Bird & Bird

A REVIEW OF SDO IPR POLICIES: DO THEY REQUIRE COMPONENT LEVEL LICENSING?

Takeaway

Must owners of IP rights (IPR) that may be essential to standards offer licenses of their essential IPR to each component maker? Or do they satisfy their commitment to Standards Development Organisations (SDOs) by offering licenses to the end user product maker, which provide "have made" rights or other assurances for the component maker? Do they need to offer license terms in circumstances where they do not seek to enforce their patents?

We look at the wording of the IPR policies of various SDOs. We find that none of the IPR policies requires the IPR holder to offer licenses of its essential IPR to component makers. All of the policies would appear to permit holders of essential IPR to adopt a policy of licensing to the end-user product manufacturer. Many of the policies contain wording that could only be relevant or applicable when licensing to parties who buy in components from component makers, such as end-user product manufacturers.

Background

High-technology products today usually contain or rely on standardised technology. Cellular wireless connectivity is one example; Wi-Fi and video encoding are others. These technologies are developed not by a single company, but by groups of companies active in the field that collaborate through standards-development organisations. Representative engineers from the companies meet and agree on technological solutions to be adopted in the standard. Often these meetings identify technical problems to be overcome. The solutions identified by the participating engineers to these problems may be novel, and inventive, and therefore eligible for patent protection.

SDOs typically have Intellectual Property Right (IPR) policies under which participants in the standards–development activities may voluntarily commit to offer licenses to IPRs that they hold which may be or may become essential to the standard ("standards-essential patents" or "SEPs") to future implementers of the standards, according to the terms of the IPR policy. In drawing up an IPR policy, SDOs seek to balance the multiplicity of interests affected by the standard under development. They take into account patent law and licensing norms in the industry. They seek to impose the bare minimum of requirements necessary to ensure that the standard may be implemented: actual commercial licensing terms are to be negotiated outside the aegis of the SDO.

High technology products today also typically result from a supply chain, with tiers of component makers supplying components, including software, to the manufacturer of the end user product. Connected cars are an example of this: the connectivity technology which goes into the vehicle is supplied by a multi-tiered supply chain to the automotive manufacturer.

In recent patent cases involving connected cars, the question arises of whether a SEP owner:

a must offer licenses of their SEP portfolio to component makers, or

b may offer licenses to the end user product maker, which provide "have made" rights for the automotive manufacturer's component makers[1], or

[1] For example *Nokia v Daimler,* Case No. 2 O 34/19 (Mannheim District Court), in which Nokia offered a license covering the vehicle, with "have made" rights covering Daimler's suppliers.

c may offer licenses to the end user product maker, and refraining from asserting patents at the component level[2].

The first of these models is referred to by the shorthand of "license to all" because each person in the supply chain may request and receive a written license agreement. The latter two models are known as "access for all", because each person in the chain has access to the technology (for example, to manufacture and supply products incorporating it), even though they may not themselves be party to a written license agreement.

There are competition or antitrust law arguments about both models. In the United States these have been addressed in some detail in the *FTC v Qualcomm* United States Court of Appeals Ninth Circuit decision, which is discussed further below. In Germany, courts in Munich, Mannheim and Dusseldorf[3] have considered whether SEP owners abuse their dominant position by offering "value chain" licenses for the connected vehicle, or whether they can be compelled to offer "exhaustive" patent licenses to component makers. At the time of writing, the answers have been that SEP owners are not obliged by competition or anti-trust law to offer licenses to component makers, exhaustive or otherwise.

Anti-trust and competition law is, however, not the only relevant issue. When IPR holders give commitments to Standards-development organisations to license on FRAND terms, this can create a contractual commitment. The UK's Supreme Court in Unwired Planet reminded the industry that the wording, and the meaning, of those commitments is decisive.

In a paper dated 8 June 2020[4], the Fair Standards Alliance sets out selected quotes from a number of SDO IPR policies[5] which are said to support the assertion that an essential IPR Owner must offer licenses of their SEP portfolio to each component maker.

