

Analysis of the IPR policy of ETSI

This analysis is a supplement to *A study of IPR policies and practices of a representative group of Standards Developing Organizations worldwide*, prepared by Rudi Bekkers and Andy Updegrave. See <http://home.tm.tue.nl/rbekkers/nas>

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This analysis has the following parts:

Part A: Adoption and general aspects of the IPR policy

Part B: Formal aspects and principles of the IPR policy

Part C: Patent disclosure

-- general

-- relating to the knowledge of the party about its IPR

-- relating to standard

-- relating to patent identities

-- other

Part D: Licensing commitments

Part E: SDO procedures and public

Part F: Conflicts and enforcement

Part G: Other

This analysis has the format of a structured survey, with numbered questions. Text in **green** indicates our own conclusions and observations. All the SDO's we analyzed were given the opportunity to review this document and comment on it. Text in **orange** are comments, complimentary explanations and corrections received by representatives of the SDO.

Note: this analysis has been performed to the best of our knowledge, using the various public documents concerning the IPR policy of your SDO. See also the disclaimers in the main report.

Note: in this analysis, the work 'policy' generally refers to the whole set of binding rules, not necessarily only to the document which is titled 'policy'. An exception is where we make specific references to documents.

Part A: Adoption and general aspects of IPR policy

A1. What is the most version of or a reference (internet) to the formal, current IP policy of your SDO? What are relevant to additional documents such as guidelines, explanations, forms, and so on?

The most recent documents at the time of this study are:

- ETSI Intellectual Property Rights Policy, defined in Annex 6 of the ETSI Rules of Procedure, dated 30 November 2011. (Here referred to as RoP). This policy was adopted at the 58th meeting of ETSI's General Assembly on 30 November 2011. The policy is part of the document known as the ETSI Directives version 29, dated January 2012. ETSI Rules of Procedure are binding to members.

- Part of this RoP, and in particular of the ETSI Intellectual Property Rights Policy are two forms (and several annexes to them): the "IPR Information Statement and Licensing Declaration" (from now on: ISLD) and the "General IPR licensing Declaration" form" (from now on: GD).

- ETSI Guide on Intellectual Property Rights, dated 20 November 2011. This version was adopted by GA#58 on 30 November 2011 (Here referred to as IPR Guide). *Clarification by ETSI representative: "This guide provides explanatory information on how to handle IPR matters in ETSI*

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and does not replace the ETSI IPR Policy which takes precedence in all cases."

- ETSI Guidelines for Antitrust Compliance, dated 27 January 2011. This version was adopted by Board #81 on 27 January 2011.

- This list of IPRs which have been notified to ETSI as being Essential, or potentially Essential, to ETSI Standards and Technical Specifications is available on-line at <http://ipr.etsi.org>. Additionally, a snapshot of this list is published every 6 months as ETSI Special Report SR000 314. The most recent version is Ver. 2.12.1, published on 21-3-2012.

On its website, ETSI publishes some more FAQ's and informatory documents of its policy.

Unless indicated otherwise, the below is based on the versions of the documents indicated above.

(For all documents, see <http://portal.etsi.org/directives/home.asp>)

A2. What changes to the policy have been made over time, and have there been additional clarifications or additions? What prompted these changes?

In 1994, a very substantial change in policy took place, when the policy from 1993 was withdrawn and a new policy was adopted by the ETSI members. This 1994 policy is still the basis for the current one.

In 2002, an IPR Ad-Hoc group was created and ETSI adopted 30 of its recommendations (which were all on the operation of the IPR policy, not changes in the policy itself). (See IPR Guide, at Background)

A change of formal policy took place in November 2005, when the EC requested ETSI to change the phrasing on the disclosure obligation. Background and change is documented in the ETSI Guide on IPR, at §4.6.

Another change took place in 2008 when ETSI introduced Patent families and made the use of the IPR declaration forms mandatory.

A change of formal policy took place in 2011 (reflected in the most recent policy we studied), several parts were added to the policy for the handling of Software Copyright.

At several points in time, clarifications have been issued for the policy, among others in the IPR guide. One of them, for instance, is the clarification that voluntary ex-ante disclosure of most restrictive licensing terms is allowed.

In the 'change history' part of the directives (page 201ff. in V29) there is short explanatory text for each change to this document.

A3. What are current discussions going on in this SDO concerning the IP policy? What is being discussed, and what prompted these discussions?

Around 2006, an ad-hoc group on IPR was established and had a number of well-attended meetings. In November 2006, the group issued a set of recommendations to the GA. They advised a few (minor) changes to the IPR policy, and a number of clarifications in the IPR Guide.

Currently, there is an ETSI IPR Special Committee that discusses issues related to the policy. Topics that are being discussed include:

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1. To what extent, if any, can the holder of a standard-essential patent (SEP) subject to a F/RAND commitment seek injunctive relief or an exclusion order?
2. Are there any principles that should be established as to the compensation element of F/RAND (such as how to determine what is a reasonable royalty and on what rate base)?
3. Are there any principles that should be established regarding a reasonable approach to reciprocity? (For example, can a SEP holder demand access to the implementer's non-SEPs if the implementer does not agree?)
4. Should ETSI make any further clarifications regarding the obligations of a SEP holder subject to a F/RAND commitment when it transfers that SEP to a new owner?

