

SUMMARY			
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Summary

Patent pools, the practice by two or more parties to license their patents as bundle, have played an important role in the licensing of Standard Essential Patents (SEPs)¹ over the years. Despite potential anticompetitive conducts resulting of such practice (e.g., price fixing and unlawful tying agreements), competition authorities such as the Department of Justice (DOJ), in the US, and European Commission (EC), in the EU, have repeatedly spoken in favour of these agreements. By presenting themselves as a 'one-stop shop' and providing relevant information about the licensing process, patent pools have the potential to overcome general obstacles of the patent market, such as the perceived lack of transparency, asymmetric information, and high transaction costs.

With the deployment of the 5G standard, the debate on patent pools has once again reached the spotlight. The 5G standard aims at real time connectivity and presents more capacity and increased efficiency that enable new technologies and business on the Internet of Things (IoT). The possible new usages of 5G, however, attracts a multiplicity of new stakeholders from different sectors that, generally, have no experience and expertise in the SEP licensing scenario. Thus, it has been argued that patent pools could offer a smoother and more transparent licensing process for "a large number of implementers in the IoT environment (especially SMEs)".²

It is important to keep in mind, however, that patent pools are not one-size fits all solution, and there are other effective licensing mechanisms in the market. For example, bilateral F/RAND³ negotiations of SEPs have also proved to be highly successful and have allowed wide dissemination of technologies in the last decades, as in the case of cellular standards.

¹ Patents that protect technologies essential to the implementation of a certain technical standard, e.g., cellular standards such as 2G, 3G, 4G and 5G.

² EC COM (2017) 712 final, Brussels, 29.11.2017, 7.

³ SEP holders generally commit themselves to offer their patents under F/RAND terms, i.e., under fair, reasonable, and non-discriminatory terms.

Against this background, this paper aims to present some of the possible considerations made by stakeholders when deciding to join or obtain a license from a patent pool. The paper also shows how patent pools work in practice, from its creation to the licensing and enforcement of their portfolio.

Part I of the paper presents (i) what are patent pools; (ii) how they are created, as well as possible challenges of finding a common solution among different stakeholders with different business models; and (iii) how such organizations are normally structured, including when it comes to patent essentiality assessments. Pools are normally seen as a more cost-effective way of licensing. However, factors such as market need, technology involved, relevance of the patent portfolio, business models of the participants, presence (or not) of an in-house licensing program, and commercial relationships are also considered by stakeholders in creating, joining, or licensing from a patent pool.

Part II of the paper explores stakeholders' considerations while explaining how the distribution of royalties within SEP holders is generally made (e.g., quantitative and qualitative systems) and the license terms generally offered by pools (e.g., the royalty rate, possible incentives, negotiable clauses). Patent pools and its 'one-stop shop' characteristic tend to be an attractive licensing mechanism to SEP implementers, especially to those implementers that do not have the expertise to evaluate portfolios and what would be a F/RAND license. Moreover, a successful patent pool can provide certain assurance to implementers that their competitors are also taking a license on similar and non-discriminatory terms, hence preserving competition and contributing to a better level playing field among them. However, there are situations that implementers may choose to negotiate bilaterally (e.g., in the case of other commercial relationships or where cross-licensing agreements are more efficient) and, sometimes, not to take a license at all. Enforcement risks can play an important role in such decision, especially when it comes to unwilling licensees. On that note, patent pools have taken different approaches on enforcement strategies. Some pools are more supportive of litigation, for example, through the offering of counselling and incentives to SEP holders willing to enforce their patents, whereas others limit their activities to licensing and management of royalties. It normally depends on the pool's competence, resources and, most importantly, on the terms established by the SEP holders at the moment of the pool's creation.

As patent pools are born out of contractual negotiations, it is possible to find in the market different models to attend each pool's interest. Nonetheless, common factors attributed to successful pools are being able to offer the most complete and relevant SEP portfolio related to the standard and/or product, as well as to present conditions that are attractive to both SEP holders and implementers in the long term.

In conclusion, patent pools can be a valuable licensing mechanism in the SEP scenario, as they have the potential to be more effective, transparent and to reduce transaction costs. There are many successful pools in the market, such as Avanci and its wireless technology licensing program to automotive and smart meter companies. Still, patent pools cannot address all the circumstances that may touch upon SEP licensing negotiations. Policymakers can provide guidance on the means to achieve balance between licensees and licensors. However, market realities and business considerations to be made by stakeholders towards SEP licensing should

always be taken into account, allowing them to assess, on a case-by-case analysis, which licensing mechanism would be the best one to the licensing circumstances at stake.