This paper analyses the various SDO IPR policy wordings to determine whether they do in fact require licensing at the component level or whether they permit the IPR owner to adopt an "access for all" model of licensing. We find that, as a matter of wording, the SDO policies looked at do not require licensing to take place at the component level.

Terminology

"Have-made" rights arise in licensing agreements, where a patent owner grants the right to "make, have made, use, keep, sell etc." The extent of "have made" rights depends on the contract. In the mobile phone industry they permit handset makers to buy in cellular radio components, modules or even entire finished devices from third party suppliers, without those suppliers infringing the licensed patents.

A "value chain" license covers the vehicle, and, through "have made" rights, the components which go into it. It accords to model b, above.

An "exhaustive" patent license is a license to the SEP portfolio which covers both the component maker's activities and those of his downstream customers. This is not the same as a true "license to all" model, under which the downstream customers would also enter a license.

[2] See, for example, *FTC v Qualcomm 19-16122, U.S. Court of Appeals for the Ninth Circuit (San Francisco)*, in which the court heard evidence from the major SEP holders in the cellular industry that they do not assert SEPs against component makers.

[3] *Nokia v Daimler Case No. 2 O 34/19 (Mannheim District Court), Sharp v Daimler:* judgments not published at the time of writing.

[4] https://fair-standards.org/wp-content/uploads/2020/06/200605-FSA-Position-Paper-Supporting-Legal-and-Policy-References-License-to-All.pdf

[5] ITU, IEEE, TIA, ATIS, 3GPP and ETSI

ETSI RULES OF PROCEDURE, 4 December 2019

ETSI remains the primary SDO for cellular radio technology. It is one of seven Organizational Partners of 3GPP.[6] ETSI transposes 3GPP work into ETSI "technical specifications", to which its members may identify potentially essential patents. ETSI has the largest database of telecommunications patents identified in the world, and most 3GPP participants identify their potentially essential patents to the ETSI organization.

ETSI has an IPR Policy, which takes effect as a contract between the IPR holders who make licensing declarations to ETSI, and ETSI itself. Article 6.1 envisages that IPR owners would be prepared to license the following acts:

- *Manufacture, including the right to make or have made customized components and sub-systems to the licensee's own design for use in Manufacture;*
- *sell, lease, or otherwise dispose of Equipment so manufactured;*
- *repair, use, or operate Equipment; and*
- *use Methods.*

The article defines "Manufacture" as "the production of Equipment". "Equipment" is "any system, or device fully conforming to a [standard]". "Methods" are "any method or operation fully conforming to a [standard]".

The ETSI licensing commitment is therefore limited to only devices fully conforming to its standards. Those standards are made up of technical specifications, many of which describe interoperability between user equipment and a network: how a device should respond given certain inputs. They require the device to function in the network environment.

It is typically only a finished end-user product which can implement an ETSI standard. A component may enable some, or even most, of this functionality. But a component by itself cannot transmit a specified response to an incoming radio signal. The same is true of the definition of methods: a component by itself typically cannot carry out a method conforming to the standard.

A patent owner's claims which described the interaction of a device within a network will generally only constitute "Essential" IPR when they are directly infringed or indirectly infringed. They may only be directly infringed once implemented in a network. They may only be indirectly infringed by an end-user product manufacturer when it supplies a product that it knows will put the patented invention into effect.

The ETSI IPR policy also expressly mentions "have made" rights. In other words, it envisages a license to a product maker which allows him to source components from a component maker, and the consent to use the patents would cover the manufacture and supply of those components. That is consistent with a model of licensing at the level of the manufacturer of a product assembled from

[6] https://portal.etsi.org/new3g/Management/OP.htm

components. It is not consistent with a model where each component maker would have his own separate license.