Part B: Formal aspects and principles of the IPR policy

B1. What is the legal foundation of the IPR policy (statutes, undertaking, contract, etc.)? What is the legal status of those that are involved (e.g. member, participant)?

ETSI is an organization with a membership structure. Members need to accept to comply to the Statutes and the Rules of Procedure and other decision taken by the General Assembly. While there are different membership categories, the obligations relating to IPRs do not differ significantly between them.

Comment by ETSI representative: "Except that Observers are not entitled to attend meetings of the Technical Bodies and are therefore not really concerned by the provisions of the ETSI IPR Policy (§1.2.4 of the ETSI Rules of Procedure)"

B2. What is the nature of SDO membership (companies, individuals)? How does this relate to the rules on disclosure and/or commitments?

ETSI Members are legal persons (§1.2.2, 1.2.3 and 1.2.4 of the ETSI Rules of Procedure). Most often, but not necessarily, they are companies. There are various membership categories, including manufacturers, network operators, and administrations.

Sources and additional details:

One category is called 'user', but the RoP (Annex 1) explain that this is for 'A User is an organization making use of services', thus being a company.

B3. Are the specific rules on firms that are subsidiaries? Do obligations that follow from the IPR policy also apply to parent companies?

All rules for members are also binding for their affiliates, which include entities that are directly or indirectly owned, or entities that are under the same direct or indirect ownership or control.

Sources and additional details:

"AFFILIATE" of a first legal entity means any other legal entity:

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- directly or indirectly owning or controlling the first legal entity, or
□ under the same direct or indirect ownership or control as the first legal entity, or
- directly or indirectly owned or controlled by the first legal entity, for so long as such ownership or control lasts.
Ownership or control shall exist through the direct or indirect:
- ownership of more than 50 % of the nominal value of the issued equity share capital or of more than 50 % of the shares entitling the holders to vote for the election of directors or persons performing similar functions, or
- right by any other means to elect or appoint directors, or persons who collectively can exercise such control. A state, a division of a state or other public entity operating under public law, or any legal entity, linked to the first legal entity solely through a state or any division of a state or other public entity operating under public law, shall be deemed to fall outside the definition of an AFFILIATE. (RoP, §15, Annex 6, Definitions)

At several key places, including the IPR disclosure obligation and the licensing commitment, affiliates are explicitly listed as having the same obligation:

In accordance with Clause 4.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby informs ETSI that it is the Declarant's and/or its AFFILIATES' present belief that the IPR(s) disclosed in the attached IPR Information Statement Annex may be or may become ESSENTIAL in relation to at least the ETSI Work Item(s), STANDARD(S) and/or TECHNICAL SPECIFICATION(S) identified in the attached IPR Information Statement Annex. (RoP, Annex 6, Appendix A).

In accordance with Clause 6.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby irrevocably declares the following [here licensing commitments follow]. (RoP, Annex 6, Appendix A).

Part C: Patent disclosure

Patent disclosure, general

C1. What is the nature of disclosure rules? (E.g. obligation vs. invitation / encouragement)

Disclosure is an obligation, the policy uses the word 'shall'. The exact wording of the disclosure obligation varies slightly between the formal policy and the forms.

Sources and additional details:

[...] each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. (RoP, Annex 6, 4.1).

(See further below for 'timely fashion'.)

This obligation is especially stressed when a member is submitting a technical proposal:

In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER'S IPR which might be ESSENTIAL if that proposal is adopted. (RoP, Annex 6, 4.1).

See further below about 'reasonable endeavour'.

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The “IPR Information Statement and Licensing Declaration” (ISLD) uses a more specific wording, indicating that the obligation is not only about what is actually essential, but also what is believed to may be or may become: §al:

In accordance with Clause 4.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby informs ETSI that it is the Declarant’s and/or its AFFILIATES’ present belief that the IPR(s) disclosed in the attached IPR Information Statement Annex may be or may become ESSENTIAL in relation to at least the ETSI Work Item(s), STANDARD(S) and/or TECHNICAL SPECIFICATION(S) identified in the attached IPR Information Statement Annex.” (RoP, Annex 6, Appendix A).

Clarification by ETSI representative: “This phrase is not only an extension as to what should be declared but is also to be seen as a safeguard as essentiality will finally only be determined by a patent court and not by an owner or potential licensor, therefore this formulation has to be seen under this disclaimer. See also §3.2, 3.2.1 and 3.2.2 of the ETSI Guide on IPRs.”

Members having IPR portfolios should improve their internal IPR co-ordination processes to ensure, as far as possible, that their participants in Technical Bodies are aware of any alleged-essential IPR the company may have (related to the on-going work on a particular ETSI Standard or Technical Specification), that they understand their obligations, and that they know how to discharge them. (IPR Guide, §2.1.1)

C2. Are there any exemptions to the disclosure rules? (For instance, a policy could specify that if a company makes a RF / RAND-z commitment, there is no more requirement for specific patent disclosure).

