

FEDERAL TRADE COMMISSION

**Request for Comments and
Announcement of Workshop on
Standard-Setting Issues**

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NOKIA RESPONSE

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Introduction and Background

Nokia's standing

Nokia is the world leader in mobility, driving the transformation and growth of the converging internet and communications industries. For more than a decade Nokia has been the world's largest manufacturer and seller of cellular handsets. Prior to 2007 Nokia was also one of the largest manufacturers of cellular infrastructure equipment.

Every day, more than 1.3 billion people connect to one another with a Nokia device – from mobile phones to advanced smartphones and high-performance mobile computers. Today, Nokia is integrating its devices with innovative services through our dedicated online service store called Ovi (www.ovi.com), including music, maps and navigation, apps, email and more.

Nokia invests significantly in innovation in the standards arena, helping to create open standards that afford interoperability for the benefit of consumers and enabling products from different manufacturers to interoperate seamlessly. Interoperability tends to be taken for granted in the telecommunications field because generally it works extremely well. However its importance should not be underestimated.

In addition to being one of the largest manufacturers of standards-compliant products, Nokia was also one of the early pioneers in cellular technology. Since 1991 Nokia has invested over 46 billion Euros in research and development related to its products and Nokia has contributed a substantial number of its own innovations and technical solutions to industry standards bodies for use by all manufacturers of standards-compliant products.

Nokia expresses the views in this submission in its capacity of being, on the one hand, a leading innovator and owner of the largest telecoms patent portfolio in the world and, on the other hand, a leading implementer of probably hundreds of standards (including many hundreds of essential patents). In this dual capacity Nokia clearly has an interest to strike a careful balance between the perspectives of licensor and licensee. From this point of view, we believe that Nokia's thinking in this area generally reflects the middle ground in this debate.

Patent rules in SSOs and the role of the Regulator

History and experience show that patent policies in standard-setting organisation (SSOs) are broadly functioning well especially in the telecoms arena. For over twenty years the telecoms industry has worked diligently to resolve many of the patent-related policy issues both within and even outside SSOs. Largely this has been successful and has had a positive impact on the market for the benefit of consumer.

Over recent years open standards have helped spur innovation and promote competition. The telecoms sector has seen new players enter the market successfully. Such market entries would not have been possible without the earlier innovative technology contributions of the industry

incumbents and the fact that these early-contributors allowed their patents to be used by third parties on fair, reasonable and non-discriminatory (“(F)RAND”) terms¹.

Admittedly, however, there are occasionally situations where self-regulation and private litigation have not yet been sufficient to address the more controversial issues around patents, standards and competition. There continues therefore to be an important overseeing role for the regulator.

While it is undoubtedly appropriate for the regulator to intervene in abusive patent hold-up situations, this has to be balanced against an overarching need to maintain an environment conducive to (F)RAND licensing - underpinned by a framework of effective legal measures available for patent-holders to seek redress against companies who refuse to take a license on (F)RAND terms but who instead choose to free-ride on patents owned by others.

Broad or unclear patent policies within SSOs can open the way for opportunistic and even overly-aggressive enforcement. This phenomenon is to some extent exacerbated by the fact that patents essential to a standard have increasingly become commonly tradable assets, even among non-practising entities (NPEs) whose business model is premised solely on enforcing patents, including standardised technology. From a policy and regulator’s perspective, the role and impact of NPEs on legitimate enterprise perhaps deserves more careful attention.

Increasingly courts of law around the world and especially in the United States are helping to apply, clarify and develop the relevant competition rules and interpretation of SSO patent policies, including the interpretation of (F)RAND, generally minimising the need for regulatory intervention.

Broadly speaking, Nokia would advocate a light-touch approach to regulation, with the regulator having a predominantly overseeing role, and we would caution against over-regulation in this space.

1. Disclosure of Patent Rights in an SSO

The patent disclosure rules are generally working well in the telecoms arena. The somewhat generic nature of SSO disclosure rules accommodates variations in legitimate ‘internal’ practices in different sectors and different firms, reflecting the “real world” environment.

While Nokia generally supports *timely* disclosure of essential patents, we have serious reservations about disclosing early-stage patent applications, especially pre-publication, when

¹The concept of “reasonable and non-discriminatory” (RAND) terms is known in Europe more usually as “fair, reasonable, and non-discriminatory” (FRAND) terms. The more generic expression (F)RAND is used in this paper to cover both.

the contents would otherwise be confidential under the law, in order not to undermine international patenting programs.

