



EU Regulation on Standard Essential Patents

EUI webinar, May 19th 2023



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SEP: Basic concepts around the functioning of SEPs

- › Standard Essential Patents (SEPs) are patents that protect standardized subject matter
- › By the process of standardization only one technical solution out of many is selected (usually by a group of horizontal competitors / Art. 101 and 102 AEUV) while all others technical solutions are excluded from competition

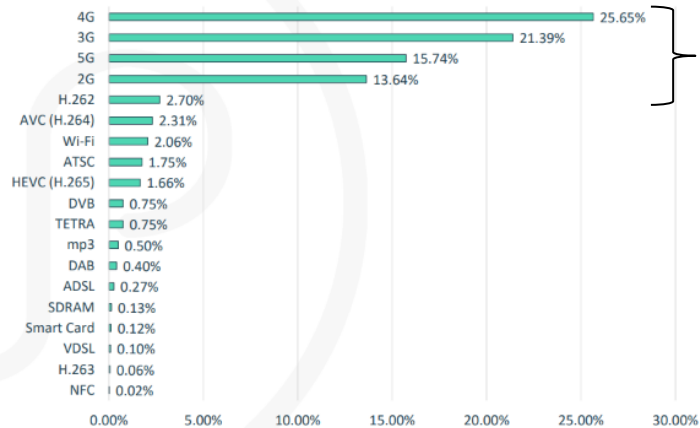
Regular Patents		SEP
<ul style="list-style-type: none">› Subject to competition and design-arounds by others	Competition	<ul style="list-style-type: none">› Patented technology mandatory no design-arounds
<ul style="list-style-type: none">› Patent holders decide whether to license third parties and freely negotiate royalties	Rights & Obligations	<ul style="list-style-type: none">› Obligation to license any willing licensee on FRAND conditions

- › The SEP ecosystem must entail a balancing of interests through licensing that is based on fair, reasonable and non-discriminatory terms (FRAND), **which was introduced to substitute regular market forces**

Litigation concentrates mainly on cellular connectivity SEPs

- › Under ETSI/3GPP's IPR policy we find the vast **>75% of all SEP litigation worldwide**
- › Under IEEE's IPR policy we find only **2% of all SEP litigation worldwide** despite covering more than 80 standards
- › Commenters have suggested that SDO FRAND policies play a role in this trend.*
- › Automotive Standards do not lead to court disputes at all

Standards subject to SEP litigation 2001-2021 (world-wide)



>75%

Source: IP Lytics “Webinar: SEP Litigation Trends and Licensing Realities”, 9 March 2021, slide 7, available at: <https://www.iplytics.com/de/webinar/sep-litigation-trends-licensing-realities-webinar-video-recording-slides/>.

*Michael Carrier and Brian Scarpelli, <https://www.law360.com/articles/1392222/how-standard-setting-orgs-can-curb-patent-litigation>

Abuse of injunctions - *IPB vs. Ford Werke GmbH – EP737*



... leads to German courts “blessing” **worldwide** license rates for **entire patent pools**;

... and German court decisions effectively having **extraterritorial effect**

- › ... although essentiality and validity of any other German IP Bridge patents is **not** reviewed;
- › ... although essentiality and validity of any foreign IP Bridge patents is **not** reviewed;
- › ... although essentiality and validity of any patent from 48 other Avanci pool members is **not** reviewed (not even a single German patent);
- › ... although the value of IPB’s portfolio or entire Avanci pool portfolio is **not** reviewed (“willingness” test)

IP Bridge vs. HTC and Inter Digital vs. Lenovo

IP Bridge vs. HTC (*BGH X ZR 123/20*) Jan 2023

EP 737 was **the** Patent that forced OEMs into unFRAND AVANCI License contracts
According to the ruling of the German FCJ the Patent EP 737 could very well be exhausted (IP B / Qualcomm covenant to sue last)

InterDigital vs. Lenovo (*UK High Court*) March 2023

“Overall, I was puzzled as to how anyone could reach conclusions effectively as to whether Lenovo was an unwilling licensee without considering the all-important valuation of the offers which were under discussion. In other words, how can a final conclusion be reached until it is possible to review the negotiating history against what is found to be FRAND.”

“Mr Meyer characterised the total discounts said to have been applied in Samsung 2014 at around 85%” or in other words: Big players get discounts up to 85%, SME pays full rate

EC IMPACT ASSESSMENT REPORT

- Start-ups and SMEs lack not only the resources but also the SEP and licensing expertise. Two thirds of SMEs replying to the Commission's targeted survey stated that **there is uncertainty regarding SEPs and that royalty payments affect their competitive position**
- **There is already proof in the automotive industry that because of SEP royalties, European suppliers are no longer able to compete and exit the automotive supplier market.** In a submission to the Commission, the automotive manufacturers' organisation ACEA reported a shortage of supplier offers and a growing dependence on Chinese suppliers

Thank You
for your attention!