Patents and Standards

A modern framework for standardisation involving intellectual property rights

Answers to the questionnaire by the Ministry of Justice of the Republic of Latvia

Q 1.1.2 Trends and consequences: *Do you see a general trend towards more/less standards involving patents? Are there any practical consequences of this trend? Are business models changing?*

Technology developers often rely on patents to commercialize their inventions and, ultimately, to support investments in research and development. These investments often produce technologies that are incorporated into standards, especially in industries such as telecommunications, consumer electronics and automotive. The potential for conflict between patents and standards arises when the implementation of the standard necessitates the use of technology protected by one or more patents. Although the objective of a standard setting body as well as of participating companies is to establish standardized technology that can be used as widely as possible, right-holders may have a commercial interest in pushing for the adoption of their own patented technology in the framework of the standard, so that they could benefit from royalties. If a patent owner can, however, block the implementation of the standard by refusing a license or claiming unreasonably high royalties, this would obviously be against the objective of the technical standardization process.

The number of patent applications and granted patents in Latvia is relatively small - approximately 200 applications and 150 granted patents per year. Number of licenses also is small - 200 licenses in 20 years. The main fields of industry in which patents were granted are not standard dependent - chemistry, mechanical engineering, food industry. During the period of 20 years there has been to visible linkage between patents and standards, therefore it is rather hard to comment on trends and changes in the business models.

Q 3.1.3 Ex-post transparency: *Either as licensor or as licensee, how do you initiate the licensing of the relevant patents? What are the means of identifying the relevant patents, the patent holders, the potential licensees, etc.? What are the respective costs of collecting information on the patent situation?*

When patents are granted the owners have a large degree of freedom on how they want to use their rights. In principle, a patent owner is not obliged to license out its patents at all. The owners of patents have different possibilities – to implement the inventions by themselves, license in order to get some revenues, cross-license blocking other technologies and etc.

The main means for identifying patents are Patent Offices' databases and access to them is free of charge. One of the most important database is European Patent Office database *Espacenet*.

Q 3.1.4 Non-transparent aspects: *In those areas where you deem patent transparency insufficient, what aspects of the patent situation are insufficiently transparent: (1) existence of patents, (2) validity of patents, (3) essentiality of the patents for the pertinent standard, (4) ownership of the patents, (5) enforceability of the patents, (6) coverage of patent by existing licences/pass through and (7) others? Please explain.*

Information relating to the existence of patents, validity of patents, ownership of the patents is available in the Patent Office's database and such situation is deemed to be acceptable. At the same time, information relating to essentiality of the patents for the pertinent standard, enforceability of the patents and licensing of patents should be improved. The information about license agreements could be available in the standard setting organization databases, but if the license agreements are not standardized, it would be difficult to compare them and to make them searchable.

According European Patent Office information if a new technology not subject to a secrecy obligation is disclosed during the development of a standard, it automatically counts as prior art and must be taken into account when examining patent applications. The main problem here for patent offices is to obtain access to the documentation of the standard at the earliest possible stage.

Q 3.1.5 Consequences/risks: *What are the consequences of insufficient patent transparency? What risks occur, and what are the (financial) impacts if these risks materialize? If appropriate, distinguish between ex-ante/ex-post transparency and between the different aspects of patent transparency above.*

Insufficient patent transparency does not allow to assess whether or not claimed patent is indeed essential for standard setting. Therefore, it is necessary to find a way how to harmonize the information regarding patent owners who would like to be involved in standard settings. That in turn will allow also to reduce the costs of standard setting.

Q 3.4.3 Combining information: *Some standard setting organizations combine declared information with information drawn from other sources, such as patent offices. What are your views on this? In what forms and to what fields of standardization could this be expanded? What sources of information (in addition to patent offices) could be used and what types of information could be added?*

It is possible only to rely on the experience of the European Patent Office which has established excellent relations that are based on mutual cooperation and trust with major standard-setting organizations at the European and world level. According to data European Patent Office's databases today contain around 1.6 million documents relating to standards. Only few hundreds of these documents were cited in EPO search reports in 2004, but the number has risen steadily to a total of over 14 000 last year.

In some fields, 35% of the prior art citations refer to standards. Between 2012 and 2013

alone, the number of standard-related citations increased by 19%. Patent examiners need special training to search this particular stock of documentation. The improvement in the searching process greatly enhances the quality of the granted patents, which in turn can help to save litigation costs in highly competitive fields of technology.

Q 5.1.1 Target areas: *What are the situations/external factors which render a patent pool useful? Are you aware of specific standards for which a patent pool would be useful but where there has been a failure to create one?*

Patent pools provide a one-stop solution for licensing a bundle of standard essential patents owned by different entities. Not only do pools significantly reduce transaction costs compared to the alternative of bilateral licensing with all the patent owners in question, but they also increase transparency, reduce uncertainty and create a level playing field.

Q 5.1.2 Benefits of patent pools: *What are the benefits of patent pools in the above situations (Q. 5.1.1) respectively for patent holders and/or patent users? What aspects in patent pool governance are particularly relevant in practice to ensure the realization of these benefits?*

Some benefits of patent pools for patent holders:
- Reduction of the transaction costs for both licensees and licensors;
- Introduction a coordination mechanism that helps to prevent royalty stacking;
- Offer a mechanism of coordination through which patent owners can collectively decide on how to change (lower) their fees in response to changing market circumstances;
- May allow relatively small standard essential patent owners to effectively generate revenues from their patents.

Some benefits of patent pools for patent users:
- Reduction of the search costs at the side of licensees;
- Reduction of uncertainty in total patent landscape, patent availability and pricing, thus reducing barriers to new entrants to implement standards;
- May reduce the total royalty fee for licensees compared to the aggregate fee of the same patents when licensed in via bilateral negotiations.

Q 5.1.4 Difficulties of pool creation: *What are the main difficulties in setting up a patent pool and how can they be addressed? Are there differences in national law or its application across countries of the EU/EEA or worldwide that make patent pool creation more difficult?*

The main difficulty could be markets' dynamic. In many product areas new technologies perhaps do not support earlier standards, therefore longer time periods are necessary for the creation of a patent pool. There is still no experience relating to the creation

of patent pools in Latvia, yet at the same time there are no easily identifiable reasons in the national law which could prevent their creation.

Q 5.1.5 Costs of pool creation: *What are the costs involved (do you have estimates)? What do these costs depend on? How are they usually (pre-)financed?*

No such information is at the disposal of the Ministry of Justice of the Republic of Latvia or the Patent Office.