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Patents and Standards

A modern framework for standardisation involving intellectual property rights

Response to Questionnaire

On behalf of

Panasonic Europe Ltd.¹ and Panasonic R&D Center Germany GmbH

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I. Preliminary remarks

Company profile²

Panasonic Corporation is a worldwide leader in the development and engineering of electronic technologies and solutions for customers in residential, non-residential, mobility and personal applications. Since its founding in 1918, the company has expanded globally and now operates over 500 consolidated companies worldwide, recording consolidated net sales of +€54bn for the year ended March 31, 2014.

Objective of the consultation

Panasonic appreciates the Public Consultation and its objective to analyze the interplay between patents and standards. History shows that standard essential patents (SEPs) have been successfully licensed and that standardization – even involving SEPs – has led to tremendous benefits for consumers and the industry. However, as noted in our reply to your questions below, there are some fields where we see opportunities for improvement.

Our objective for a reply to the Public Consultation is to share information and our views on the interplay between standardization and patents.

Panasonic high-level views on the performance of the current framework governing standardization involving patents and how it should evolve

Panasonic relies on a sound framework for the protection of IPRs in order to remain innovative and successful in a highly competitive, fast-changing, IP-intensive, and global technology market.

We would like to point out that standardization is always a result of compromise among a variety of stakeholders, including, among others, entities without any patents, entities with large portfolios accumulated through extensive R&D investments and efforts, and universities that expect – and often rely heavily on – appropriate remuneration for their SEPs to support further research activity. Developing standards often requires significant investments and is time consuming, and companies are only rewarded for their technologies implemented in standards through the licensing of their SEPs.

We recognize the need to maintain a delicate balance between the different incentives of potential licensees and SEP holders, and to encourage such parties to diligently

² For more information about Panasonic, please visit the company's website at <http://panasonic.net/>.

negotiate and conclude licenses on FRAND terms and conditions without entering into litigation.

Today's framework governing standardization involving patents allows a balance between the interests of licensees and licensors.

Any regulatory or legislative intervention that would tilt the balance to either side should be avoided by all means. In particular, we believe that:

1. Fair, reasonable and non-discriminatory (FRAND) terms – which is a widely used mechanism in IPR policies of SSOs – are the right answer to maintain this fragile balance. For example, significantly limiting injunctions for SEPs would not only tilt that balance but would, rather, fully eliminate it. This would deprive patent holders from any means of enforcement against unwilling implementers and result in more proprietary technologies instead of standards.
2. Ex-ante disclosure of licensing terms should not be required by EU law and policy. The membership of standards organizations should be free to decide their IPR policy re ex-ante disclosure.
3. EU policy should not impose the creation of a patent pool or the participation of any stakeholder in its work.

II. Responses and reservations to detailed questions

We did not respond to some of the questions. For the avoidance of doubt, this does not mean that Panasonic endorses the points of view expressed in the report by the European Competitiveness and Sustainable Industrial Policy (ECSIP) Consortium³ on those unanswered questions. Panasonic merely chooses not to express its opinion at this stage.

III. Confidentiality

Panasonic agrees with the publication of this submission.

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http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/intellectual-property-rights/patents-standards/index_en.htm

IV. Responses to detailed questions

Panasonic's responses to the selected detailed questions are provided in the following pages.

Key Issue:

Key issues 1 and 2 – Scope of standardisation involving patents; best rules and practices

Detailed Question:

Q 1.3.2 Defences by the patent holder:

Do you see a risk that a standard setting process could be abused to obtain (preferential) access to patent-protected technologies? Has this happened? Please explain. How can the patent holder defend his/her rights?

Panasonic's Point of View:

Sharing the documents contributed to the standard setting with the patent offices ("PTOs") would be a solution to this issue. As referred to ECSIP's final report Section 2.2.5, "EPO signed agreements with ETSI, IEEE and ITU providing it with timely access to all such documentation," we would hope that other PTOs would follow the agreement entered into with the EPO and hope that the EPO would also enter into similar agreements with other SSOs. Depending on the SSOs, there could be internal policies that the proposals are made based on the confidentiality agreement amongst the parties, therefore, the PTO may not be able to use those as prior art even if the PTO obtained those proposals under confidentiality obligations, but the details could be worked out together with each of the SSOs.

Supporting evidence or data:

Not available

Key Issue:

2. Suggestion on SSO IPR rules

Detailed Question:

Q 2.1.1 Best rules and practices:

A variety of rules and practices govern standardisation involving patents. Which elements of these rules and practices are working well and should be kept and/or expanded? Which elements on the other hand can be improved? Would you consider it helpful if standard setting organizations would be more explicit about the objectives of their patent policies?

Panasonic's Point of View:

We believe that the FRAND declaration system is one of the rules and practices that are working well and it should be kept. We are not saying that the current FRAND declaration system is perfect, but it provides a workable solution within which good-faith implementers can practice the standard technology (by obtaining a SEP license on FRAND terms).

One of the areas where we see room for improvement is how to protect the interest of patent holders who make FRAND declarations in good faith. Just like patent holders commit to license their SEPs on FRAND terms via the FRAND declaration system so that there would be no patent hold-up, potential licensees should express their willingness by a binding statement to obtain a license for all SEPs (for a given standard) from patent holders who have made the FRAND declarations so that there would be no patent hold-out. This would help parties to conclude a patent license agreement more easily. The statement needs to fulfill several criteria, like timeliness, to show that patent hold-out is not the implementers' objective which would be encouraging information for the patent holders to conclude agreements. This aspect will be further discussed later in the section of Key Issue 8.

Other elements which can be improved are "promotion of patent pools" and "rules and practices for transfer of SEP ownership" as noted in the ECSIP's final report.

