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The EU SEPs Expert Group Report – Transparency Issues

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In an [earlier post](#) we considered the general licensing and evaluation issues raised by a report issued in January 2021 by the EU Group of Experts on Standard Essential Patents (EU SEPs Expert Group). The present comment focuses on the transparency aspects highlighted by the Expert Group's report.

Transparency of Declarations

In an ideal world we would be able to rely on objective declarations of essentiality. However, the world we live in is far from ideal – there is a distinct lack of transparency in the context of the SEP licensing frameworks managed by Standard-Setting Organisations (SSOs). This lack of transparency has negative consequences. As noted in the [European Commission's Communication of 29 November 2017](#), several studies on important technologies demonstrate that, when strictly assessed, only between 10% and 50% of declared patents are really essential (see [Re?gibeau et al., Transparency, Predictability, and Efficiency of SSO-based Standardization and SEP Licensing, A Report for the European Commission \(2016\)](#), p. 62). Are there ways to improve access to reliable information on the scale of exposure to SEPs? Improved transparency would benefit the users of standards, especially small and medium-sized enterprises, that have little experience of licensing practices when they enter the relevant markets looking for connectivity.

This concern over transparency is noted by the Expert Group in its report, which states that some SSOs' declarations disclose little to no data in relation to specific SEPs. Other SSOs including the European Telecommunications Standards Institute (ETSI) are more demanding as they ask for detailed declarations – yet, such declarations are not updated regularly so as to show the public modifications within the SEP landscape. The life-cycle of patents and patent applications often sees changes to ownership (patentee) and property boundaries (scope). Applications may be refused; patent claims may be narrowed. Patents may be revoked for lack of novelty or inventive step, or simply expire. They could also be deprived of their *essential* nature if the relevant standards are amended or supplemented, potentially making existing declarations incorrect and unreliable. Moreover, generally this info, on ownership of patents and changes in scope, falls within the data managed not by SSOs but by the European Patent Office (EPO).

As we noted in our prior post, the nature of the Expert Group's report is that there is no consensus on recommendations. Yet, it is worth noting that to enhance transparency, some members of the Expert Group suggest specific proposals with regards to:

- SSO databases of already declared SEPs;
- analyses of essentiality of purported SEPs; and
- determinations of validity of approved SEPs.

With regard to (i), the above mentioned ETSI does provide an all-inclusive digitalised database containing information regarding declared SEPs for specific standards. Some members of the Expert Group recommend that the EU should encourage other SSOs, including those outside the EU, to provide accessible SEP databases with specific SEP declarations, e.g. when it comes to standards used in EU public procurement.

Declared SEP databases must be reliable, however. That is why some members of the Expert Group also urge that SSOs develop platforms where SSOs members are able to submit information on declared SEPs, including the outcome of 3rd parties' essentiality assessments and final decisions within opposition proceedings as well as legal disputes on the validity or essentiality of declared SEPs. This would help bridge the gap between SSO knowledge and EPO data.

Regarding (ii), assessing essentiality is key. Implementers need assistance when it comes to analysing which licences they require. SEP owners need support in quantifying the value of FRAND royalties. The Expert Group recommends the use of independent bodies, specifically patent offices, such as the EPO or certified law firms, in order to confirm the essentiality of their declared SEPs soon after the adoption of the standard. There is a link here with (i) above, on co-operation between SSOs and the EPO.

This proposal echoes a similar one recently put forward in the [final report](#) produced by a consortium including the Eindhoven University of Technology (TU/e) and the Technical University of Munich (TUM), and commissioned by the European Commission's Joint Research Centre (JRC). That report, discussed in [an earlier post](#), suggests to identify a supervisory body aimed at devising the assessment procedures and to bear responsibility for their quality and performance. More specifically, it recommends that assessment tasks be outsourced to already existing entities, particularly organisations and individuals who already perform analogous tasks, including patent offices and patent attorneys. An important role – that report reminded – should be played by the EPO and national patent offices in Europe, which are likely to be the most appropriate organisations to perform high quality essentiality checks, as they can rely on experts with enhanced skills and guarantee impartiality and objectivity.

The Expert Group also suggests that costs for the essentiality checks are kept at a fair and equitable level. Likewise, procedures to appeal decisions on essentiality of approved SEPs should be fast and cheap. To adequately inform all stakeholders, some members of the Expert Group urge that approved SEPs, namely those SEPs which have been checked by independent assessors and confirmed as real SEPs, are included in SSOs' databases. Also, incentives should be given to SEP owners to submit their declared SEPs for essentiality confirmation as rapidly as possible after the adoption of the standard.

For (iii) a member of the Expert Group recommends requiring SSOs to exchange documents related to standardization with patent offices, urge SSO members to bring opposition proceedings against declared SEPs, and recommends that SEP owners conduct exhaustive prior art searches, via AI tools.

Conclusion

The proposals and suggestions made in the report in relation to transparency seem appropriate and fair. While they are addressed at both SEP holders and implementers, they seem aimed at neutralising attempts by SEP owners to declare as many patents as possible as essential to specific standards. If actually implemented, these proposals may have the effect of reducing the risk of “hold-up” situations where implementers are exposed to high royalty requests from SEP holders who try to take advantage of the market power which comes with being the first developer of a standard. This may encourage more fair and reasonable licensing arrangements, which would contribute to guaranteeing a smooth competition between the many players of the Information and Communication Technology (ICT) market.

It is true, however, that some of the above proposals on transparency seem unlikely to come to fruition. Nonetheless, there is value in encouraging cooperation between the SSOs, such as ETSI, and patent offices, such as the EPO. The current information environment is far from ideal – any improvements that would enhance transparency must be encouraged. The EU’s powerful institutions can play a role in brokering further co-operation between the external organisations ETSI and EPO. Yet, the fact that the EU’s own SEPs Expert Group was unable to reach a consensus on this issue does not bode well in this regard.

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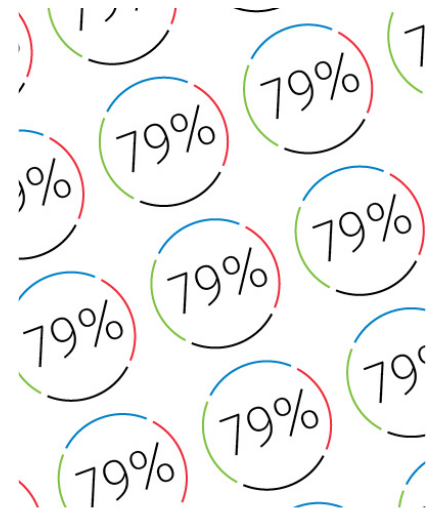
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