No such exemptions are specified.

Sources and additional details:

Such a exemption does not exist for FR / RAND-Z, and also not for plain FRAND as explained below:

Use of the General IPR licensing declaration does not take away the obligation for members to declare essential patents to ETSI as stated in 2.1.1. (IPR Guide, §2.1.3)

[The General IPR licensing declaration] is submitted without the IPR information statement annex but, in accordance with Clause 4.1 of the ETSI IPR Policy, members should provide updates in a timely fashion via the IPR information statement and licensing declaration and the IPR information statement annex. (IPR Guide, §2.1.3)

C3. At what point in time are parties required to disclose essential patents? Is it related to when a standardization activity reaches a particular state of advancement, and/or events relating to the specific member (joining the SDO, joining a WG, etc)?

Disclosure should be done in a ‘timely fashion’ (RoP, Annex 6, 4.1). Members are recommended to make IPR disclosures at the earliest possible time following their becoming aware of IPRs which are, or are likely to become, essential. For those members that participate at meetings, it is specified that they should respond at the earliest possible time to the Call for IPRs performed by Technical Body Chairmen at the beginning of each meeting. At various points in time (submission of a proposal, first draft, approval of draft, formal approval) the participants are reminded of their obligation.

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There is a concept of 'intentional delay', which means that it can be demonstrated that a member has deliberately withheld IPR disclosures significantly beyond what would be expected from normal considerations of "Timeliness". Intentional delay should be seen as a breach of policy, for which the GA can take appropriate sanctions.

Sources and additional details:

The formal policy states:

"each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. (RoP, Annex 6, 4.1).

The IPR Guide offers a discussion, which includes the following aspects:

Definitions for "Timeliness" or "Timely" cannot be agreed because such definitions would constitute a "change to the Policy". (IPR Guide, §2)

Members participating in Technical Bodies should respond at the earliest possible time to the Call for IPRs performed by Technical Body Chairmen at the beginning of each meeting, based on the working knowledge of their participants. (IPR Guide, §2.1.1)

"Intentional Delay", where proven, should be treated as a breach of the IPR Policy (Clause 14 of the ETSI IPR Policy) and can be sanctioned by the General Assembly. (IPR Guide, §2)

"Intentional Delay" has arisen when it can be demonstrated that an ETSI Member has deliberately withheld IPR disclosures significantly beyond what would be expected from normal considerations of "Timeliness". (IPR Guide, §2. Note that the formal policy does not use the word 'Timeliness' but uses the term 'timely fashion').

Although the formal policy does not further define points in time, the IPR Guide explains that members and participants are to be reminded about their disclosure obligations at specific points in time, namely:

- on formal submission of a technical solution;
- on completion of the first stable draft of the standard;
- on working group approval of a draft standard;
- on TB approval of a draft standard. (IPR Guide, §2.3.3)

C4. How is dealt with disclosure of patents owned by other (third) parties (non-members / non-participants)?

The disclosure obligation is both for patents owned by the member itself as well as those owned by third parties. The latter type of disclosures, however, do not appear in the IPR database and are not made public otherwise, but result in the Director General approaching the suspected patent holder and requests it to make a licensing declaration. Such third party disclosures are not made public.

An ETSI representative further explained that one of the reasons not to make third party IPR disclosures public that '*companies might wish to bring to the attention of ETSI potentially essential IPRs of third parties on a confidential basis.*'

Sources and additional details:

The principle disclosure obligation, as phrased in the ETSI IPR Policy, does not specify that the obligation would be limited to the IPR owned by the member itself:

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"each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. (RoP, Annex 6, 4.1).

The IPR Guide is more explicit on this, where it phrases the text an Chairman can cite when doing a call for patents:

The attention of the members of this Technical Body is drawn to the fact that ETSI Members shall use reasonable endeavours under Clause 4.1 of the ETSI IPR Policy, Annex 6 of the Rules of Procedure, to inform ETSI of Essential IPRs in a timely fashion. This section covers the obligation to notify its own IPRs but also other companies' IPRs. (IPR Guide, §2.3.3)

Also Table §1.4 in the IPR Guide on Members' obligations: includes a members obligation to "to inform ETSI about their own, and other people's Essential IPRs (Clause 4.1). "

Furthermore, the ISLD very explicitly has a box to tick to indicate IPR is held by a third party:

The Declarant and/or its AFFILIATES (**check one box only**):

are the proprietor of the IPR(s) disclosed in the attached *IPR Information Statement Annex*.

are not the proprietor of the IPR(s) disclosed in the attached *IPR Information Statement Annex*. (RoP, Annex 6, Appendix A)

Finally, this is also reflected by an option in the associated IPR Licensing Declaration Annex where the declarant can indicate that the reason for not licensing is that the IPR is owned by a third party.

