

DRAFT FSA Text for Response to IEEE Consultation

Submitters (Tab 2):

Name	Employer	Affiliation
Alexander Prenter	Fair Standards Alliance	Fair Standards Alliance

Option 1: No Change to 2015 Patent Policy (Tab 3):

Pros: Maintaining the terms of the IEEE Patent Policy is fundamental to the success of IEEE standards, the promotion of innovation around IEEE technologies, and the protection of competition and fair-play involving IEEE implementations.

The Fair Standards Alliance (FSA) is a broad and inclusive association of mainstream stakeholders that promotes the licensing of standard essential patents (SEPs) on a fair, reasonable, and non-discriminatory (FRAND) basis. Like IEEE membership, our membership is diverse, ranging from large multinationals to many small and medium-sized businesses, and coming from different levels of the value chain across a diversity of industry sectors. Our members significantly contribute to innovation worldwide. Annually, the aggregate turnover of FSA members is more than \$2.5 trillion, and in aggregate our members spend more than \$160 billion on R&D and innovation. FSA members have more than 500,000 patents, including SEPs, that are either granted or pending. A list of the approximately fifty FSA members can be found at <https://fair-standards.org/members/>.

Many of our members were present when the US Department of Justice challenged the IEEE to take up the effort to clarify its patent policy, and to improve predictability for IEEE members and the marketplace at large. Renata Hesse, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Six "Small Proposals for SSOs Before Lunch*, <https://www.justice.gov/atr/file/518951/download>. The IEEE's effort has paid off, with IEEE standards far less likely to be subject to disputes than other standards, such as cellular, where litigation and unfair practices have run rampant. <https://www.law360.com/articles/1392222/how-standard-setting-orgs-can-curb-patent-litigation>. IEEE's efforts the Patent Policy to fairly balance all parties' interests, and to clearly delineate basic requirements, has offered the predictability needed by innovators to invest in and around IEEE standards.

It has been documented, such as by the famous studies from IPLytics, that IEEE and IEEE standards have thrived under the Patent Policy, and that efforts by a small handful of special interests to demean IEEE are without merit. IEEE's own publicly accessible data shows that total new work (new PARs + PARs for revision of existing standards) increased from 183 items in 2016 to 244 in 2020. Furthermore, new PARs, which are subject to the provisions of the 2015 patent policy increased from 100 to 178, a 78% increase, during the same five-year time frame. Since the adoption of the 2015 patent policy, contributors have chosen to initiate within IEEE, new standardization work in diverse areas at the forefront of innovation including connectivity of

personal health devices, blockchain, robotics and autonomous systems, among others. The successful history of the IEEE Patent Policy over the last 6 years, demonstrates the appeal that IEEE holds for people looking to develop standards for cutting technologies, many of which will shape the future economy, and the widespread support that IEEE has received from mainstream stakeholders. The only correct conclusion is that Patent Policy has been an outstanding success and benefit to IEEE's standardization work and its Mission "to foster technological innovation and excellence for the benefit of humanity."

The Patent Policy also accords well with applicable law. For SSOs, like IEEE, that have a global reach, it is important to appreciate that different legal regimes can support different approaches. The Patent Policy provides a common reference point for global application of the Patent Policy, in line with mainstream approaches and default legal rules. For example, the Patent Policy's approach to Reasonable Rates safeguards "appropriate compensation to the patent holder for the practice of an Essential Patent Claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard." This mirrors, for example, US legal requirements that "[w]hen dealing with SEPs ... the patentee's royalty must be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231-32 (Fed. Cir. 2014). It likewise accords with European legal requirements that "Licensing terms have to bear a clear relationship to the economic value of the patented technology. That value primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard." Communication of the Commission: Setting out the EU approach to Standard Essential Patents COM (2017) 712 final, 29 November 2017, sec. 2.1.

By establishing clear rules for assessment of Reasonable Rates, consistent with mainstream legal approaches, the Patent Policy facilitates negotiations on a worldwide basis to promote licensing and adoption of IEEE standards.

Likewise as to Prohibitive Orders, where applicable law restricts injunctions where monetary relief is sufficient. In the United States, the Federal Circuit has confirmed that "a patentee subject to FRAND commitments may have difficulty establishing irreparable harm" such that an injunction often will be unavailable. *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014) (RAND commitment may make it difficult for plaintiff to establish eBay factors such as irreparable harm). But rules internationally can differ significantly. It only makes sense that IEEE seek to encourage a common worldwide approach to Prohibitive Orders involving IEEE-declared SEPs and standards. Such an approach improves market uptake, use and clarity around IEEE standards.

Finally, we note that the US Department of Justice (DOJ) recently set forth its approach to SSO patent policies, and on the IEEE Patent Policy in particular, a marked contrast to the approach taken under the prior DOJ administration. . Jeffrey Wilder, Economics Director of Enforcement, Antitrust Div., U.S. Dep't of Justice, *Leveling the Playing Field in the Standards Ecosystem: Principles for a Balanced Antitrust Enforcement Approach to Standards-Essential Patents*, Remarks at the IAM and GCR Connect SEP Summit (Sept. 30, 2021) <https://www.justice.gov/opa/speech/antitrust-division-economics-director-enforcement-jeffrey->

[wilder-iam-and-gcr-connect-sep](#). DOJ's current approach is a return to the traditional SEP policies that have guided US law for decades, as expressed in its 2015 Business Review Letter to IEEE. In this speech, DOJ announced, among other things, that going-forward it "will support (and not discourage) SDOs in their efforts to adopt IPR policies that address licensing inefficiencies and enable the dissemination of standardized products to consumers." *Id.* at 5.