The disclosure of published applications could be misleading as the scope of the patent will normally be amended (narrowed) during prosecution, for example in the light of prior art, and it is only possible both for patent owners and third parties to assess with confidence if claims are essential or potentially essential once the patent has been granted. This might even encourage drafting overly-broad patent applications in the first place to artificially inflate an essential patent portfolio with patents that turn out not be essential at all. Overall, disclosure of pending applications could therefore result in greater uncertainty for third parties.

The non-disclosure of patent applications would generally only become a concern if the patent owner, after the grant of a patent that is essential, is in a position to create “hold-up” by refusing to license or by seeking license terms that are non-(F)RAND. However, this type of abuse of the hold-up power can be effectively prevented – without compromising confidentiality - by **requiring firms involved in developing the standard to make a general *ex ante* FRAND commitment, i.e. in the early stage of standardization.** With such a general commitment the essential patent holder would commit to be bound to (F)RAND in respect of any and all their patents and patent applications they generate that may become essential to the standard.

Policy makers need to be aware that disclosure policies can apply to huge numbers of patents, especially in the telecoms sector. Searching and identifying relevant patents is a non-trivial task requiring significant cost and resources. We would advocate that disclosure rules carefully reflect what is needed from a policy perspective to prevent hold-up without imposing an undue burden on firms, e.g. there should be no requirement to carry out a search.

The general *ex ante* (early phase) (F)RAND commitment proposed above would address situations where the patent holders have difficulties in identifying precisely which of their patents eventually will become essential. General *ex ante* (F)RAND commitments would also have the benefit of taking the focus away from the importance of rigorous disclosure of each and every patent, as third parties can rest assured that all essential patents will be subject to the (F)RAND commitment, whether disclosed or not.

Overall, Nokia believes it would be beneficial if the regulator were to encourage SSOs to require a general *ex ante* FRAND declaration, and subsequently patent-specific disclosures on a ‘good faith’ basis once patent holders have acquired a reasonable level of certainty that their patents are or will become essential, even in the context of royalty-free (RF) standards to avoid subsequent confusion (e.g. in the case of transfer of ownership of relevant patents – see further discussion below). SSOs should also ensure that patent disclosures and licensing declarations are publicly visible to everyone.

In relation to non-disclosure and the question of deceptive conduct, it is difficult to prescribe generic rules and, in our view, it is better for this always to be assessed on a case-by-case basis having regard to the particular circumstances. Usually, if a firm has made a (F)RAND commitment, makes good-faith disclosures of essential patents and adheres to its (F)RAND obligations in its licensing practice, then there should be no case for making an ambush claim.

Generally speaking, the regulator should exercise extreme caution in pursuing an ambush claim unless there is clear and compelling evidence of deceptive conduct and actual harm. It is important for the industry and for individual firms who will inherently be exposed to generating standards-related patents, to know and to be reassured that the authorities would not normally intervene except in cases of clear abuse.

In summary, it would be beneficial for SSOs to require a general *ex ante* (F)RAND declaration, and subsequently patent-specific disclosures on a 'good faith' basis once patent holders have acquired a reasonable level of certainty that their patents are essential.

2. The (F)RAND Licensing Commitment

Especially for complex standards as in telecoms, Nokia believes that (F)RAND is the only workable solution to prevent patent hold up. Broadly speaking, the (F)RAND regime is functioning well – not only for Nokia's benefit as an industry participant but also for the success of cellular standards as a whole.

The courts in the United States and in other countries will continue to play an important role in interpreting (F)RAND in individual cases, and there does not appear to be any compelling or urgent need for regulator intervention except in cases of clear abuse.

Injunctions

It is important to maintain a system where a firm seeking to license its patents on (F)RAND terms can get an injunction against an unwilling firm who is blatantly free-riding on patents owned by third parties, while at the same time recognising that abusive use of injunctions against a willing prospective licensee may necessitate regulatory intervention by authorities unless the court system shows itself capable to deal with the issue effectively from a policy perspective.

Transfer of patent ownership

This is an example of an area where SSO patent policies are not fully effective, not least because some participants may divest their patents possibly circumventing their (F)RAND obligations.

To avoid potential abuse and the opportunity simply to by-pass a (F)RAND commitment made by a predecessor in title, Nokia believes **it would be valuable for the regulator to clarify that the (F)RAND commitment made to an SSO should remain in force and be conveyed with the patent if ownership (or exclusive right to grant licences) of an essential patent/application is transferred**, when the original owner of that patent has made a (F)RAND – including a royalty free (RF) - commitment to an SSO.