The Declarant and/or its AFFILIATES are unable to grant irrevocable licences [...] because

the Declarant and/or its AFFILIATES are not the proprietor of the IPR(s) disclosed in the attached *IPR Information Statement Annex* (RoP, Annex 6, Appendix A)

Patent disclosure, relating to the knowledge of the party about its IPR

All the following items are about the knowledge the claimant has about its patents, or should have about its patents.

C5. Are the disclosure rules limited to patents (1) covering its own contributions, (2) standards developed in the working group the party is participating in, (3) any standard developed in the SDO?

In principle, the disclosure is about essential patents on any standards developed in ETSI. In certain defined situations it is added that the obligation is subject to 'reasonable endeavours' and disclosure shall be made in a timely fashion. In short:

1. When a member is contributing proposals, the firm as well as its representatives in meetings should be aware of its own patents essential to its own proposal and shall disclose them on a 'bona fide basis' and in a timely fashion.
2. When a member is participating in the development of a specific standard, the firm as well as its representatives in meetings shall use it reasonable endeavours to inform ETSI of ESSENTIAL IPRs in a timely fashion .
3. When a member is not participating, it still has to disclose patents it is aware of, but there

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might be situations it is not aware since patent searches are not required.

See also the questions below.

An ETSI representative clarified that also for situation '1' above, the disclosure obligation at '2' remains applicable.

An ETSI representative further clarified what 'any standards developed in ETSI means: "STANDARDS" or "TECHNICAL SPECIFICATIONS" as defined in article 15 of the ETSI IPR POLICY and further defined in the ETSI Technical Working Procedures:

ETSI Standard, ES: An ETSI deliverable, containing normative provisions, approved for publication by application of the Membership Approval Procedure.

European Standard, EN: An ETSI deliverable containing normative provisions, approved for publication in a process involving the National Standards Organizations and/or ETSI National Delegations with implications concerning Standstill and National transposition.

ETSI Technical Specification, TS: An ETSI deliverable, containing normative provisions, approved for publication by a Technical Body.'

An ETSI representative further commented on 'situation 3' that "My understanding is that this situation would not be problematic as it would be unlikely that the Member has essential patents." We feel less confident about the latter view, though. ETSI has a lot of standardization activities and even when a member is not participating in the development of a specific standard, it is well conceivable that it owns essential IPR. (For instance, a company that participated in the GSM project but not in the TETRA project could still own essential IPR for TETRA....)

C6. Does the policy refer to patents that 'are' essential, 'believed' to be essential, 'may' be essential, etc?)

The primary clause for the disclosure obligation does not use any wording like 'believe' or 'may'. However, the forms in which firms actually make their licensing declarations states that the declarant 'believes that its patents may be or may become essential'.

An older version of the policy stipulated disclosure of patents which the member was 'aware of', but this phrase was removed after the European Commission argued that this was a weakness in the policy and could lead to patent ambush, and that being aware is already a part of the 'reasonable endeavours' they have to make.

Sources and additional details:

The primary clause for the disclosure obligation does not use any wording like 'believe' or 'may':

[...] each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. (RoP, Annex 6, 4.1).

However, a later clause in the IPR Guide, the word 'believe' is used in a (less important) clause about updating the information in the database:

Members are obliged to declare IPRs which they believe to be essential. (IPR Guide, §3.2.2)

Prior to the 46th ETSI General Assembly, Clause 4.1 of the ETSI IPR Policy read:

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Each MEMBER shall use its reasonable endeavours to timely inform ETSI of ESSENTIAL IPRs it becomes aware of. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted. (this prior clause is given in the current IPR Guide, §4.6.1 at History of Changes)

The European Commission, who successfully argued that the 'aware of' phrase should be removed, argued:

'the rationale behind the proposed deletion of "becomes aware of" is that we would expect a Member in a standard-setting process to have a general awareness of the scope of its IPR rights in that area, and therefore where necessary, "use its reasonable endeavours" to identify these IPR.' (IPR Guide, §4.6.2.1)

The (current) "IPR Information Statement and Licensing Declaration" (ISLD) uses a more specific wording, indicating that the obligation is not only about what is actually essential, but also what is believed to 'may be' or 'may become' essential:

Clarification by ETSI representative: "This phrase is not only an extension as to what should be declared but is also to be seen as a safeguard as essentiality will finally only be determined by a patent court and not by an owner or potential licensor, therefore this formulation has to be seen under this disclaimer. See also §3.2, 3.2.1 and 3.2.2 of the ETSI Guide on IPRs."

In accordance with Clause 4.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby informs ETSI that it is the Declarant's and/or its AFFILIATES' present belief that the IPR(s) disclosed in the attached IPR Information Statement Annex may be or may become ESSENTIAL in relation to at least the ETSI Work Item(s), STANDARD(S) and/or TECHNICAL SPECIFICATION(S) identified in the attached IPR Information Statement Annex." (RoP, Annex 6, Appendix A).

The IPR Guide also uses the words 'alleged-essential'.