Supporting evidence or data:

Not available

Key Issue:

2. Suggestion on SSO IPR rules

Detailed Question:

Q 2.1.3 Differences in SSO rules and practices:

Do you see significant differences between SSOs in terms of their patent policies and/or treatment of standard essential patents in practice? If so: What are the practical consequences of these differences? Which of these differences (if any) pose problems? Which of these differences are justified?

Panasonic's Point of View:

We believe there are some significant differences between SSOs in terms of their decision making processes. For example, creation and/or revision of IPR policy is openly discussed and a decision is made based on the consensus of all interested members in some SSOs, while it is done by a limited number of board members in others.

As a practical consequence in the latter case, transparency is not secured and the resulting IPR policy could be imbalanced. It may reflect the benefits and interests of limited members (e.g. implementers) and spoil the rights and benefits of others (e.g. SEP owners.)

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.2 Required effort

What effort should be required from a patent holder in identifying relevant patents in his portfolio? Should these efforts be contingent on the degree to which the patent holder participates in a specific standard setting process (for example whether or not he has actively contributed the technology in question)?

Panasonic's Point of View:

The efforts should be contingent on the degree to which a patent holder participates in a specific process. Companies who actively contribute to the standardization should identify relevant patents as far as they are aware of their existence, and those who didn't are encouraged to do so. If SSO participants (regardless of whether or not they are contributors) fail to identify relevant patents, they should be bound by default conditions, i.e., FRAND or RF depending on the IP Policy of the relevant SSO.

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.3 Process of declaration

If you are a patent holder active in a standard setting body that requires patent declarations, how do you comply, in practice, with the obligation to declare specific patents? What are the concrete steps undertaken to identify such specific patents, and what parts of your organization are involved?

Panasonic's Point of View:

If we are active in a standard setting body, our engineers automatically learn about relevant patents during the course of the technical discussions in the SSO without undertaking any specific steps, such as a patent search. As soon as our engineers become aware of the existence of relevant patents, whether or not the engineers themselves participate in the technical discussions in the SSO, we normally submit a declaration without undue delay. IP department is involved in the essentiality evaluation process and the declaration process.

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.4 Costs of declaration

What are the costs involved in complying with an obligation to declare specific patents? What are the respective costs of (1) identifying patents and (2) informing the standard setting organization? Would you search for patents in your own portfolio that relate to a standard, even when there is no obligation from the SSO patent policy? If yes, would your approach differ in process and thus in cost? Please be as specific as possible.

Panasonic's Point of View:

If we are active in a standard setting body, our engineers who participate in the SSO automatically learn about relevant patents during the course of the technical discussions in the SSO without undertaking any specific steps, such as a patent search. We don't incur any material costs in complying with an obligation to declare specific patents as we don't usually conduct a search for patents in our own portfolio for the declaration process. In order to timely comply with the declaration obligation, it is important that this can be done without incurring a material cost in the process.

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.5 Blanket declarations

Some standard setting organizations require their participants to declare that, in general, they hold essential patents over a standard without requiring that these participants identify each of these patents specifically. Do you believe that such declarations provide for enough transparency? Please justify your answer, where necessary distinguishing situations where you consider that this approach is sufficient from those where you do not.

Panasonic's Point of View:

It depends on the nature of each SSO. A blanket declaration is enough for SSOs where a royalty-free license, patent pool participation, or non-assertion is mandated. Generally, specific patent declarations increase the level of transparency.

In a different perspective, blanket declarations could be useful to encourage participants to declare their commitment to license under the FRAND terms for their SEPs that they may own but are not aware of at the time of declaration. It would give significant assurance to implementers than in the situation where neither specific nor blanket declarations are made.

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.6 Scope/details

Where standard setting organizations require that patent holders identify the relevant patents individually, what information about the patent should be transmitted? Only the patent number or other aspects? What are the respective benefits and costs of requiring that the patent holder also (1) specifies to which part of the respective standard the declared patent belongs and/or (2) explains why the patent is relevant for the standard?

Panasonic's Point of View:

When a patent holder submits a FRAND or RF declaration, identifying patent numbers (if published), or indicating the volume of patent applications (if not published) and specifying the respective standard name to which the declared patents are relevant, e.g. ISO/IEC 14496-2 (MPEG-4 Visual Standard), are adequate information to be disclosed. When a patent holder submits a declaration of Non-License, the patent holder should be required to specify to which part of the respective standard the declared patent is relevant and to technically explain why the patent is relevant to this part of the standard. This allows the participants to the technical discussions to study alternative technologies which evade (do not infringe) the technical scope of the declared patent.

Supporting evidence or data:

Not available

Key Issue:

3. Increasing the Level of Transparency

Detailed Question:

Q 3.2.7 Consequence of non-compliance

What should be the consequences if a patent holder has failed to comply with its declaration obligation (for the standard, for the patent holder, for licensing negotiations)? Should the respective standard setting organizations take action and what should this action be? Are the consequences of non-compliance sufficiently clear in your experience?

Panasonic's Point of View:

Consequences of non-compliance with a patent holder's declaration obligation are not sufficiently clear in our experience so far.

We believe if a patent holder has failed to comply with its declaration obligation, it would be reasonable to mandate the patent holder to offer a FRAND license (assuming that the basic terms of the SSO are to license on FRAND terms). It should be taken into consideration whether the party is a contributor or a non-contributor.

If the respective SSO clarifies the rule for non-compliance, such as exemplified above, in its IPR Policy, then the SSO does not need to take any specific action.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardisation

Detailed Question:

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?

Panasonic's Point of View:

A patent pool is useful when a standard consists of a lot of patents and patent holders, such as *de jure* or forum standards, where participation to technical discussions is open and technical content is abundant and/or new standards are adopted frequently.