Finally, long-standing industry practice can also be a guide to interpretation of contractual language. For many of the prominent ETSI contributors, their practice to date has been to enter written SEP licenses only at the end user product maker level[7]. That practice is being questioned today, but for the first 15 years of the life of the policy it was accepted. However, there are also SEP owners, including some major contributors to the standards, who have chosen not to set up a licensing program, and either do not offer licenses to their SEPs at all, or only offer them as part of a cross-licensing package with another SEP owner. This practice is consistent with a goal of access to all: implementers can use the technology covered by those SEPs. The practice has never been challenged by ETSI, by regulators or by other members, and even today advocates of "license to all" do not assert this to be a breach of the ETSI IPR policy. As such, it is reasonable to construe the provision that SEP owners be "prepared to license patents" as a requirement to license only to the extent that SEP owners assert those SEPs, or operate an out-licensing programme in respect of those SEPs.

The policy therefore permits an IPR owner to adopt an "access for all" model, and contains wording that is inconsistent with an obligation to license at the component level.

ATIS

The Alliance for Telecommunications Industry Solutions ("ATIS") is the U.S. Organizational Partner of 3GPP, which promulgates the UMTS and LTE standards. ATIS's IPR Policy expresses its intent in the first paragraph:

"it is the intention of ATIS and its Forums to benefit the public while respecting the legitimate rights of intellectual property owners."[8]

ATIS's IPR Policy envisages that a holder of essential patent claims may give an

"assurance that a license to such essential patent claim(s) will be made available to applicants desiring to utilize the license for the purpose of implementing the standard . . . under reasonable terms and conditions that are demonstrably free of any unfair discrimination."

Section 3 of the ATIS Declaration uses the following wording:

"The license assurance is provided for [...] the claim(s) of the patent(s) [...] covering an invention the use of which is required for compliance with the American National Standard".

The wording restricts the class of potential licensees to applicants desiring to "use" the invention for "compliance with the standard" or "utilize the license for the purpose of implementing the standard". ATIS deals with the same technical specifications as ETSI. Many of these technical specifications specify how a device must react in a network environment, for example what the device must transmit in reaction to an incoming signal, or specify how it should initiate an exchange of radio transmissions. It is typically only a functioning end user device which can implement these.

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[7] *Unwired Planet v Huawei, TCL v Ericsson* Case No. 8:14-cv-00341-JVS-DFM (C.D. Cal. Dec. 21, 2017).
[8] https://www.atis.org/wp-content/uploads/01_legal/docs/OP.pdf

For a component manufacturer to fall within the definition, it would be necessary to read "for the purpose of implementing" as covering implementation by a downstream customer of the applicant, rather than implementation by the applicant himself. It would be necessary to read “use” in section 3 as covering “use by a downstream customer of the applicant” rather than use by the applicant himself. Although that is not an inconceivable interpretation, it would stretch the wording beyond its literal meaning.

One reason against such a reading is the need for compatibility among IPR Policies of cellular SDOs. As a 3GPP Organizational Partner, ATIS is the US equivalent of ETSI. Both promulgate essentially the same standard, developed in the 3GPP framework. The 3GPP Working Procedures require that IPR policies of members of 3GPP are compatible[9]. It is also desirable that IPR policies are aligned because this strengthens the 3GPP partnership, it promotes the consistent application of telecommunication standards, and because differences in the IPR policies may cause SDO forum shopping. So there are good reasons to prefer a reading of the ATIS policy which is consistent with ETSI.

The question of whether the words “for the purpose of implementing the standard” requires licensing at the component level has been considered by the American National Standards Institute (“ANSI”) Executive Standards Council Appeals Panel. ATIS is accredited by ANSI and the ATIS IPR Policy is based on the ANSI patent policy. The text “for the purpose of implementing the standard” appears in both. In 2018 the ANSI Executive Standards Council Appeals Panel issued a decision[10] about the compatability of some modified language proposed by another ANSI-accredited standards body, and, as part of that decision, the Panel considered the question of whether the ANSI IPR policy required licensing at the component level. The Panel stated that “*We do not wish to express or imply any such ‘default’ interpretation … of the ANSI Patent Policy requiring licensing at the component level,*” and that, while “*such a requirement was not inconsistent with the ANSI Patent Policy, that does not mean that ANSI’s Patent Policy requires licensing at the component level.*” Their reasoning suggests that the similarly-worded ATIS patent policy also does not require component level licensing.