And addressing the IEEE even more expressly, DOJ noted, "When IEEE further defined participants' licensing obligations in 2015, the [DOJ] concluded that revisions to IEEE's patent policy had 'the potential to benefit competition and consumers by facilitating licensing negotiations, mitigating hold up and royalty stacking, and promoting competition among technologies for inclusion in standards.' We understand that the [DOJ's]2020 supplemental competition advocacy letter to IEEE questioning the merits of the 2015 business review may have shaken confidence in the business-review process and deterred efforts by SDOs to promote best practices. That is why [DOJ]acted this past April and removed the 2020 supplemental competition advocacy from IEEE's 2015 review file." *Id.* at 11. In short, DOJ confirmed that the 2015 business review letter regarding the Patent Policy, including its conclusions about the benefits of the Patent Policy, remained the applicable and official DOJ guidance regarding the Patent Policy. In view of DOJ's regarding IEEE's patent policy in particular and SDO's IP policies in general, there are no longer any competition or competition-related reasons to consider changes to the Patent Policy.

Cons: There are no cons to maintaining the IEEE Patent Policy. It may be, perhaps, that a few vocal special interests will continue voice their concerns.. But IEEE should not react to these tactics when the benefits to the mainstream IEEE community from the current Patent Policy are so significant.

Please provide comments regarding the ongoing use of the Custom LOA form under this option: For standards projects initiated prior to the effective date of the Patent Policy, the custom LOA form should be permitted so that parties may make a declaration pursuant to the text of the IEEE policies that were in effect at the time the project was initiated. But for projects initiated after adoption of the Patent Policy, the custom LOA form should not be permitted.

Option 2(a): Remove All of the Patent Policy Provisions Regarding Prohibitive Orders (Tab 4):

Pros: FSA does not believe there would be any benefits from removing the Patent Policy's text addressing Prohibitive Orders.

Cons: As addressed in the response to Option 1, Prohibitive Orders targeting IEEE standards seriously damages IEEE standards implementers businesses. They restrict promulgation of IEEE standards. They dis-incentivize adoption of IEEE standards, and restrict investment in products and technologies using IEEE standards. The Patent Policy correctly recognizes that where RAND compensation is available, the SEP owner has no reason to pursue injunctions other than to gain leverage over a potential licensee to force acceptance of a license on non-RAND terms. The IEEE was correct to clarify and reinforce this point by including express text limiting the use of injunctions, and should not risk the harm to IEEE and to those who rely on

IEEE standards, including consumers, that would accompany the use of injunctions to coerce potential licensees.

Please provide comments regarding the ongoing use of the Custom LOA form under this option:

For standards projects initiated prior to the effective date of the Patent Policy, the custom LOA form should be permitted so that parties may make a declaration pursuant to the text of the IEEE policies that were in effect at the time the project was initiated. But for projects initiated after adoption of the Patent Policy, the custom LOA form should not be permitted.

Option 2(b): Remove All Optional Factors in the Definition of Reasonable Rate (Tab 5):

Pros: FSA does not believe there would be any benefits from removing the optional factors in the definition of Reasonable Rate.

Cons: As addressed in the response to Option 1., IEEE standards are implemented worldwide, and so are subject to various (and varying) rules regarding royalties. The IEEE was right to include express text in the Patent Policy to facilitate a common application of the Patent Policy, and to provide better clarity to market participants. Efforts to undermine that clarity by removing portions of the IEEE's text would harm investment incentives and the ability of small and large companies to reliably invest in research and development to bring new and useful products to market. The IEEE's approach also is entirely fair; it accords with established legal precedent and ensures that Reasonable Rates are assessed in a manner that provides full RAND compensation to the SEP owner without additional compensation beyond the value of the relevant patents.

Please provide comments regarding the ongoing use of the Custom LOA form under this option:

For standards projects initiated prior to the effective date of the Patent Policy, the custom LOA form should be permitted so that parties may make a declaration pursuant to the text of the IEEE policies that were in effect at the time the project was initiated. But for projects initiated after adoption of the Patent Policy, the custom LOA form should not be permitted.

Option 3: Offer More Options than Before By:

- (i) **Allowing the LOA Filer the Ability to Choose Whether it May or May Not Seek Prohibitive Orders in Accordance with the Current Wording of the Patent Policy; and**
- (ii) **Clarifying the Optionality of the Factors Included in the Definition of Reasonable Rate.**

Pros: There would be no benefits to these approaches.

Cons: For the reasons addressed in response to Option 2(a), IEEE should not make it "optional" to seek Prohibitive Orders targeting IEEE standards. Prohibitive Orders put implementers of IEEE standards seriously damages implementers businesses. They restrict promulgation of IEEE standards. They dis-incentivize adoption of IEEE standards, and restrict investment in

products and technologies using IEEE standards. The Patent Policy correctly recognizes that where RAND compensation is available, the SEP owner has no reason to pursue injunctions other than to harass and coerce a potential licensee into accepting a license on non-RAND terms. The IEEE was correct to include express text limiting the use of injunctions, and should not risk the harm to IEEE and to those who rely on IEEE standards, including consumers, that would accompany the use of injunctions to coerce potential licensees.

As to question 3(ii), FSA does not see that there is any need to clarify the optionality of the factors included in the definition of Reasonable Rate, as such optionality already is clearly stated in the Patent Policy, as well as in the IEEE's FAQs. FSA would be concerned that any effort to provide further text or revisions on this issue would create more confusion, rather than resolve any significant issues.

Please provide comments regarding the ongoing use of the Custom LOA form under this option: For standards projects initiated prior to the effective date of the Patent Policy, the custom LOA form should be permitted so that parties may make a declaration pursuant to the text of the IEEE policies that were in effect at the time the project was initiated. But for projects initiated after adoption of the Patent Policy, the custom LOA form should not be permitted.