Also, there is a growing and, as yet, unresolved debate in the context of SSOs which do not have a disclosure policy/practice, about how to identify that there is a (F)RAND commitment attaching

to relevant essential (but unidentified) patents if their ownership should change. The proposal above for a generic *ex ante* (F)RAND declaration would help resolve this problem.

Divisionals and continuations

In the case of divisional and continuation patents/applications, where a (F)RAND commitment is made on the parent patent/application, the (F)RAND commitment should also apply automatically to the divisional/continuation unless expressly excluded by the patent owner at an early stage of the standardization process.

In summary, (F)RAND is the only workable solution in telecoms to prevent patent hold-up. The (F)RAND commitment should remain in force and be conveyed with the patent if ownership (or exclusive licence) of an essential patent/application is transferred. The (F)RAND commitment should also apply automatically to divisional and continuation applications unless expressly excluded by the patent owner at an early stage in the standardisation process.

3. Ex ante Disclosure and/or Negotiation of Licensing Terms

Ex ante disclosure of (most restrictive) licensing terms is not well suited to the telecoms environment, which is often characterized by complex, dynamic standards having broad technical scope, involving huge numbers of technology contributions and long evolution cycles over many years. It is simply not possible to determine a meaningful value/price long before it is known what kind of products will eventually implement the standard.

Traditionally, *ex ante* disclosure of license terms has focussed on revealing a licensor's own individual most restrictive terms (e.g. maximum royalty rates), so that if there is wide enough participation and all (or most) licensors disclose their rates, it could in theory be possible simply to add up all the individual rates and calculate an expected aggregated rate for the standardised technology in question.

Practical experience of trying to use *ex ante* disclosure of license terms in the telecoms environment shows that when a lot of individual rates are aggregated, the cumulative figure can turn out to be extremely high and appear anything but commercially viable. The problem is exacerbated as the number of licensors grows and more individual rates have to be aggregated.

In short, *ex ante* disclosure of individual licence terms in complex, early-stage telecoms standards can end up being somewhat counter-productive, in that it risks undermining commercial confidence in whole technology platforms that would otherwise be selected.

From the perspective of complex technology standards it would be significantly more useful for licensors to disclose *ex ante* what they regard as the maximum commercially viable **aggregate rate** for a given standard, rather than merely disclosing their own individual rates.

This ‘top-down’ approach has the advantage that it puts into the public domain an array of data points about anticipated maximum aggregate royalty rates from informed actors, thus providing extremely valuable (and reliable) information for those interested in implementing the standard to better understand the likely market-entry costs attributable to patents. The more licensors who participate, the more data points there will be. Such information would be particularly useful for potential new entrants and prospective licensees generally, whose primary concern is the aggregated cost reservation that they would need to make for obtaining essential patent licenses.

Ex ante disclosure of aggregate rates is not about imposing - or trying to impose - any kind of royalty cap, express or implied. It is merely a licensor expressing a unilateral view of what a commercially viable cumulative royalty might be. Actual royalties remain to be negotiated bilaterally in the normal way.

Another potential problem with ex-ante disclosure of individual maximum license terms is that it inherently induces firms to announce inflated royalties so as not to undermine the negotiation position in bilateral negotiations. There is the danger that some firms will argue that their disclosed terms have been “approved” by the SSO members whether or not they are truly (F)RAND compliant. In this sense the *ex ante* process is open to abuse as a sort of rubber-stamping exercise for non-(F)RAND terms. This would have an anticompetitive effect of unjustly increasing the price of patent licences. Furthermore, there is no correction mechanism available where third parties could “oppose” disclosed rates and it may even make it more difficult for a potential licensee to argue later that disclosed rates are not (F)RAND-compliant.

To safeguard against *ex ante* disclosure of most restrictive licensing terms being abused to massage the value of essential patents, Nokia would welcome the regulator taking steps to emphasise and explain the difference from an economics perspective between *ex ante value* and *ex ante disclosure of maximum license terms*, noting that the latter is merely a unilateral aspiration of maximum value, not evidence of actual value. Put simply, disclosing individual license terms *ex ante* does not mean or guarantee that those terms are (F)RAND-compliant.

In summary, *ex ante* disclosure of individual licensing terms is not well suited to the telecoms environment, where it would be more useful for licensors to disclose *ex ante* what they regard as the **maximum commercially viable aggregate rate** for a given standard. In any case, the regulator could usefully do more to emphasise the difference between *ex ante value* and *ex ante disclosure of maximum license terms*, noting that the latter is merely a unilateral aspiration of maximum value, not evidence of actual value.