One of such areas is the video and audio digital codec field. Several patent pools, such as MPEG-2 patent pool and MPEG-4 patent pool, have been quite successful in this field. Major patent holders, who are also major implementers, have joined such patent pools as licensors and licensees.

Another is the communication field. Some patent pools were set up in the communication field, but none of them seem to have succeeded. In case of 3G and LTE, the patent pools are not successful because major patent holders haven't participated in the pools and the patent coverage has been small for both cases.

Supporting evidence or data:

<http://www.mpegla.com/main/default.aspx>

<http://www.vialicensing.com/licensing/index.aspx>

<http://www.vialicensing.com/lte/index.aspx>

<http://www.sisvel.com/index.php/background>

<http://www.sipro.com/W-CDMA.html>

Key Issue:

5. Patent pools related to standardisation

Detailed Question:

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?

Panasonic's Point of View:

Benefits of patent pools for licensees are as follows:

1. Time and effort for licensing negotiations can be drastically reduced, since SEPs owned by multiple SEP owners are granted in a one-stop-shopping manner through a patent pool.
2. When a new SEP owned by an existing licensor is issued, it is also added to the pool licensing program, and the new SEP is automatically granted to existing licensees.
3. When a SEP owner joins a pool licensing program as a new licensor and its SEPs are covered by the pool licensing program, the per unit royalty usually does not change, resulting in the ceiling of the risk, i.e. serving as the cap of royalty accumulation.
4. Licensing terms of a pool licensing program are open and a licensee can confirm that the terms are standardized, fair and non-discriminatory to all licensees.

Benefits of patent pool for licensors are as follows:

1. Time and effort for licensing negotiations with multiple implementers can be drastically reduced. Resources for licensing activities such as patent evaluation (validity and infringement), contract management, royalty management, and tax disposition can also be drastically reduced.
2. Since patent evaluation is made by independent third party evaluators, the credibility of the essentiality of SEPs can be strengthened.
3. The number of licensees is likely to be higher than in the case of bilateral licensing because of the convenience of one-stop-shopping.

In order to realize the benefits described above, it is important to ensure the following in each patent pool program:

1. Disclosure of information on licensing terms, existing licensors and licensees.
2. Evaluation by independent third party SEP evaluators who are technical experts in

the relevant standard technology field.

3. Neutral, independent and fair licensing agent or administrator.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

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?

Panasonic's Point of View:

The difficulties in setting up a patent pool lie in the parts of coordinating the multiple patent holders' interests and to create a program that is beneficial for those patent holders. Since the interests differ from patent holder to patent holder, seeking a common ground where most, if not all, licensors could live with, is a challenge.

In order to set up a patent pool, you will need a facilitator, an independent patent evaluator and a critical mass of patent holders. For patent pools to succeed, however, the participation of the main patent holders who contributed to the standard setting is essential. In order for the patent holders to be motivated to join patent pools, patent holders would like to be confident that the patent pool would be accepted in the market. This could be achieved by the participation of many implementers to join as licensees of the patent pool. On the other hand, implementers would not take a license unless they see a critical mass of licensors joining such pool. As you can see, it is a 'chicken and egg' situation. It is crucial that active participants in the standard setting process who also implement the technology join the patent pool both as a licensor and as licensee, as this would send a strong signal that the pool benefits both patent holders and implementers alike.

As to the question regarding the differences in national law or its application that make patent pool creation more difficult, an example is Taiwan. The CD-R disc patent pool in Taiwan was judged to be a breach of anti-trust law. It is not the existence of the national law itself, but we believe its application need careful consideration, as a patent pool is definitely a better solution than taking multiple bilateral licenses.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

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?

Panasonic's Point of View:

Costs for establishing a patent pool:

1. Patent evaluation cost: Generally, a patent holder who wants to participate in the discussion for establishing a pool license is required to submit a certificate issued by third party experts, confirming that the patent holder has at least one essential patent reading on the subject standard. Patent evaluation cost depends on the number of essential patents submitted. Evaluation cost is usually borne by each patent holder. The per patent evaluation fee is generally around US\$10,000.
2. Meeting cost: Fees for renting meeting room(s), drinks, food are usually shared among participants, although it differs from program to program. Meeting cost depends on the number of meetings held. The number of meetings depends on the facilitator, participants, number of essential patents, standard technology, potential market, competing licensing programs and so on. Travel expenses are borne by each participant.
3. Anti-trust Attorney's fees: To minimize the anti-trust risk, it is desirable to have anti-trust counsel involved in the process. The fees are usually borne by patent holders and the administrator.
4. Contract Attorney's fee: Fee for drafting contracts. It is usually borne by patent holders and the administrator.
5. Facilitator & Administrator cost: In many cases, an existing licensing agent calls for essential patent holders to participate in the discussion for establishing a patent pool. During the patent pool establishment process, such licensing agent takes the role of facilitating and administrating the process voluntarily without a charge.
6. Cost of establishing a licensing agent: In some cases, patent holders, who want to start a pool license program, invest and set up a licensing agent to create and manage a pool license program. Examples are MPEG LA LLC for MPEG-2 Video pool license, ULDAGE for Japan DTV pool license and One-Blue for Blu-ray Disc pool license.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

Q 5.2.1 Decision to participate in pool:

What factors influence a patent holder's decision to participate in a pool or not?

Panasonic's Point of View:

For the patent holders who are not implementers of the subject standard, the most important factor for their decision is the comparison of expected revenue and costs between a pool license and bilateral licenses. To make an accurate comparison, it is important to know information such as other potential licensors in a pool, the number of essential patents of its own and in the pool, market size, the number of potential licensees, royalty rates and allocation rules of royalties and so on.

