INTELLECTUAL PROPERTY MODELS TO ACCELERATE SUSTAINABILITY TRANSITIONS
(IPACST)

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Sustainability FRAND Licensing Knowledge Brief

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Sustainability FRAND Licensing

What is Sustainability FRAND Licensing?
FRAND, also known as RAND terms are a voluntary licensing commitment between IPR owners and users, with the licensing conditions including royalty rates being **fair, reasonable** and **non-discriminatory**.

RAND *reasonable and non-discriminatory*
FRAND *fair, reasonable, and non-discriminatory*

How? *For example, the "Fair Standards Alliance" formulates the following:*

- ***Reasonable royalty rates –*** *should reflect the value of the invention only, no more, no less.*
- ***Licenses to all (non-discriminatory) –*** *Licenses should be available at any point to all interested organizations regardless of their geographical location or their position in the value chain.*
- ***Transparency –*** *should be encouraged to create greater predictability and avoid discrimination.*
- ***Sustainable Framework –*** *A FRAND rate must take into account the overall royalty that could be reasonably charged for all essential IPRs.*
- ***Predictability for innovators –*** *The FRAND commitment must include relevant and further essential patents.*
- ***Fair negotiations –*** *Injunctions should be made only in exceptional circumstances.*

Based on Fair Standards Alliance (2021)

This licensing approach has been developed for standard essential patents in information and communication technology where patents are usually distributed across several owners and implementing technology standards require negotiation of licenses with numerous entities in several countries. In order to participate in these important markets, numerous users have to access these standard essential patents for their products. Standard-setting organizations such as industry associations and political institutions like the EU, mediate between the various interests by demanding compliance with the F/RAND license fees by focusing on balance, transparency and appropriateness. FRAND conditions are to overcome complex and lengthy negotiations to improve technology diffusion.
Given that some technologies are key to transform sectors towards sustainability, the FRAND conditions could be applied to sustainability-technology-essential patents.

Benefits for the licensor

- Easier negotiation process: instead of the usual individual licensing, the procedure is generalized, negotiations are facilitated
- costs and benefits are comprehensible and calculable
- efficiency is increased
- inspire competitors to contribute their IPR in the same way
- increased impact of sustainability technology, can also be reported in sustainability reporting
- demonstrate a stance on sustainability by using IPR to enable technology diffusion
- benefit from broad use of own IPR, including economies of scales and network effects, instead of lawsuits, mediation and arbitration e.g. through WIPO
- increase sales of IPR-related services and products
- determine grant conditions, e.g. comply with quality standards, reporting of products and beneficiaries, using trademark

Challenges

- There is always a risk that IPR owners of dependent IPR may not offer FRAND conditions for their IPRs
- In global competition there are cross-border differences in law, politics and economic framework conditions. The business models and economic goals of companies also vary in different regions and countries around the world. Therefore, it is not easy to rely on a general validity of the F/RAND licensing.

Benefits for the user

- Gain access to IPR for sustainable technologies and products
- Reduce licensing negotiation barrier
- Reduce and avoid R&D costs and associated risks
- Free up resources for other necessary activities such as setting up manufacturing lines, developing supply chains and markets
- Benefit from economies of scale and network effects

Benefits for the society

- Accelerated pace of creating and diffusing sustainable technologies and products by utilizing IPR as facilitating collaboration amongst relevant stakeholders
- With F/RAND Licensing, many often long-term court hearings and disputes about standards can be reduced.
- Reducing information biases at technology markets. For consumers, this can lead to lower prices.
- Reducing overall costs of sustainable technologies and products, and thus speed up transition towards sustainability including circular economy concepts

Where to get advice for FRAND licenses?

Institutions such as the World Intellectual Property Organization (WIPO), various patent offices around the globe, e.g. the European EPA, the DOJ of the United States, the Japanese JPO and other institutions such as China's High People's Court and the Fair Standards Alliance (FSA) deal with how they set F/RAND royalties and balance the interests between SEP owners and licensees and the public.

Without F/RAND there is a risk that the IP owner will use their position to charge a licensee an inappropriate high price. Patent holders could be willing to strive for significantly more than the F/RAND value of their patents, in line with the additional market power of a standard essential patent (patent holdup problem).

Example of the importance of FRAND

"Microsoft Corp. v. Motorola, Inc. *(W.D. Wash. Apr. 25, 2013):*
Motorola sought to exclude Microsoft's gaming consoles from the United States and demanded that Microsoft pay royalties of between $6–8 per console for the use of patents reading on the 802.11 and H.264 standards. The court determined that the F/RAND rate was less than four cents per unit for the 802.11 standard, and less than one cent per unit for the H.264 standard. The cumulative RAND royalty found appropriate by the court was approximately 1/150th the royalty sought by Motorola."

McSweeny (2018)

Outlook

As has already been shown in the ICT industry, the FRAND framework conditions were quite successful, the industry was able to develop quickly, in connection with a high degree of competition and interoperability between different products. It was particularly successful with mobile radio standards (e.g. with GSM and UMTS).

In the sustainability area, too, there are requirements to integrate various technologies and specific services and applications as quickly and effectively as possible. It is important to encourage voluntary cooperation between all those involved.

Further readings

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