Members having IPR portfolios should improve their internal IPR co-ordination processes to ensure, as far as possible, that their participants in Technical Bodies are aware of any alleged-essential IPR the company may have (related to the on-going work on a particular ETSI Standard or Technical Specification), that they understand their obligations, and that they know how to discharge them. (IPR Guide, §2.1.1)

C7. What knowledge is assumed to be known to the party and/or its representatives in meetings?

In terms of its disclosure obligation, a member is required to use its 'reasonable endeavours'. This is even more true for those members submitting proposals, who must provide information on a 'bona fide basis'.

It is noted that in case a member is not submitting a technical proposal, or perhaps not even participating in the development of a specific standard, 'reasonable endeavour' might not necessarily result in disclosure, because patent searches are not obligatory (see below).

Sources and additional details:

[...] each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. (RoP, Annex 6, 4.1).

This obligation is especially stressed when a member is submitting a technical proposal:

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In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted. (RoP, Annex 6, 4.1).

This suggest that of one submits a technical proposal, that disclosing one's own IPR is certainly a 'reasonable endeavour'.

For this topic, we also refer to a discussion between the EC and ETSI, which is reprinted in the IPR Guide at §4.6.

The members take note that they are hereby invited:

- . to investigate in their company whether their company does own IPRs which are, or are likely to become Essential in respect of the work of the Technical Body, (ETSI Guide on IPRs, 2.3.3)

C8. Are patent searches required, encourage, or not required?

The policy explicitly states that patent searches are not obligatory.

In (very) specific cases, ETSI may conduct a patent search itself:

Sources and additional details:

The obligations pursuant to Clause 4.1 above do however not imply any obligation on MEMBERS to conduct IPR searches. (RoP, Annex 6, §4.2)

Patent searches are not required. See also above, where a 'reasonable endaeuvres' is referred to.

The same principle is repeated several times in the reprinted discussion between ETSI and the EC in IPR Guide (at §4.6).

At the request of the European Commission and/or EFTA, initially for a specific STANDARD or TECHNICAL SPECIFICATION or a class of STANDARDS/TECHNICAL SPECIFICATIONS, ETSI shall arrange to have carried out in a competent and timely manner an investigation including an IPR search, with the objective of ascertaining whether IPRs exist or are likely to exist which may be or may become ESSENTIAL to a proposed STANDARD or TECHNICAL SPECIFICATIONS and the possible terms and conditions of licences for such IPRs. This shall be subject to the European Commission and/or EFTA meeting all reasonable expenses of such an investigation, in accordance with detailed arrangements to be worked out with the European Commission and/or EFTA prior to the investigation being undertaken. (RoP, Annex 6, 6.4)

Patent disclosure, relating to standard

C9. How exactly is 'essentiality' defined and/or to be interpreted? Is it 'purely' technical essentiality or are there elements of commercial essentiality?

It is defined as technical essential, and 'commercial essentiality' is explicitly excluded from the definition.

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Also, for rare cases, the policy specifies that if there are multiple implementations possible, and if all these implementations are also covered by patents, that all these patents are to be considered essential.

Sources and additional details:

"ESSENTIAL" as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL. (RoP, Annex 6, §15).

C10. Do disclosures have to specify for which standard(s) the patents are believed to be essential? How specific is this information required to be? (e.g. WG/SC/TC, specific standard, version of the specific standard / year).

This remains a bit ambiguous, both in terms of the wording of the policy and the forms, as well in terms of the actual disclosures published.

Sources and additional details:

In the ISDL, there is a header called 'STANDARD, TECHNICAL SPECIFICATION or ETSI Work Item' where the submitter is asked to fill the following categories:

- Project or Standard name
- Work Item or Standard No.
- Illustrative Specific part of the standard (e.g. Section)
- Version (V.X.X.X)

It is not so clear, however, whether all categories are required to fill in, and observing the existing published disclosures some (large) firms have systematically only provided the project name, not any other more specific information.

(In the GL, the submitter can choose to provide either a project name, or the more specific standards or technical specification. See Question C13, however, about a discussion whether the GL is to be considered a disclosure or not)

In accordance with Clause 4.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby informs ETSI that (check one box only):

with reference to ETSI STANDARD(S) or TECHNICAL SPECIFICATION(S) No.:

with reference to ETSI Project(s): _____

with reference to all ETSI STANDARDS AND TECHNICAL SPECIFICATIONS

C11. How should the submitter deal with mandatory vs. optional portions of the standard, or with informative portions / informative references in the standard, etc.?

The disclosure obligations also hold for options described in standards (/technical specifications, as defined by ETSI) and also holds for drafts of such documents.

An ETSI representative furthermore clarified that the formal ETSI definition of STANDARDS is such that it only includes normative provisions, so there are no informative (= non normative) provisions in these documents.

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Sources and additional details:

"STANDARD" shall mean any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs and including drafts of any of the foregoing, and documents made under the previous nomenclature, including ETSSs, I-ETSSs, parts of NETs and TBRs, the technical specifications of which are available to all MEMBERS, but not including any standards, or parts thereof, not made by ETSI. The date on which a STANDARD is considered to be adopted by ETSI for the purposes of this POLICY shall be the date on which the technical content of that STANDARD was available to all MEMBERS. (RoP, Annex 6, §15)

On the basis of the above, it can be understood that once the draft has been made available to all members, the disclosure obligations comes into force.

