European Commission, DG Enterprise and Industry
Unit A4 - Industrial Competitiveness Policy for Growth
Avenue d'Auderghem 45, 1040 Bruxelles, Belgium

FSFE response to Consultation on Patents and Standards: A modern framework for standardisation involving intellectual property rights

Date: February 13, 2015

Submission information

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FSFE is registered in the EU Transparency Register with the ID 33882407107-76.

FSFE represents the interests of Free Software developers and businesses.

About FSFE

Free Software Foundation Europe[1] is a charity that empowers users to control technology. Founded in 2001, we have continuously engaged with industry, policymakers and the Free Software (also

1 http://fsfe.org

known as "open source software" - computer programs which anyone may use, study, share and improve) community in order to build awareness for the importance of software freedom, and to create the social, political and economic conditions for Free Software to thrive.

Throughout its work, FSFE has championed Open Standards:[2] standards for software which may be implemented by anyone without restrictions, in any business model, and with any approach to licensing and distribution which users may find suitable. Open Standards allow people to share all kinds of data freely and with perfect fidelity. They prevent lock-in and other artificial barriers to interoperability, and promote choice between vendors and technology solutions. FSFE pushes for the adoption of Open Standards to promote free competition in the IT market, as they ensure that people find it easy to migrate to Free Software or between Free Software solutions.

In this endeavour, standard-essential patents which are licensed on FRAND terms, or carry other restrictions, are a frequent stumbling block for developers and businesses. This is why FSFE appreciates the opportunity to reply to the this consultation. We hope that our submission will contribute to the creation of more competition-friendly rules in future.

Issue 1: Other fields of standardisation

Standardisation involving patents is common in the telecommunication industry and in the consumer electronics industry. Which other fields of standardisation comprise patent-protected technologies or are likely to do so in the future?

Q 1.1.1 Fields of standardisation involving patents: To your knowledge, in which technological areas and/or fields of on-going standardisation work are patents likely to play an increasingly important role in the near future? What are the drivers behind this increase in importance?

Q 1.1.2 Trends and consequences: Do you see a general trend towards more/less standards involving patents? Are there any practical consequences of this trend? Are business models changing?

The rapid development of software and internet technology has largely been based on Open Standards, which are available free of restrictions and royalties. This shows that restriction-free standards are crucial in an environment where innovation is rapid and incremental; where there is a large number of actors from very different jurisdictions and backgrounds; where commercial and non-commercial actors cooperate and compete at eye level; and where most actors are small and lack the resources to engage in sophisticated patent licensing transactions. As noted in the "Patents in standards" study, sectors such as the telecommunications industry are increasingly taking on a similar shape. We therefore advise to thoroughly consider royalty- and restriction-free licensing of patents in standards for these sectors, as well.

2 http://fsfe.org/activities/os/def.en.html

Issue 4: Transfers of SEPs

Patents on technologies that are comprised in a standard are sometimes transferred to new owners. What problems arise due to these transfers? What can be done to prevent that such transfers undermine the effectiveness of the rules and practices that govern standardisation involving patents?

FSFE has repeatedly engaged with competition authorities, industry actors, and the general public to highlight specific patent transactions that pose risks to Free Software as a motor for competition, and to the open Internet in general. In 2011, FSFE briefed EU and US competition authorities on the potential risks and consequences of the sale of Nortel's patent portfolio (acquired from Novell) to a consortium of industry actors called "Rockstar Bidco"[3].

Q 4.1.2 Issues and consequences: In your experience, what are the typical issues that arise in the context of transfers of standard essential patents? Are such transfers leading to more or less fragmentation of SEP ownership? Are these transfers leading to more or less disputes/litigation? What is their impact on royalty rates for the transferred patents and on the total royalty rate for all patents essential for a standard?

The impact of the transfer of patents -- standard-essential or otherwise -- on Free Software developers and companies can be signficant. Any complex software program contains a large number of potentially patentable inventions. While software "as such" may not be patented in Europe, the European Patent Office has routinely awarded patents for so-called "computer-implemented inventions". More than 1000 of such patents have been granted each year in Europe.[4] As a matter of fact, these patents are effectively a legal threat for software developers, putting them at risk of patent infringement simply for developing and exploiting computer programs they have written themselves.

The current interpretation of the law by some patent offices, including the EPO, has been regularly contradicted by judicial decisions in Europe. For instance in Germany, patents covering software and telecoms are invalidated by courts in 88.11% of cases, mostly because the patents were granted on things that shouldn't be patentable in the first place.[5] However, the mere existence of patents is enough to chill innovation in software development.

Further compounding the problem, many software companies get involved in the US market while they are still quite small, exposing them to the even more aggressive patent litigation climate in that country. Indeed, in the US, the number of patent lawsuits filed each year has tripled.[6] These lawsuits

3 https://fsfe.org/campaigns/swpat/nortel.en.html

4 Years 1978 to 2002. Source: European Commission http://europa.eu/rapid/press-release_MEMO-02-32_en.htm?locale=en

5 For German court decisions during 2010-2013. Source: Bardehle, [pdf] http://www.bardehle.com/uploads/files/Patent_Papiertiger.pdf

6 From 1990 to 2010. Source: New York Times http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?_r=2&pagewanted=all

increasingly invoke patent infringement covering software.[7].

