DIGITAL INTEROPERABILITY FORUM RESPONSE ON "PATENTS AND STANDARDS – A modern framework for standardisation involving intellectual property rights"

Transparency Register ID: 77946677931-57

The Digital Interoperability Forum (DIF)[1] represents major players involved in the pay TV value chain on EU technology policy issues. DIF members represent all parts of the broadcasting, communications and multimedia paid-for audiovisual content value chain, including transmission, hardware, software, middleware, platform operation and content provision, with content being delivered by a myriad of platforms and devices. DIF members have a strong interest in the continuing success of digital TV and information society services in Europe and have invested substantial sums over the years to bring advanced audiovisual and information society services to EU citizens.

Inherent to the development and successful deployment of existing and new services is innovation and investment in technology. Within this the development of standards and specifications – both open and proprietary - plays a key role. DIF members are active in many standardisation bodies such as DVB, ETSI, Cablelabs, MPEG, etc., and DIF itself is an ex officio member of DVB.

DIF does not develop standards but focuses on the policy aspects of standardisation. Accordingly, DIF's response concentrates on some key principles relating to patents and standards.

Disclosure of IPR

There can be no dispute that holders of IPR should be rewarded for their creative efforts. Without the prospect of remuneration the time and resources expended by companies in participating in standards work would diminish, if not disappear. However, in the context of this consultation it is important to recognise also that for many companies IPR has become the single largest contributor to their profit and represents a substantial element of their balance sheet. With profit margins in manufacturing, etc., falling, it is returns on IPR and licensing IPR which sustains many companies. The relative financial importance

[1] www.difgroup.eu

of IPR has changed significantly in the last decade or so and this has implications for IPR disclosure policies and rules, the management of patent pools, etc.

Against this background DIF considers that it is essential that standards and specifications development is not driven by the profit motive of IPR holders but by technology considerations, having regard to businesses' commercial requirements. Such an approach – which has largely prevailed in standards organisations – allows standards to be freely developed with less risk of being "hijacked" by patent holders seeking to maximise their own financial gain. In this respect, DIF considers that ex ante disclosure[2] of IPR may hinder the development of the best technical solution as the process could become constrained by financial interests.

On the other hand ex ante disclosure may also deter participation in standards work by companies who may be reluctant to disclose their IPR at such an early stage. There may be some circumstances in which ex ante disclosure of IPR is justified but DIF suggests that the procedure adopted should be left to standards organisations to determine in consultation with their members.

Disclosing the cost of patents

DIF recognises that it is impractical to require that the full cost of licensing a standard should be known when a standards user wishes to implement the standard. This can arise for a variety of reasons, for example, some IPR holders may be unaware that they have a patent relevant to the standard. However, it is imperative that patents which have been declared are available on a fair, reasonable and non-discriminatory basis (FRND). Although, as the consultation paper notes, different approaches to FRND are used by different standards organisations, the important issue is that the way FRND is applied and interpreted is transparent. DIF considers it unnecessary to have a single approach (and considers that this would be impossible to achieve in any event given the global spread of standards bodies).

DIF considers that the Commission's questions relating to technology neutral standards (where the standard does not refer to any particular patented technology but requires the use of such or where the standard excludes elements covered by patents – Q1.3) raise issues concerning the likelihood that such a standard would be implemented. Not only would the cost of using the

[2] An ex ante approach would have also to be complaint with competition law and may require a competition lawyer to be present in meetings.

standard be unknown, further administrative costs would be involved in identifying the patents and patent holders (presumably this would be registered with the standards organisation?) and negotiating with them for the right to use the patent with the standard. The Commission's questions seem counterproductive given the aim of making the standardisation process more efficient.

From the paragraph above it should be evident that DIF considers that the cost of using a standard should be as fully transparent[3] as possible when a business comes to implement it. This is particularly crucial where the Commission may be considering mandating or promoting the use of a particular standard. Indeed it must be central to any impact assessment that the cost of using a standard proposed for mandation can be quantified. The Commission may recall the extensive and heated debates between 2001 and 2005 about the Commission's proposal to mandate DVB Multimedia Home Platform (MHP) for use by digital TV providers in the provision of interactive services. MHP had been developed in DVB on a voluntary basis and, according to members of DVB, its adoption would be market driven.

Leaving aside the policy and political pros and cons of the MHP mandation debate what became apparent only after the Commission had concluded that there was no public interest justification to mandate the standard was that the licence terms for MHP were unknown. Ex post attempts to devise a fee structure revealed generally the dangers of implementing a standard where the IPR costs are not transparent and have not been declared on a FRND basis. . It was also a lesson to policymakers which should not be forgotten.

Protecting IPR

Following from the second section above it is axiomatic that DIF considers IPR protection to be an essential element of the standardisation agenda. Patent holders are entitled to an appropriate return on IPR[4]. Where patent disputes arise, recourse to fast resolution mechanisms would reduce the risk that patent holders stifle the use of standards (a tactic which may be intended to hinder

[3] DIF acknowledges that full transparency cannot be guaranteed as some patent holders may only become visible at a later stage. However, it would expect the major patent holders to have complied with the rules on patent disclosure.

[4] DIF notes that FRND is commonly used to determine the cost of a patent and that there are various approaches to FRND. DIF suggests that the FRND approaches should be transparent and unambiguous.

competition) and would encourage both the use of standards and continued participation in standards-making.

DIF suggests that the full range of IPR protection mechanisms should be available, including injunctions where appropriate. It should also be recognised that the inclusion of a patent in a standard and its protection may have a primary purpose which is not the standard itself. Often this is the protection of audiovisual content against piracy. For example, in the DVB Common Scrambling Algorithm (CSA) there is Hook IP whose purpose is to require users of CSA to implement anti-piracy measures. Hook IP is also used in consumer devices and in other products to aid detection of infringing or illicit devices. It is licensed generally on nominal terms but provides a valuable tool for fighting piracy. The ability to use Hook IP and the right to take steps to protect is, therefore, an invaluable tool where protected content is being made available. DIF would object to any steps which would reduce the value of Hook IP.

Digital Interoperability Forum **January 2015**