The ETSI definition of STANDARD is such that

An ETSI representative furthermore clarified that the formal ETSI definition of STANDARDS is such that it only includes normative provisions, so there are no informative provisions in these documents.

C12. How should the submitter deal with elements of the standards that only affect certain product categories (terminal vs. base stations, or encoders vs. decoders)?

The policy does not require such distinction to be made. The obligation is to disclose any IPR, regardless of whether or not it may be essential to some specific product categories only.

Patent disclosure, relating to patent identities

C13. Are blanket disclosures (general declarations) allowed and, if relevant, under what circumstances?

ETSI does not allow blanket disclosures. The disclosure must include information on the specific IPRs believed to be essential. Recently, a General Declaration form has been introduced and members are now recommended to make early general IPR undertakings/commitments for specific standardization areas. However, these General Declarations are not disclosures as such and are required to be followed up by specific (non-blanket) disclosures.

This combination of GL (but not a blanket disclosure) plus a ISLD (a specific disclosure) seems to combine the best of two worlds: an early insurance is sought that standards will not have problems with the unavailability of FRAND licenses, while information on specific patents is added once known by the owner.

Although blankets are not allowed, the actual disclosures published by ETSI do include a number of actual blanket disclosures, which seems to suggest that although not allowed, blankets are tolerated after all.

An ETSI representative clarified that *"the [GL and ISDL] forms became mandatory in 2008 and became part of the ETSI IPR POLICY in 2008 (IPR Policy dated 26 November 2008). In the past, ETSI had "IPR information statement and licensing declaration" in Annex G of the Technical Working Procedures and Annex B of the ETSI Guide on IPRs."*

Sources and additional details:

The *IPR information statement and licensing declaration shall* be submitted with the IPR information statement annex and, where applicable, together with the IPR licensing declaration annex to identify the specific IPRs which

are applicable. (IPR Guide, §2.1.3)

Use of the General IPR licensing declaration does not take away the obligation for members to declare essential patents to ETSI as stated in 2.1.1.1. (IPR Guide, §2.1.3)

From this, it must be understood that the obligation relates to individual patents that can be identified as such (preferably with the appropriate publication of the granted patent or its application, information, however at least with *some* identifiable information such as patent title, the legislation, the serial application number, etc.

Our understanding is that the GL is not to be seen as a disclosure of IPR. The literal text of this form does not constitute a disclosure. There is no phrase in which the declarant declares it owns or believes to own patents that may be or may become essential. Also a party not owning any essential IPR may submit this a form, perhaps anticipating that it might own such IPR in the future, or simply indicating that should it ever have such IPRs, that it is willing to commit FRAND licenses. What is remarkable, though, is that the relevant part of the form refers to Section 4.1 of the ETSI Policy - which is about disclosure, not licensing commitments.

In a clarification by ETSI representative, it is argued that the GL is a disclosure, and a reference was given by the following text on a ETSI web page: *"You may wish to use the 'General IPR licensing declaration' form in all cases where you do not have all the detailed knowledge of your IPR yet (e.g. the granting procedure of your patent is still on-going and you don't even have an application number), but you want, nonetheless, to tell ETSI about your preparedness to grant licenses under any of your IPR(s) that is/are or may become essential in respect of an ETSI STANDARD/TECHNICAL SPECIFICATION or to any ETSI STANDARDS/TECHNICAL SPECIFICATIONS of an ETSI PROJECT or to all ETSI STANDARDS/TECHNICAL SPECIFICATIONS."*

http://www.etsi.org/website/aboutetsi/iprsinetsi/Guidelines_IPR_Declarations.aspx
(this text does not appear in any official ETSI documents).

However, this text seems to indicate a *possible* use of this form (see phrases as "you may wish"). We feel that this webpage text is not sufficient to assume that a GL is a disclosure, as long as nothing in the policy or the statement itself makes this clear.

We believe that *usually* the issue of a GL will indicate the ownership of essential IPR, it is not necessarily the case.

Also, there is a quite interesting text that is unfortunately 'hidden' in a clause that is about requirements of updating:

A minimum of information should be provided, which allows verifying the essentiality or the potential essentiality of an IPR. (IPR Guide, §2.1.4)

About the blankets in the database: this is evident from the text that the submitters give in the 'notes' field (this is at least the case for the ETSI online database as it was on 2 March 2011 when I downloaded and analyzed it in detail). As an illustration, we insert two examples of the text at such disclosures:

– Lucent Technologies Inc. affirms, in accordance with long-established practice, that it will offer patent licenses for submissions made by it which are adopted or recommended as a standard by ETSI, as follows: If part(s) of a submission by Lucent is (are) included in a standard and Lucent has patents and/or pending application(s) that are essential to implementation of such included part(s) in said standard, Lucent is prepared to grant – on the basis of reciprocity (grantback) – a license on such included part(s) on reasonable, non-discriminatory terms and conditions.