Patent holders who are implementers of the subject standard, also consider which is better, a pool license or bilateral licenses, from the view point of minimizing IP risk (SEPs and non-SEPs) against their own implementation. A pool license can be a solution to royalty stacking of SEPs. However, non-SEPs are usually out of the scope of pool licenses. If the number of participating SEP holders and the coverage of the pool are substantial, the pool license is useful for minimizing the IP risk. If the number of participating SEP holders and the coverage of a pool are insignificant, bilateral licenses such as cross-licenses are effective and efficient. Implementers may choose bilateral licenses if they would also like the license to cover non-SEPs.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

Q 5.2.2 Incentives for pool participation:

How can this balance be influenced positively? What incentives can be provided by public authorities and/or standard setting organizations to increase patent pool participation?

Panasonic's Point of View:

- It would incentivize SEP holders to join a patent pool if authorities approve that the terms and conditions of the pool license are a benchmark of FRAND conditions for the subject standard and that an implementer who refuses to obtain the pool license within a certain period of time should be recognized as an unwilling implementer. The approved benchmark could be the basis of a royalty rate that a SEP holder may offer for bilateral licenses as well. In the bilateral negotiations, however, a SEP holder usually adds some extra costs to a pool royalty, including, but not limited to, its own attorney fees, travel and personnel expenses. Accordingly, SEP holders are more likely to choose to join the patent pool than seeking bilateral licenses because they can expect a broader coverage of licensees, thus a greater revenue stream, than seeking bilateral licenses. Similarly, if authorities support that the patent pool license is a FRAND license, it would motivate SEP holders to join the patent pool in order for them to narrow-down and lessen the arguments they need to overcome (e.g., avoid counterargument from implementers that the SEP holders are breaching the FRAND obligation). The same logic could apply to bilateral licenses, but in case of bilateral licenses, there would be room for counterargument from implementers that the extra costs (as mentioned above) are unreasonable.
- If PTO or WIPO takes the role of an essentiality evaluator, it would be good from the view point of keeping the transparency and neutrality of the patent evaluation, which will encourage both potential licensors and licensees to participate in the pools. Evaluation costs are expected to be lower than those conducted by law firms, which will promote participation of potential licensors.
- The DVB Project is a good example of an SSO promoting a pool license. The DVB Project took the role of a facilitator for setting up a pool license by calling for essential patents, selecting a patent evaluator and arranging the first meeting among patent holders. At the first meeting, patent holders decided to take up the role of the DVB

Project as a facilitator and continue the effort of setting up a pool license themselves. Two examples are the DVB-T and MHP pool licenses that are the results of such activities by the DVB Project.

Supporting evidence or data:

DVB MOU (January 1, 2014) Clause 14 available at

https://www.dvb.org/resources/public/documents_site/dvb_mou.pdf

Key Issue:

5. Patent pools related to standardization

Detailed Question:

Q 5.3.1 Right moment for pool creation:

What is the right moment in the standard setting process to start the process of creating a patent pool? What part of work on setting up a patent pool start could/should be done in parallel to the standard setting discussions?

Panasonic's Point of View:

The timing of releasing the 0.9 version of standard specifications ("Spec"), such as Committee Draft (CD) in ISO is the right moment to start the process of creating a patent pool. The 0.9 version of a Spec is the final draft from the technical group, so it is substantially the same with the final Spec and only minor revisions will be made after releasing the 0.9 version of a Spec. Therefore, essential patents evaluated based on the 0.9 version Spec are expected to be based on the final Spec as well and to start calling for essential patents after releasing the 0.9 version Spec is the right moment.

Patent Evaluations and the first SEP holders meeting will be done in parallel to the standard setting discussion. It is efficient and helpful, since the SSO can request patent holders to submit patent declarations before releasing the final standard.

It should be noted that starting the process of creating a patent pool before releasing the 0.9 version Spec is premature and inefficient, since it is not sure who the SEP holders are at that moment. Further, even after releasing the 0.9 version Spec, if the potential market related to the subject standard is expected to be insignificant or difficult to predict, then it is not the right moment to start the process.

The right point to start any pooling efforts is when the market is either already mature, or the expectations are quite likely that it will take up soon and there will be return that can finance – at least – the initial cost of setting up the pool. For example, DVB fostered a CPCM pool, but it turned out after a couple of meetings that there are no short term prospects of any implementation of the technology. Similarly, the DVB-H pool was formed very early after the standard was finished but the technology was not widely adopted. This resulted in a huge loss of time and money spent for the creation of the pool.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

Q 5.3.2 Role of SSOs:

What contribution can standard setting organizations make with regard to patent pools? Should they provide guidance patent pools? Should they provide and/or select patent pool administration services?

Panasonic's Point of View:

- The DVB Project is a good example of what an SSO can do for creating a pool license, as we discussed in our answer to Q5.2.2. In case of the DVB Project, the SSO played the facilitator's role in the initial phase, followed by SEP holders own initiatives. We don't believe an SSO should be involved any further. Specifically, during the process of creating a patent pool, the SSO should not be involved in the discussion of or have the right to authorize, the terms and conditions of a pool license.

Supporting evidence or data:

Not available

Key Issue:

5. Patent pools related to standardization

Detailed Question:

Q 5.3.3 Role of public authorities:

What contribution can public authorities make to facilitate patent pool creation? What role could publicly owned patents play? Are there specific features of non-EU legal systems that could be useful also in the EU? Under what conditions and to what purpose would public financial support be beneficial?