Judge Koh, in an interim decision in *FTC v Qualcomm*[11], took a different view. Judge Koh issued a decision on summary judgement that construed the ATIS and TIA patent policies as a matter of contract. The court’s analysis was specific the positions of Qualcomm and Intel, competitors in the chip market: had the SEP owner in that case been a manufacturer of infrastructure equipment or handsets, then Judge Koh's analysis may well have led to a different conclusion as to the meaning and effect of the ATIS policy. In any event, Judge Koh’s decision in relation to antitrust law was vacated on appeal, so no longer has any effect, and the appellate court found that Qualcomm had no antitrust duty to license chip makers[12].

Consequently, we conclude the wording of the ATIS policy does not mandate component-level licensing.

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[9] art 6 of the 3GPP Working procedures
https://www.3gpp.org/ftp/Information/Working_Procedures/3GPP_WP.htm#Article_6

[10] Decision of the ANSI Executive Standards Council Appeals Panel 23 February 2018

[11] *No. 17-CV-00220-LHK (N.D.Cal. Nov. 06, 2018*. This decision was subsequently overturned by the Ninth circuit [*19-16122,* U.S. Court of Appeals for the Ninth Circuit (San Francisco)]

[12] *19-16122, U.S. Court of Appeals for the Ninth Circuit (San Francisco)* Opinion at 31-36.

TIA

The Telecommunications Industry Association ("TIA") is the U.S. Organizational Partner of 3GPP2, which promulgates CDMA2000.

The TIA IPR policy provides that SEPs "*will be made available under reasonable terms and conditions that are demonstrably free of any unfair discrimination to applicants only and to the extent necessary for the practise of*" a standard adopted by TIA[13].

The same arguments apply as in respect of the ATIS policy. It is limited to applicants who intend to practise the standard. It should be read in a way which is consistent with the ETSI policy. Like ATIS, TIA is also accredited by ANSI, so ANSI's decision that it does not require licensing at the component level applies equally to the TIA policy. But significantly, the TIA policy is arguably narrower than ATIS in two respects:

- The TIA policy uses the words "only and to the extent necessary for the practise of". "Only and to the extent necessary" restrains any commitment to license to a greater degree than the wording of the ATIS policy.

- "Practise" is narrower than "implement" in that it is more direct: it is a stretch to suggest that a person who supplies a component to another person, who makes a device which will practise the standard, is himself "practising" the standard. To use an analogy: a supplier of pharmaceutical drugs to the medical profession does not himself "practise" medicine, even where those drugs will be used in the practise of medicine.

The TIA policy also does not require the licensing of patents. It requires the licensing of individual patent claims, and only "to the extent necessary" to practise the standard. Patents typically contain equipment claims, and method claims. Even where a component may fall within an equipment claim, it will not fall within a method claim. The method claim only comes into play when the end user device is operating within a network, or when the end user device is sold to a customer who intends to use it. So, even if we could stretch the meaning of "practise" to cover the supply of components, only those claims actually infringed by the supply of components would be covered by the licensing obligation. That would not include the method claims. The manufacturer of the end user product, which would infringe those method claims, would therefore also itself need a license.

In conclusion, the TIA IPR policy does not require or oblige licenses to be granted at the component level. Even if it did, the end user product maker would still need a separate license for those patent claims not infringed at the component level.

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[13] It was amended in 2005 "to make it explicit that a patent that was necessarily infringed by the practise of an 'optional' element of a standard was nonetheless still an 'essential'" (*Koninklijke Philips NV v. Asustek Computer Inc.,* [2016] EWHC 2220 (Pat)

IEEE

The IEEE (Institute of Electrical and Electronic Engineers) has a standards-development role in several areas. Most relevant are the family of radio communication standards known as Wi-Fi.