– Nortel has declared that it is the owner of IPRs which might be considered essential to the W-CDMA systems standards. Nortel is prepared to grant irrevocable licenses under the IPRs, on terms and conditions which are in accordance with clause 6.1 of the ETSI IPR Policy.

In total, we identified 93 records in the online database of 2 March 2011 that I consider to be

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blankets.

C14. Do disclosure rules only apply to granted patents, or also to (published / unpublished) patent applications? Do other types of IP (copyright etc.) need to be disclosed?

Disclosure rules also apply to patent applications.

Disclosure rules also apply to copyright (obviously as far as that copyright is to be considered essential to the standard) (see also at question G2 below on the new copyright commitment regime).

An ETSI representative clarified that "IPRs reflected in the ETSI IPR Database are patents only, as usually copyright licences are granted for free."

Sources and additional details:

The above follows from the definition of an IPR in the formal policy itself:

"IPR" shall mean any intellectual property right conferred by statute law including applications therefor other than trademarks." (RoP, Annex 6, §15)

A more detailed statement is given in the IPR guide

In the ETSI IPR Policy: **an IPR includes:** • COPYRIGHT • PATENT, UTILITY MODEL, REGISTERED DESIGN,... and applications thereof. **an IPR does not include:** TRADEMARKS, TRADE SECRETS, CONFIDENTIAL INFORMATION, RIGHTS RELATING TO GET-UP (packaging)

Assumingly, applications only refer to patents, utility models, and registered designs, because no thing such as an application for a copyright exists.

While it is perfectly understandable that a disclosure obligation wants to include applications, it is somewhat curious that the term IPR is defined as including applications. Although in a normal legal sense an application of a patent is not considered to be a right, this definition does seem to make sense in the context of disclosing. At the same time, it is curious that trademarks are outside the definition of IPR, while any regular formal definition of intellectual property rights would include them. I assume this unusual definition should be seen in the context of the objective of the policy.

C15. Are there requirements for disclosing equivalent patents in different patent legislations? (i.e. patent family members)

A member only needs to disclose one member of a family. A patent family is defined as: 'all the documents having at least one priority in common, including the priority document(s) themselves'.

Sources and additional details:

"The obligations [...] are deemed to be fulfilled in respect of all existing and future members of a PATENT FAMILY if ETSI has been informed of a member of this PATENT FAMILY in a timely fashion. Information on other members of this PATENT FAMILY, if any, may be voluntarily provided." (RoP, Annex 6, §4.3)

all the documents having at least one priority in common, including the priority document(s) themselves' ." (RoP, Annex 6, §15)

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Patent disclosure, other

C16. Does the SDO make available specific (paper or electronic) patent disclosure forms? If so, is the use of these forms mandatory?

Members shall disclose their IPR using the mandatory ISLD form.

Non-members that are requested to issue a licensing declaration do not seem to be bound to this form. (See RoP, Annex 6, 6bis.) An ETSI representative commented that “However, they are encouraged to use the forms to be in line with the requirements of the ETSI IPR POLICY.”

Judging on the form of published (older) disclosures, the disclosure form underwent several changes over time.

C17. Are there provisions concerning updating of disclosures in case of changes in the (proposed / final) standard or the (applied / granted / rejected / expired) patent, or updated information concerning the patent identities?

Parties are not obliged to update this specific disclosures, although they are encouraged to do so.

[Regardless of the discussion whether a GL is a disclosure or not], parties are obliged to a GL to an ISDL once they have relevant information about the (identity of the) IPRs they own.

Sources and additional details:

There is one provision about updating the information about a specific IPR:

Members are not obliged to inform ETSI of any updates to their essential IPRs. Nevertheless, Members are encouraged to update and complete their information statements in line with the forms (see Annex 6 of the ETSI Rules of Procedure). A minimum of information should be provided, which allows verifying the essentiality or the potential essentiality of an IPR. (IPR Guide § 2.1.4)

And there is another provision about updates to a GL, which means the submitter shall declare the individual IPRs in an ISLD:

[The General *IPR licensing declaration*] is submitted without the *IPR information statement annex* but, in accordance with Clause 4.1 of the ETSI IPR Policy, members should provide updates in a timely fashion via the *IPR information statement and licensing declaration* and the *IPR information statement annex*. (IPR Guide, §2;.1.3)

An ETSI representative added that “Any changes to the status of a declaration will automatically be visible in the ETSI IPR database”.

In response to question D10, however, an ETSI representative noted that: “My understanding is that [when a patent is no longer essential to the final standard], the patent holder should act in good faith and inform ETSI that the IPR should be reflected as being non essential”

Interestingly, this statement does suggest that ‘good faith’ obligations may be interpreted such as parties having an update obligation.