Panasonic's Point of View:

- If PTO or WIPO takes the role of an essentiality evaluator, it would be good from the view point of keeping transparency and neutrality of patent evaluation. Financial support of evaluation cost is beneficial for small companies and universities.
- If publicly owned patents, such as patents owned by national laboratories or universities, are included in a pool license, it may attract other patent holders to join the pool. On the other hand, if public financed entities choose not to join a pool and enforce their patents and/or bring a patent infringement lawsuit against implementers, then many implementers have no interest in taking the pool license. In turn, other patent holders would have no interest in joining the pool.

Supporting evidence or data:

Not available

Key Issue:

6. Notions of "fair", "reasonable" and "non-discriminatory"

Detailed Question:

Q 6.1.1 Notions "fair" and "reasonable":

How, in your view, should the terms "fair" and "reasonable" be understood? Which of the above methodologies do you consider particularly appropriate, which other methodologies do you find important and what could be an appropriate mix of references?

Panasonic's Point of View:

"Reasonable" should mean balanced terms and conditions between an SEP holder and an implementer taking into account various factors, including existing other license conditions of the standard in question or those of similar standards/technologies, the duration of the patent, the importance of the standard in the product, degree of contribution of the patented technology to the standard, product price, business relationship, and so on.

"Fair" means good faith and equal position in negotiations with the goal to achieve equitable results for SEP holders and implementers. For example, when "fair" is discussed, license terms and conditions of counter-patents owned by an implementer shall be considered.

Supporting evidence or data:

Not available

Key Issue:

6. Notions of "fair", "reasonable" and "non-discriminatory"

Detailed Question:

Q 6.1.3 Time required for negotiations:

In your experience, how long does it take, on average, to negotiate FRAND terms? What does the length of negotiations depend on? Is it more or less difficult/fast to reach an agreement on FRAND terms and conditions for standard essential patents licenses compared to other similar patent licensing deals?

Panasonic's Point of View:

There is no general rule, and the duration of licensing discussions varies greatly. The most difficult and time consuming part is the discussion about royalty rates. There is no substantial difference between SEPs and non-SEPs.

Supporting evidence or data:

Not available

Key Issue:

6. Notions of "fair", "reasonable" and "non-discriminatory"

Detailed Question:

Q 6.1.5 Other methods of ensuring reasonableness of licensing terms and conditions:

Can patent pool prices for a given standard be a proxy for FRAND terms and conditions? What are the limits of the use of patent pools as a proxy? How can bias coming from such a method be avoided?

Panasonic's Point of View:

Although we support the idea that a pool rate is referred to as a benchmark for a FRAND rate, a pool rate should not be a proxy for a FRAND rate in bilateral negotiations. A FRAND rate in a bilateral license will be determined by consideration of a lot of other factors, including licensing costs, such as lawyers' fee, patent research cost, travel expenses, other human resource expenses and so on. Royalty rates of patent pools which do not have a critical mass of licensors and/or licensees should not be used as a benchmark of FRAND terms and conditions.

Supporting evidence or data:

Not available

Key Issue:

6. About *ex-ante*

Detailed Question:

Q 6.2.2 Unilateral *ex-ante* disclosure

Would you welcome a larger role for unilateral *ex-ante* disclosure of licensing terms in order to facilitate the licensing of SEPs? What form could it take? How should SSO mechanisms be shaped to facilitate this instrument? Should they be mandatory or voluntary? Should the disclosure only concern the most restrictive terms?

Panasonic's Point of View:

We wouldn't welcome a larger role for unilateral *ex-ante* disclosure of licensing terms in any form. There are unavoidable downsides to it as discussed in the ECSIP's final report (Section 5.1 "Overview of suggested solutions" S11. "Promoting coordination mechanisms" 2).

We are skeptical that the VITA situation cited in the ESCIP's final report (cited below) would generally apply to other SSOs.

"While being fiercely opposed by some, at least one SSO (VITA) introduced such a policy. A study published by the US National Institute for Standards (NIST) concludes that many of the feared side-effects (including participants leaving the SSO) did not take place after the introduction of this policy and that, in a survey, the policy impact was judged quite positively by SSO members;" (Section 5.1 "Overview of suggested solutions" S11. "Promoting coordination mechanisms" 3)

Supporting evidence or data:

Not available

Key Issue:

6. Notions of "fair", "reasonable" and "non-discriminatory"

Detailed Question:

Q 6.3.1 Advantages of portfolio licensing:

What are the advantages of portfolio licences respectively for the patent holder and for the implementer? How important is the so-called "freedom to operate" or "patent peace" between companies? Please cover in your answer also issues of scope (e.g. geographic scope, product scope, inclusion of future patents).

Panasonic's Point of View:

Benefits for patent holders: Portfolio licenses are usually more efficient time-wise and cost-wise than patent-by-patent licenses for patent holders. It would be inefficient if a patent holder has to negotiate and enter into a license agreement each time a new patent is issued.

Benefits for implementers: Portfolio licenses are usually more efficient time-wise and cost-wise than patent-by-patent licenses for implementers as well. It would be inefficient if an implementer has to do a patent search, license negotiation, and enter into a license agreement each time a new patent is issued for a licensor who has already entered into another license agreement covering the same technical area.

Portfolio licenses are more efficient than patent-by-patent licenses in the ICT industry because i) a number of patents are involved in the same product or product category, ii) ICT products are sold worldwide, and iii) new patents are issued along with the development of a standard or technology.

Supporting evidence or data:

Not available

Key Issue:**6. Notions of "fair", "reasonable" and "non-discriminatory"****Detailed Question:****Q 6.5.1 Current business practices:**

On what level of the value chain (e.g. component, bundle of components, final product) does SEP licensing currently take place in the fields of standardization in which you are active/interested? Is this business practice applied by all patent holders/implementers or are there different business practices?