The IEEE uses the term *Letter* of *Assurance* to describe a document stating a Submitter's commitment to license an Essential Patent Claim. The requirements for a Letter of Assurance are defined in clause 6.1 of the IEEE-SA Standards Board Bylaws.

These bylaws were revised in 2015. The revised byelaws include a paragraph on the use of the "smallest saleable patent practising unit" ("SSPPU") as a baseline for determining royalties: they do not mandate this, but "recommend" it. It is often asserted that these revised bylaws require (or recommend) licensing at the component level.

The new proposed wording of a Letter of Assurance includes a statement that the Submitter will *make available a license for Essential Patent Claims to an unrestricted number of Applicants, on a worldwide basis to make, have made, use, sell, offer to sell, or import any Compliant Implementation that practises the Essential Patent Claims for use in conforming with the IEEE Standard. "*Compliant Implementation*"* means *any product (e.g., component, sub-assembly, or end-product) or service that conforms to any mandatory or optional portion of a normative clause of an IEEE Standard.*

There have been a number of statements that the revised IEEE policy mandates component level licensing.

- In 2015 the United States Department of Justice issued a Business Review Letter relating to the policy. Ordinarily a business review letter would limit itself to stating whether the department had any objection to the policy, rather than opine on its interpretation. However, in its 2015 letter the DoJ stated that "*The Update obligates patent holders bound by the IEEE RAND Commitment to license their patents for "any Compliant Implementation," meaning that a patent holder making an IEEE RAND Commitment cannot refuse to license its patents for use in IEEESA standards at certain levels of production,*" and that "*this provision entails a departure from historical licensing practices for some licensors (who, for example, may prefer to license manufacturers of the end product, not manufacturers of the input)*".

- In its 2016 IEEE decision, the ANSI Executive Standards Council stated that "*the IEEE-SA Patent Policy requires an essential patent claim holder to make licenses available for products (including components or sub-assemblies) that implement merely a "portion" of a complete standard, however small that portion may be".*

- In a paper in IAM on 12 October 2020 the respected University of Utah law professor Jorge L Contreras notes the reference to components, sub-assemblies. This explicit reference, he argues, clearly establishes a license-to-all obligation for SEP holders.

The difficulty with all of these statements is that, to fall within the new proposed wording of a Letter of Assurance, it is not enough that a device be a component or sub assembly. The device also has to "conform" to the standard. As with 3GPP standards, the IEEE's family of Wi-Fi standards do not specify implementations: they do not specify how a device or a component is to be made. They specify interoperability: for example how one device in a radio network should respond to a signal from

another device, or how it should initiate a communication. In order to "conform" to such clauses in a standard, the device must at a minimum be capable of receiving wireless signals and transmitting wireless signals. So, although the policy expressly mentions components and sub-assemblies as potentially falling within the definition of a "compliant implementation", there is a limit to the level of those components which could still be compliant. A Wi-Fi module may conceivably "conform" to a mandatory or optional portion of a normative clause of an IEEE Standard. But it is hard to see how any component which is unable to receive or transmit, or provide a specified response to a specified signal, could itself be said to “conform”.

In a later Business Review Letter to the IEEE dated 10 Setember 2020 the US Department of Justice appears to have rowed back somewhat on its earlier statements. It notes that since the IEEE's 2015 policy (including this SSPPU wording) took effect, negative assurances—those in which a technology contributor declines to give a RAND assurance—increased significantly, with the result that in 2019 the American National Standards Institute declined to approve two proposed IEEE standards amending the 802.11 Wi-Fi standard. The Department now suggests that this wording should be reconsidered or amended, and that "*parties should be given flexibility to fashion licenses that reward and encourage innovation*".

The license to be offered under the Letter of Assurance wording is also a license on a claim by claim basis, for those claims that are practised by the product. Although it is conceivable that a component may practise a device claim, a component would not practise a method claim. Method claims would need to be licensed by the seller of the end user device.

