s fourth “Principle” defies legal precedent, and should be revised to conform to longstanding legal approaches to patent valuation based on the value of the patented technology itself.

- Discrimination is Not Permissible: CWA1’s fifth “Principle” appears to improperly limit FRAND’s non-discrimination obligation to “similarly situated competitors”. But FRAND’s non-discrimination obligation is not so narrow as CWA1 would suggest. Whether companies are “similarly situated” may potentially be a consideration in assessing whether discrimination is present. However, it is not the case that SEP owners may freely discriminate against companies that are not “similarly situated”. The approach proposed by CWA1 would permit SEP owners to pick marketplace winners and losers, and could prevent new competitors from emerging.

- FRAND Does Not Usurp Parties’ Right of Access to National Courts: CWA1 appears to advocate for processes that would, in effect, usurp the national authority and interests of national jurisdictions. CWA1’s sixth “Principle” suggests that parties are obligated to agree to “worldwide” processes that could encroach on the authority of national jurisdictions (e.g., processes whereby, for example, a court in Asia would be tasked to evaluate the applicability and pricing for a license to European patents, or vice-versa). While parties might *voluntarily* elect to participate in worldwide adjudications, or in alternative dispute mechanisms such as arbitration, any suggestion that parties should be obligated to forego their rights of access to the national courts should be rejected. CWA1 should make clear that while parties can always agree voluntarily to alternative dispute resolution procedures, there should be no adverse consequences to a party based on its election to proceed under traditional legal rules as set by the relevant patent jurisdiction.

We thank you for considering these comments, and hope that CWA1 Participants will revise their draft so as to disclaim support for the currently-proposed practices, as the current draft includes practices that (i) do not comply with applicable law, (ii) breach the FRAND commitment, and (iii) disrupt innovation, business and consumers as the market moves to 5G and IoT-based technologies.

Sincerely,

Fair Standards Alliance

ACT / The App Association