

Why ‘license to all’ could be a license to kill innovation in Europe

Ensuring a fair, balanced and predictable approach to licensing essential technology patents

The EC has called for a balanced, fast, predictable, efficient and enforceable licensing approach that ensures a fair return on investment for patent holders and enables fair access to patents for all participants in the value chain. A ‘license to all’ policy goes against those objectives and could have a serious negative effect on technology innovation in Europe and impact on the emergence of Europe’s Digital Single Market.

Undermining Europe’s Digital Single Market strategy

The debate around a ‘license to all’ obligation for standard essential patents (SEPs) – also known as licensing level discrimination and compulsory licensing – focuses on whether a patent holder has the right to decide at which level in the value chain it licenses patents, and if licensors are obliged to grant a license to *any* potential licensee that demands it. With telecoms (3GPP standards) a key focus area, this issue is important because *patents can only be licensed once in the value chain; once licensed, the patent rights are in general exhausted.*

The European Commission believes common standards “ensure the interoperability of digital technologies and are the foundation of an effective Digital Single Market”. However, a change from ‘access to all’ to ‘license to all’ will jeopardize standards development and undermine the Digital Single Market strategy, especially with the huge growth of Internet of Things (IoT) applying and as 5G technologies are deployed.

Market background

Technology sharing is enabled through commitments by patent holders to offer access to their inventions on *Fair, Reasonable and Non Discriminatory* terms (known as FRAND). Standards are typically developed through the contribution of new solutions - many protected by patents that are essential to achieving the standard - that together form a complete specification. Through FRAND, the standard is effectively *accessible* for every party that wants to manufacture products that are compliant with the standard.

Under this system, patent holders are not refusing to supply/license intellectual property (IP) rights. They make their technology available to all, accounting for the fact that IP rights are subject to exhaustion: a patent holder can only license its patent once. By choosing the level in the value chain where to license, patent holders are driven by practical considerations that make licensing more efficient and less costly.

Why move from fair and reasonable to unfair and unreasonable?

Standard essential technology for telecoms is currently made widely available at reasonable terms. The problem is, companies that have not contributed in a meaningful way to standardization are pushing the original creators of standards out of the mobile phone market. Evidence undeniably shows that patent holders have not used the rights conferred by their patents to exclude parties from the market – far from it. They have instead given access to many new players, at all levels of the value chain.

At first glance, a small linguistic change to IP rules for standardized technologies - from ‘access to all’ to ‘license to all’ - might appear insignificant. Yet this change would have a profound impact on the market, disrupting the balanced, efficient and enforceable framework behind the dynamic standardization of mobile technology and creating many negative effects, especially for smaller companies who are active as innovators and contributors to technology standards as well as implementers of the technology itself.

Under ‘access to all’

‘Access to all’ on FRAND terms works and is efficient. Current European Telecommunications Standards Institute (ETSI) rules strike an important balance, ensuring access to all in the market while simultaneously respecting the basic rights of a patent holder to license at the appropriate point in the value chain. Under the ‘access to all’ arrangements:

- No company has been denied access to standardized cellular technology
- No company wanting to enter the smartphone business has been barred access to the technology
- No company wanting to sell components to smartphone manufacturers have been barred from entering this ecosystem
- There is no real or imminent threat that someone may be precluded from accessing IoT or 5G technology once standardized

Imposing unbalanced ‘license to all’ requirements

In contrast, ‘license to all’ is neither balanced nor efficient and would not work for the telecoms sector. It would dramatically alter European Standardization Policy and ETSI rules to the detriment of companies that believe and invest in ETSI standards rather than in their own proprietary technologies.

‘License to all’ asserts a policy that is not found in the agreement to license: ETSI rules clearly do not require a patent holder to license to all. Such a policy would not find support in French law to unilaterally change the contract through a general policy statement, and abandoning rule of law at this critical juncture in the telecom, IoT and 5G industry is not wise for Europe. The ‘license to all’ approach is actually designed to undermine the value and licensing of standard essential patents, and should therefore be opposed.

Why ‘license to all’ should be opposed

‘License to all’ is in total opposition of the EC objective to create a “balanced, fast, predictable, efficient and enforceable licensing approach” and would severely disadvantage European patent holders.

It is simply not true that ‘license to all’ would promote even greater access to standards and an even better Intellectual Property Rights environment. A ‘license to all’ regime converts patent ownership into such an onerous burden that European companies making substantial R&D investments to create patent portfolios would opt-out of standard essential patent ownership and not invest in standards that are key to realizing the Digital Single Market strategy - leaving European industries at the mercy of proprietary wireless technologies.

Some parties and particularly those with proprietary business models do not want intense standards-based competition in Europe to continue into the 5G era and as cellular technology spreads into the Internet of Things. ‘License to all’ is not about access to standards or the advance of technology or fairness or consumer interest. It is about royalties: a strategy advanced by those who either want to pay less in royalties or want to make it more difficult for inventors to collect royalties.

In reality, a ‘license to all’ regime *would simply not work*. It would quickly lead to a commercial gridlock, fragmentation at various levels, significant uncertainty, a substantial increase in litigation, weaker Intellectual Property Rights - and so provide no reasonable rewards for European innovators who contribute so much to technology standardization and who should otherwise be playing a central role in enabling the Digital Single Market.