Like ETSI, the IEEE policy envisages that licenses would include "have made" rights. This does not seem to be consistent with a model which mandates component level licensing. It is more consistent with a model in which a license is granted to a manufacturer, who purchases components from component makers who do not themselves have a direct license.

The revised bylaws include a paragraph on the use of the "smallest saleable patent practising unit" ("SSPPU") as a baseline for determining royalties. This has also been put forward as a recommendation of component level licensing. We do not agree that this wording should be read as a recommendation of component level licensing for two reasons:

- There is a distinction between royalty base, which is a factor in determining the amount of the royalty, and licensing level, which concerns with whom the license agreement is entered. Even if the use of SSPPU were mandated by the policy, that is not the same as a statement that licenses must be granted to component makers.

- If anything, the inclusion of SSPPU language in the policy points to the opposite conclusion: that the authors of the policy had in mind that licensing would take place at the level of an end user product maker. Had the authors been envisaging licensing at the level of the component, it would not have been necessary to recommend the use of the SSPPU as a royalty base, because there would be no distinction between the price of the component and the price of the SSPPU.

We conclude that the IEEE policy, even in its 2015 form, does not mandate licensing at the component level, and does not preclude the IPR holder from adopting an "access for all" model. Further, its wording is in two areas actively inconsistent with component level licensing.

ITU

The International Telecommunication Union is a specialized agency of the United Nations responsible for all matters related to information and communication technologies. It has three sectors, of which two are relevant to this paper. ITU-R manages radio frequency allocation and communications globally. ITU-T operates as a standards-development organisation for telecommunications. ITU, together with ISO and IEC, is the SDO for video compression standards such as H.264.

ITU-T and ITU-R share a common IPR policy with the ISO and IEC[14]. The Policy is supplemented by Guidelines[15] which are "*intended to clarify and facilitate implementation of the Patent Policy*."

The objective of the Policy is to make "*a patent embodied fully or partly in a Recommendation | Deliverable [...] accessible to everybody without undue constraints*".

The objective of the policy is therefore to ensure access to the technology described within a patent. The Policy is neutral as to how that access is to be achieved, whether by licensing or other means, stating:. "[...] *The detailed arrangements arising from patents (licensing, royalties, etc.) are left to the parties concerned, as these arrangements might differ from case to case.*"

The patent statement and licensing declaration form for ITU-T or ITU-R recommendations contains the following wording:

"The Patent Holder is prepared to grant a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to make, use and sell implementations of the above document.

Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO, or IEC."

The word "Patent" on the ITU form means "*those claims contained in and identified by patents, utility models and other similar statutory rights based on inventions (including applications for any of these) solely to the extent that any such claims are essential to the implementation of the same above document. Essential patents are patents that would be required to implement a specific Recommendation or Deliverable".*

As is usual, the ITU's family of video compression standards do not specify implementations: they do not specify how a device is to be made. The H.264 standard describes the format of the encoded data and how the data is decoded, but it does not specify algorithms for encoding video – that is left open as a matter for encoder designers to select for themselves, and a wide variety of encoding schemes have been developed. Nor does it specify how those algorithms are to be implemented, which may be done in a hardware device, or in software running on a generic processor.

In order to "conform", a device must be capable of receiving a compressed video signal and decoding it. As with the cellular standards above, there is a limit to the level of those components which could still be compliant. If the implementation of the receiving portion is done in software, the hardware

[14] The text of the Policy is at https://www.itu.int/en/ITU-T/ipr/Pages/policy.aspx .
[15] Guidelines are at https://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000010005PDFE.pdf

components would clearly not conform. If implementation of the receiving portion is done in hardware, a stand-alone H.264 module might "conform" to the H.264 Standard. But it is hard to see how any individual component which is unable by itself to receive or decode could be said to "conform".

The license to be offered is also on a claim by claim basis, for those claims that are practised by the product. Although it is conceivable that a component may practise a device claim, it would not practise a method claim. Method claims would need to be licensed by the seller of the end user device.