Panasonic's Point of View:

Panasonic believes, as a basic principle, that everyone who implements the technology equally benefits from it irrespective of whether the implementation is a component, final product, the content (compressed using standard compression technology) or service (transferred by standard communication technology). Thus, those using the technology benefit from the development and should equally reimburse the investment made to develop such technology. However, the same patent cannot be licensed twice in the same value chain. One of the solutions would be to divide the patent portfolio that would be licensed to one level in the value chain (e.g. component or content) and another level in the value chain (e.g. final product). For simplicity purposes, many of the SEPs are licensed to a specific level in the value chain (e.g. component or final product). Video compression technology patent pool license is licensed at the level of the final product and content, before it is delivered to an end user. Audio compression technology, for example mp3 licensed by Technicolor along with Fraunhofer's patents are licensed to either level, e.g. licensee can choose whether to pay at the component level or final product level.

The desired level in the value chain to be licensed depends on the patent holder. A patent holder, who is also an implementer, wants to leverage its SEP against its competitors to protect and promote its business. In this case, the patent holder wants to leverage its SEPs at the level of competing products. A patent holder who is not an implementer prefers to license at the level of the final product sold to an end-user, since it is easy to identify the potential licensees and to trace unlicensed products.

Supporting evidence or data:

For mp3 license available at

<http://mp3licensing.com/royalty/hardware.html>

Key Issue:

6. Notions of "fair", "reasonable" and "non-discriminatory"

Detailed Question:

Q 6.5.2 Royalty base:

How should the royalty base be selected to allow licensing for different types of products (products that rely entirely on a given standard or set of standards, or rely mostly on a set of standards or on multiple technologies)? For a given implementation of a standards in a product, to what extent would it be desirable or feasible that the royalty type be streamlined, e.g. in a percentage of the product value, royalty per unit sold, or lump sum?

Panasonic's Point of View:

Common technologies used in a broad range of products, such as compression technologies, should be fixed fees, as in many cases such technology is simply one function out of many in a specific product. Depending on the nature of the technology and the products adopting such technology, the type of payment may vary. On page 188 of the ECSIP's final report, it is noted that in the telecommunication field, often it is a value-based/percentage license fee. While it had been a percentage based royalty in the past, as the telecommunication products get more and more multi-functioned (or we could say that many products which are not primarily designed to be phones are implementing telecommunication technology), we see an increase in the fixed fee approach being proposed like we see it in compression technology SEP licenses, which would not change according to the price of the product.

Supporting evidence or data:

Sipro's WCDMA program applies a fixed fee after the third year:

<http://www.sipro.com/Licensing-Terms-W-CDMA.html>

Proposed LTE pool programs are fixed fees:

<http://www.vialicensing.com/licensecontent.aspx?id=1516>

<http://www.sisvel.com/index.php/lte/introduction>

Key Issue:

7. Patent dispute resolution

Detailed Question:

7.1.2 Main areas of disputes:

What are the main areas of disputes over SEPs (infringement/ essentiality, validity, value, etc.)? How are these areas related in the practice of negotiations and litigation?

Panasonic's Point of View:

The value of SEPs and the level of royalty rates are usually the main areas of the current disputes over SEPs with FRAND declarations, as described in the final report of ECSIP. In our point of view, the validity is also one of the main areas of disputes, in particular, until a patent pool program or bilateral licensing program for those SEPs is created and attracts a significant number (critical mass) of licensees.

Supporting evidence or data:

Not available

Key Issue:

7. Patent dispute resolution

Detailed Question:

7.2.1 Usefulness of alternative dispute resolution

In your experience, does ADR currently play an important role in resolving SEP disputes? Is it regularly considered/discussed when SEP disputes arise? Do you see any trend in its prevalence?

Panasonic's Point of View:

It is a good idea for SSOs to include an adjudication process, whether judicial or arbitral, as a final binding means to resolve disputes between members. ADR seems prominent as a dispute resolution mechanism aimed at resolving disagreements on licensing terms of SEPs on one level or another, for example, it has an enforcement power not only in a jurisdiction where arbitration is actually conducted, but also in signatory nations of, e.g. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, ADR should not be an exclusive means and other optional means such as judicial proceedings should not be precluded in the policy.

Supporting evidence or data:

Not available

Key Issue:

7. Patent dispute resolution

Detailed Question:

7.2.2 Target areas

Which situations/external factors render an alternative dispute resolution mechanism particularly useful? In what areas of patent based standardisation would ADR be particularly useful?

Panasonic's Point of View:

The scope of ADR should focus only on a FRAND fee level for timely and less costly judgment. SEP owners should be adequately and fairly rewarded for the use of their IPRs in the implementation of standards and technical specifications (for investment recovery) in a timely manner. Just like implementers are released from a "HOLD-UP" risk by patent holders' commitment to license on FRAND terms (FRAND declaration system,) it is important that the "HOLD-OUT" risk on SEP owners should also be timely removed through the ADR process. We note that ADR on a FRAND fee level is useful for such timeliness purpose.

On the other hand, validity and infringement requires very specific knowledge and skills, and therefore can be discussed and judged in other independent processes. For those validity and infringement aspects, the use of PTOs and WIPO may be helpful. Please also refer to our comments in this response on Detailed Question 5.2.2.

Supporting evidence or data:

Not available

Key Issue:

7. Patent dispute resolution

Detailed Question:

7.2.4 Benefits of ADR

What are the benefits of alternative dispute mechanisms applied to SEP disputes respectively for patent holders and/or patent users? What are the most important conditions to ensure that these benefits materialize?

Panasonic's Point of View:

Benefits of ADR for both patent holders and patent users include the following.

