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IP Developments, Patenting and Licensing with SEPs and SSOs helps SMEs



MALLINSON, Keith: IP Developments, Patenting And Licensing With SEPs And SSOs Helps SMEs, Wise Harbor, February 2013

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SUMMARY			
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Abstract

In the present paper, the author critically examines the findings of a 2012 report of the UK Intellectual Property Office, suggesting that standardization practices pose barriers to enter into patenting particularly to small and medium-sized enterprises (SMEs). The author presents evidence to the contrary and reaches the conclusion that standardization is beneficial for every stakeholder involved, including SMEs.

Summary

For many years, standardization practices, particularly in the Information and Communication Technology (ICT) industry, have been criticized for allegedly posing barriers to market entry to companies. In October 2012, the UK Intellectual Property Office (UK IPO) issued a report entitled “A Study on Patent Thickets”, in which it suggested that so called “patent thickets” (that is overlapping sets of patent rights), are a barrier to entry into patenting for UK businesses, particularly for small and medium-sized enterprises (SMEs).

According to the author, the assumptions, on which the above report as well as, in general, the arguments criticizing standardization in this context are based, do not stand up to closer scrutiny.

The fact that SMEs patenting levels in the ICT field are relatively low in comparison to larger companies, does not imply that standardization poses barriers to enter into patenting. SMEs may limit or avoid patenting for many reasons that have little or nothing to do with alleged patent thicket barriers, such as significant staffing commitments and financial outlays (including patent filling costs as well as costs for maintaining specialist intellectual property staff). Further, the fact that it can take many years before innovations embedded in a standard start generating a return on investment in either product sales or licensing fees for patents essential to the standard (Standard Essential Patents, SEPs), may be daunting for SMEs.

The further concern expressed in UK IPO’s report that companies in sectors, in which patenting is very intensive, like the ICT industry, will not be able to enter product markets, is rebutted by many examples of companies that successfully introduced products based on technologies developed within Standard Development Organizations (SDOs), even at a later stage. These include Apple and HTC, who both entered the mobile handset market relatively late.

Furthermore, the strong increase of patent thickets in certain industries, including ICT, cannot, for itself, serve as an indicator for barriers to enter into patenting for SMEs. On the contrary, examples of UK SMEs that have successfully entered the patenting market in ICT, including Ubiquisys Ltd, Cvon Innovations Ltd, MMI Research Ltd. and ARM, demonstrate the opposite.

The argument that very large numbers of licensed SEPs lead to high transaction costs, is also rebutted by many examples. For instance, licensing fees for all patents regarding the MPEG standard administered by MPEG-LA are capped at around 20 US cents per end device. Moreover, a Bluetooth patent pool grants licenses royalty free.

In the author's view, standardization through SDOs provides various significant opportunities for SMEs. SMEs can influence the direction of standardization, contribute their innovations to the standardization process and gain financial rewards from participating in standardization both as manufacturers of standards-compliant products and licensors of SEPs.

The European Telecommunications Standards Institute (ETSI), a SDO in the ICT field, counts over 200 SMEs, including micro- enterprises, among its 758 members. According to an ETSI survey focused on SMEs, 34 % of SMEs use ICT standards, while 28 % use and participate in the development of such standards. The survey also revealed that 40 % of SMEs participating in the standards development process have taken a leadership position or formal role (chairman, rapporteur etc.), 30 % are members of three or more standards bodies, 50 % follow three or more such bodies, 30 % have three or more people involved in standards related work, 60 % participate in over six standards meetings per year, 70 % indicated that they wished to drive the standardization process in a particular direction and 51 % indicated a need to give advanced access to the standard. These results reveal a strong interest of SMEs to participate in standardization.

As a conclusion, the author argues that the introduction of standardized technologies has reduced market entry barriers for large companies and SMEs alike. In contrast to propriety platforms, which tend to concentrate associated intellectual property rights (IPR) in the hands a few platform owners, standards-based technologies developed within SDOs are open and have much more widely dispersed IPR ownership.

For this reason, the author encourages SMEs to embrace standardization driven by SDOs, particularly in the ICT industry, where markets, including mobile communications have flourished in the last years.