For these reasons, we do not conclude that the ITU licensing declaration mandates licensing to component makers. The objective of the policy is to give access to the technology, which could include by licensing, but also by other means. On the transmission side, there does not appear to be any commitment to license at all. On the receiving side, any licensing commitment appears limited to devices, together with any necessary software, which are capable of receiving and decoding. For components, there is no licensing obligation.

Other Policies

We also looked at the IPR policies from the Broadband forum IPR Policy (April 20, 2016) , the Internet Engineering Task Force (May 2017), OASIS and W3C. We found that these also did not require licensing at the component level, for similar reasons to those considered above. Some expressly allowed a patent owner to license, or not assert, at its option. Some referred to "have-made" rights, again suggesting licensing of assembled products rather than the components. Some restricted the license to implementations of the standards, rather than components which form part of a product which implements the standards.

Conclusion

In its 8 June 2020 paper, the Fair Standards Alliance has sets out quotes from a number of SDO IPR policies which are said to support the assertion that a SEP Owner must adopt a policy of offering licenses of their SEP portfolio to each component maker. In these, the Fair Standards Alliance places emphasis on words such as "all applicants" in support of the assertion that the SEP Owner must adopt a policy of offering licenses to component makers.

The words "all applicants", however, must be read in context, since each of the policies goes on to set out further restrictions on any licenses to be granted. Where IPR Policies have adopted wording such as "all applicants", they may be seeking to make clear that licence offer should be to persons whether or not they are members of the SDO, for example. A commitment to offer licenses to "all" does not override the other provisions of the policy. To use an analogy: a local government requirement that a swimming pool be open to "all" does not permit its use by windsurfers or kayakers.

We find that the SDO policies looked at do not require a SEP owner to offer licenses to the manufacturer of components, even where they state that licenses must be offered to "all applicants", or similar. There are, broadly, three reasons for this.

1. Some policies contain wording that is inconsistent with component level licensing.

2. All of the policies restrict the purpose for which the SEPs may be used. This purpose restriction inherently limits to whom licensing may occur: a SEP owner need not offer a license to a component maker who does not operate within the purpose restriction.

3 Some policies require licensing on a claim by claim (as opposed to a patent by patent) basis. Many SEPs have both equipment and method claims. Even if a component satisfies all integers of an equipment claim, it will typically not of itself fall within a method claim. There would be no obligation to offer a license to those method claims to such a component maker.

We also note that case law appears to support this interpretation.

- In the *FTC v Qualcomm*[16] case, the 9th Circuit decision found that OEM-level only licensing does not violate antitrust law.

- Two decisions of the German courts[17] have dismissed an argument that the IPR holder is obliged to offer licenses to component makers.

- The English Court in *Unwired Planet*[18], the District Court for the Central District of California in *TCL v Ericsson*[19] and the District Court for the Western District of Washington in *Microsoft v Motorola*[20] have each imposed SEP licenses at the end-user product manufacturer level[21].

- In similar circumstances, courts from China, India, Brazil and across Europe have upheld license offers made by, or to, end-user product makers as being FRAND. They have not found that such licensing should be taking place at a component level.

There would therefore appear at this point in time to be a general global consensus that SDO IPR policies do not mandate licensing at the component level, and that they permit IPR holders to adopt an "access for all" IPR licensing model, through written licences entered at the last stage of the value chain.

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[16] *19-16122, U.S. Court of Appeals for the Ninth Circuit (San Francisco)*,
[17] *Nokia v Daimler* and *Sharp v Daimler*, ibid.
[18] [2017] EWHC 711 (Pat)
[19] *TCL Communications v Ericsson*, Case No. 8:14-cv-00341-JVS-DFM (C.D. Cal. Dec. 21, 2017).
[20] Case 2:10-cv-01823-JLR
[21] In each case the manufacturers of the end-user products used Qualcomm or Mediatek chips.