1. Cost effective.
2. No need to file judicial proceedings in every jurisdiction since it has an enforcement power not only in one jurisdiction where ADR is actually conducted, but also in signatory nations of, e.g. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Benefits of ADR for patent holders would be that it is not appealable and that parties are able to get a timely decision. As stated several times in this response, SEP owners should be adequately and fairly rewarded for the use of their IPRs in the implementation of standards and technical specifications (for investment recovery) in a timely manner. Timeliness is of the essence, and it would be better if IPR policies of SSOs fulfill several criteria on timeliness of an ADR process.

On the other hand, downsides of ADR for both patent holders and patent users include the fact that opportunities for repairing proceedings are limited and somewhat risky for the parties. Also, judgment on validity and infringement requires very specific knowledge and skills, therefore it can be discussed and judged in another separate process. For those validity and infringement aspects, the use of PTOs and WIPO may be helpful. Please also refer to our comments in this response on Detailed Question 5.2.2.

Supporting evidence or data:

Not available

Key Issue:

7. Patent dispute resolution

Detailed Question:

Q 7.3.1 Your experience:

Are you participating in SSOs that have ADR mechanisms? To your knowledge are they being used? If so, what are the experiences? If they are not used, why not?

Panasonic's Point of View:

Panasonic participates in SSOs that have ADR mechanisms, namely, Blu-ray Disc Association and DVB.

To Panasonic's knowledge, the ADR mechanism has not been used.

Panasonic's experiences are as follows:

[BDA] The BDA Bylaws mandates ADR to solve the RAND dispute between Members, however, the disputes that we see now are not between Members.

[DVB] Arbitration clause 14.7 has not come into effect because there is a joint licensing program that fulfills the condition in clause 14.9. (as referred in ECSIP's final report P184).

Supporting evidence or data:

BDA Bylaws Clause 16 (5) available at

<http://www.blu-raydisc.com/Assets/Downloadablefile/BDA%20Bylaws%20V2.3.pdf>

DVB MOU (January 1, 2014) Clause 14.7 and 14.9 available at

https://www.dvb.org/resources/public/documents_site/dvb_mou.pdf

Key Issue:

7. Patent dispute resolution

Detailed Question:

Q 7.3.4 Voluntary/mandatory:

What are the benefits and risks of making ADR mandatory for the resolution of SEP disputes? What consequences would this have for participation in standardisation, for licensing negotiations and for the implementation of a standard? If ADR would be made mandatory: Should it be linked to membership in SSOs, or to the fact of contributing a patented technology to a standardisation process, or other? Should there be an opt-in/opt-out possibility at the declaration stage? Should ADR replace litigation completely or should it be a mandatory step (e.g. mediation) before litigation?

Panasonic's Point of View:

The benefit of making ADR mandatory is that the outcome can be enforced through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards contracting States.

The risks of making ADR mandatory are that (i) there are not many experienced arbitrators, (ii) the judgment is non-appealable, (iii) there would be no involvement of injunction, (iv) the parties would have to conduct arbitration in a certain region and a different language even if both parties are from the same country, (v) the parties would have to go to litigation if the dispute goes beyond the issues that have to go to arbitration.

Opt-in/opt-out possibility in the declaration undermines the purpose of having ADR. As we saw in the Blu-ray Disc Association case, if parties have an opt-out possibility, a party may choose not to go to ADR but use other means. Then, the other party has no choice to go to ADR even if such party opted-in. Therefore, both parties have to opt-in in order to go to ADR if there is an opt-in/opt-out possibility. Parties could go to ADR if they both agree to do so even without the ADR mandatory obligation or opt-in/opt-out possibility. Opt-in/opt-out possibility vitiates the existence of an ADR clause.

As to the question of whether ADR should replace litigation completely, Panasonic believes that SSOs should not exclude the possibility of bringing the issue to the court. ADR could not replace litigation completely if the scope of the issue for ADR to consider is limited, and mandating ADR prior to litigation would be more time consuming and costly and would vitiate the benefits that ECSIP's final report states as a benefit of ADR.

Supporting evidence or data:

Not available

Key Issue:

7. Patent dispute resolution

Detailed Question:

Q 7.4.5 Transparency:

Should the outcomes of ADR be made public in order to achieve transparency? If only partially, which part? And in what form?

Panasonic's Point of View:

If ADR is limited to the issue of whether a royalty meets the FRAND obligation, the process of getting to the final outcome and the methodology or the formula, and the resulting patent value, should be made public in order to keep consistency amongst the same standard, which would make part of the decision public and make it have *res judicata* effect. Needless to say, any other outcome or the details of the case should be kept confidential as it normally is in arbitration. It is important to make the ADR process a safe one for those who will reveal confidential information, and at the same time, share the outcome where it would help to resolve potential future disputes.

Supporting evidence or data:

Not available

Key Issue:

8. Unwilling implementers and injunctions

Detailed Question:

8.1 Defences for patent holder:

(a) What needs to be done to ensure that holders of standard essential patents have effective means of obtaining appropriate remuneration for their patents and to defend themselves against implementers who are unwilling to pay royalties or who delay payment of such royalties? (b) What can standard setting organizations do in this regard?

Panasonic's Point of View:

A quote* from the ETSI IPR Policy: "... the ETSI IPR Policy seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs. IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS."

(a) In order to ensure patent holders' rights against unwilling implementers, similarly to patent holders committing to license on FRAND terms, potential licensees should express their willingness to be licensed under all SEPs (for a given standard) from a patent holder by a binding statement which shall have several criteria such as an agreement to a third party adjudication and timeliness for each party's action. If the unwilling implementer did not fulfill these requirements, the patent holder should be able to enforce its rights to seek injunctions using the FRAND declared SEPs. By having this mechanism, it would expedite the process and give higher possibility for parties to conclude a license agreement.