Much of the problem lies in the uncertainty about future actions by the owners of a patent portfolio. In the Free Software industry, many companies that develop and distribute software rely on promises of non-enforcement by patent owners, and avoid implementing technology covered by patents that are actively enforced. When these patents are transferred to a new owner, there is usually considerable doubt whether the new owner will behave in the same way. If patents are transferred to NPEs with a reputation for aggressive behaviour, this can be sufficient to reduce engagement with the technology, chilling innovation and value creation. As the Report on Patents and Standards suggests, one component of a solution could be to bind the commitment to license a standard-essential patent non-exclusively, and on restriction-free terms, to the patent itself, rather than to the patent owner. In order to have value, these commitments need to be formal, legally binding, and easily enforceable.

These risks are further aggravated by the fact that in software, it is next to impossible for developers to know whether a patent already exists on the technology they are building, and who may hold this patent. Given the large number of potentially patentable ideas that go into building any complex computer system, conducting a systematic patent search is too costly, and in reality often not feasible. This leaves especially small, innovative companies exposed to the risk of substantial and unpredictable demands by patent holders.

To understand the magnitude of the costs which patents cause in the innovation process, it is useful to consider that companies like Apple and Google spend more on patents, including patent litigation, than they spend on research and development.[8]

Issue 6: FRAND

Many standard setting organizations require that patents on technologies included in their standards are licensed on "fair", "reasonable" and "non-discriminatory" (FRAND) terms, without however defining these concepts in detail. What principles and methods do you find useful in order to apply these terms in practice?

FSFE was one of the earliest organisations to highlight the problems which arise from the interaction of standards and patents in relation to Free Software[9]. Among a number of other activities, we have engaged with the European Commission on the revision of the European Interoperability Framework[10], and have participated in the 2012 UK Open Standards consultation[11] run by the Cabinet Office.

7 “Internet software patents” are litigated eight times as often as other patents in 1998-2009. Source: Allison, in 2012 Stan. Tech. L. Rev. 3. SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989144

8 Source: New York Times http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?_r=2&pagewanted=all

9 http://fsfe.org/activities/os/ps.en.html

10 http://fsfe.org/activities/os/eifv2.en.html

11 http://fsfe.org/activities/os/2012-06-uk-consultation-os.en.html

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?

The problem with so-called "fair, reasonable and non-discriminatory" licensing terms is that they are, in fact, no such thing. In practice, such licensing terms permit some business models, while making others infeasible. Paying royalties of 0.000001 Cent per copy to implement a standard might look fair at the first sight, but such a fee would make it impossible to distribute a program as Free Software. Free Software safeguards the right to share with others. Therefore, when Free Software companies sell their software they cannot know how many people will eventually end up using it. It becomes impossible to estimate the total amount of royalties owed to patent owners; Free Software businesses will be unable to compete with their proprietary competitors and Free Software as a whole would be undermined. This matters; Free Software programs are either market leaders or among the top three solutions in many software fields.

More particularly, the most widely used free software licenses, the GNU GPLs, require that companies may not enter into any patent license agreement that contradicts the terms for distribution of Free Software, which allow royalty-free redistribution by recipients of the software. "Fair, reasonable and non-discriminatory" licensing terms typically discriminate against these popular terms for Free Software. It should be noted that hese terms do not prohibit one-time royalties paid by the first grantor of GPL license: the only thing that matters is that the royalty is not imposed upon parties receiving the program directly and indirectly.

This is the reason why the royalty-free approach of such software- and Internet-focused standards organisations has historically been successful. So-called FRAND terms, on the other hand, do not just inhibit competition: they lock a whole set of competitors out of entire markets.

Q 6.3.3 Cross-licenses: What are the advantages of cross-licensing? What problems arise? How do the concepts "fair" and "reasonable" apply to cross-licensing?
In the dynamic field of software and Internet technology, many of the actors in the market are small and new. Webs of patent cross-licensing serve only to protect large, established players from competition and disruption.

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?

Q 6.6.1 Definition in practice: In your opinion, what is the best definition of the non-discrimination principle? What aspects of non-discrimination do you find important? Is there sufficient clarity on what non-discrimination means and how it is to be applied in practice? Does the non-discrimination principle relate to the initial offer of the patent holder or the actual outcome of negotiations? Does it relate to an offer isolated to a single standard or to multiple standards? Do you consider that the non-discrimination principle creates obligations on the (potential) licensee?

In our view, the best definition of the non-discrimination principle is that standards should be free from legal or technical clauses that limit their use by any party or in any business or distribution model. They should further be without any components or extensions that have dependencies on formats or protocols that do not fulfil this requirement themselves.

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