(b) SSOs should make it clear in their IPR Policies to implement a mechanism mentioned in above (a) including the right to seek injunctions. The SSO could make available a draft of such a statement to be submitted by the implementer to the patent holder.

Supporting evidence or data:

*: The ETSI IPR policy available at

<http://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>

The quote is taken from sections 3.1 and 3.2.

Key Issue:

8. Unwilling implementers and injunctions

Detailed Question:

8.2 Protection against abuses:

How can it be ensured (at the same time) that injunctions based on standard essential patents are not abused to either exclude companies from implementing a standard or to extract unfair, unreasonable or discriminatory royalties from them?

Panasonic's Point of View:

Injunctions based on SEPs are abused if a patent holder seeks an injunction against potential licensees willing to be licensed on FRAND terms.

It is fair for SEP holders to refrain from seeking and/or enforcing an injunction as long as the potential licensee shows its willingness to negotiate in good faith towards a comprehensive FRAND license. No patent owner who submitted a FRAND declaration would exclude a willing potential licensee if it sees that a license between the two can be concluded. If there is disagreement between the parties as to whether an offered license has in fact FRAND terms and conditions, it shall be adjudicated via an independent third party (arbitration or litigation), e.g. comparing it to previous licenses that had been concluded at an arm's length negotiation or have been adjudicated independently.

Supporting evidence or data:

Not available

Key Issue:

8. Unwilling implementers and injunctions

Detailed Question:

Q 8.3: Prevalence of injunctions:

According to your experience, in which fields of standardization and in which situations are/were injunctions based on standard essential patents threatened and/or actually sought? What are/were the consequences? Please be as specific as possible. 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?

Panasonic's Point of View:

Case where an injunction was actually sought: Under MPEG-2 pool licensing program, some licensors, including Panasonic, filed patent infringement lawsuits against PC makers and media makers and also enforced our right to seek an injunction. Around that time, there were a lot of licensees willingly paying royalties to the pool. We simply could not let go the infringers, because a lot of faithful licensees were suffering unreasonable competition in the market as the infringers' products were less expensive as they did not pay royalties. Against such unwilling infringers who are distorting the market, the right to seek an injunction is a crucial tool to make the infringers sit down at the negotiating table and take the negotiations seriously. The German Court found that Panasonic's SEP were infringed and granted injunction against the media maker. We even paid the bond to effectuate the injunction. As to the PC makers litigation, the cases resolved at an early stage prior to getting the decision of injunction.

Case where the right to seek injunction was threatened: We have filed a lawsuit against Imation for infringing SEPs for the Blu-ray Standard. Imation insisted that injunctions based on SEPs are not compliant with the FRAND obligation. The case is ongoing.

Supporting evidence or data:

Imation citation: One-Blue LLC v. Imation Corp., No. 13 Civ. 917 (D.Del. May 22, 2013)
Media maker: Landgericht Düsseldorf 4b O 346/05

Key Issue:

8. Unwilling implementers and injunctions

Detailed Question:

8.4 Consequences of banning injunctions:

Are you aware of national jurisdictions that have banned injunctions based on standard essential patents or that have restricted injunctions even against unwilling implementers (court cases or legislative changes)? Did this impact on the licensing negotiations, on the royalty rates and/or on the risk of getting no remuneration at all? How did patent holders react in these jurisdictions?

Panasonic's Point of View:

We are not aware of any jurisdiction that would not allow injunctions on SEPs or restricted injunctions against unwilling licensees.

Supporting evidence or data:

Not available

Key Issue:

8. Unwilling implementers and injunctions

Detailed Question:

8.5 Awareness among stakeholders:

In your experience, is there sufficient awareness among standardization participants of the recent EC antitrust decisions cited above? What role can standard setting organizations play in ensuring awareness of these antitrust decisions? On what aspects of the issue as such would you welcome additional guidance, if any?

Panasonic's Point of View:

There is sufficient awareness amongst the telecommunication industry members who participate in ITU IPR AdHoc or ETSI IPR SC meetings. We are not sure whether or not the others are fully aware of the decisions (e.g., Samsung and Motorola decisions.)

As to the question of the role that SSOs could play, SSOs should, as soon as they become aware, disseminate any relevant decisions to their members in the respective sub-bodies, like an IPR sub-group. Information sharing on current and relevant decisions is for sure a very good idea to help also Small and Midsize Entities (SMEs) to be up-to-date with latest (regulatory) developments, as those entities might not have the manpower to monitor all potentially relevant news portals etc. Although EC decisions are made public, in order for the SSOs to be able to timely share the relevant decisions within their organization, it would be helpful if the EC could purposely inform any such information to the SSOs, especially to the SSO handling the same technology field as the one in the decision.

As to the question of the additional guidance that the SSOs would welcome, as the EC issued "Speaking Point" several times in ETSI and ITU, we think there is no need for further guidance on the topic of injunctions. Rather, these matters should be discussed and agreed among stakeholders who are directly affected by the outcome.

Supporting evidence or data:

ITU IPR AdHoc Documents:

- IPR-C-166 European Union.pdf
- IPR-C-246 European Commission.docx
- IPR-C-252 European Commission.docx

ETSI IPR SC documents:

- IPR(13)16_015_Speaking_Points_delivered_by_the_European_Commission.doc
- IPR(13)17_014_Speaking_Points_delivered_by_the_European_Commission.doc
- IPR(14)19_022_Speaking_Points_delivered_by_the_European_Commissions.doc
- IPR(14)20_017_Speaking_Points_delivered_by_the_European_Commissions.doc