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C18. Are there requirements to withdraw disclosures when patents 'lose' their essentiality (e.g. due to the surfacing of a new, alternative implementation that can also fulfill the required element of the standard in question)

The policy does not have any such provisions. An ETSI representative clarified that *"If a company informs the ETSI Secretariat that one of its patents is no longer essential, we will be able to reflect it in the ETSI IPR database. The declaration will remain visible but with the history of changes."*

C19. In addition to the formal, written disclosure statements, what information on potentially essential patents do participants need to provide during standardization meetings? Is it different for own proposals vs. proposals by others? Is this information (oral statements?) recorded, and to whom is it available?

Each meeting of a Technical Body includes a call for patents, and any (oral or written?) patent disclosure statements made during these meetings are to be recorded by the chairman, and must be immediately communicated to the ETSI Legal Advisor. What has to be disclosed is the same as for the overall policy as set out in §4.1 of the ETSI IPR POLICY (see above).

An ETSI representative clarified that also these disclosures are to be done via the obligatory ISDL statements.

ETSI policy stipulates that information disclosed at Technical Bodies is public (RoP, Annex 6, §10) and also a clause in RoP, Annex 6, §7.2 seems to oblige such publication.

2.3.4 Record and report information on IPRs: Technical Body Chairmen must be particularly careful to record in the report of each meeting that a reminder was issued and include details of any responses that were made. If there were no responses, then this fact should also be recorded.

Whenever a Chairman becomes aware of the existence of an Essential or potentially Essential IPR he must immediately inform the Legal Advisor of the ETSI Secretariat. (ETSI Guide on IPRs, §2.3.1)

C20. Are all patent disclosures being made public? Where and in what form? Is there any information in the disclosures that is not made public?

ETSI publishes the received disclosures (ISDL's and also the earlier disclosure statements, before they were called that way) as well as GL's immediately in its online database on the ETSI portal. Additionally, a snapshot of this list is published every 6 months as ETSI Special Report SR000 314.

An ETSI representative explained that all disclosures are to be made via the obligatory for and also that indeed all disclosures become public (via the IPR database) with two exceptions:

- Third party disclosures are not made public. One of the reasons for this is that *'companies might wish to bring to the attention of ETSI potentially essential IPRs of third parties on a confidential basis.'*

- Disclosed essential copyrights are not made public: *"IPRs reflected in the ETSI IPR Database are patents only, as usually copyright licences are granted for free."*

Recently, the DARE project resulted in an overhaul of the ETSI disclosure database, and with

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cooperation of the EPO the identity of disclosed patents was matched with that of the EPO database on worldwide patents. This way, patents are much better identifiable and also patent family members can be checked.

One element of the overhaul of the ETSI online database is that since March 2011, also the original (facsimile) declarations can be consulted by the public.

Sources and additional details:

Any published STANDARD or TECHNICAL SPECIFICATION shall include information pertaining to ESSENTIAL IPRs which are brought to the attention of ETSI prior to such publication. (RoP, Annex 6, §7.1)

In practice, STANDARDS and TECHNICAL SPECIFICATIONS have a section in their text that refers to the ETSI IPR list (SR 314) (and perhaps later versions to the online ETSI IPR data base).

ETSI shall establish appropriate procedures to allow access to information at any time with respect to ESSENTIAL IPRs which have been brought to the attention of ETSI. (RoP, Annex 6, §7.2)

C21. How does the SDO deal with situations in which a party claims that a disclosed patent is not in fact essential or not any longer essential? Have such situations occurred?

The ETSI Guide on IPRs does include a provision that the General Assembly may decide to remove a disclosure or, or that additional information (not from the patent owner) is attached to the disclosure.

We were informed that there was a case occurred at ETSI where some parties claimed a certain patent to be not essential, and where the EC requested ETSI to remove the disclosure from the database. Perhaps the above-mentioned provision included in response to that event.

Sources and additional details:

[...] existing data in the ETSI IPR Database should only be updated based on information received from IPR holders or as the result of a General Assembly decision, in particular with respect to the following cases:

- Addition of information concerning studies performed on the essentiality of an IPR: Members are obliged to disclose IPRs, which might be essential and ETSI is obliged to make these disclosures available to Members. This disclosure reflects, of course, only an opinion of the Member and some facts on the IPRs, but the Member is responsible for the content. Any further opinion should be added only with the agreement of the Member or to implement a General Assembly decision.

[...]

- Removal of IPR disclosures in exceptional circumstances: Removals not requested by the IPR holder shall only be performed following a decision taken by the General Assembly. Any such removal shall be tracked in the IPR on-line database. (ETSI Guide, §3.2.2)

Part D: Licensing commitments

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D1. What best characterizes the commitment model? For instance, (1) Parties are committed to license by default and do not have to make a commitment statement (or make a general statement when joining the SDO); (2) Parties are *required* to issue a commitment statement (even if it's a statement of refusal to license) or (3) Parties are *invited* to issue a commitment statement.

Members are *required* to issue a commitment statement (even if it's a statement of refusal to license).

Third parties, of which IPR ownership has been brought to the attention of ETSI, are requested (but not obliged) to give an irrevocable undertaking to grant licenses under FRAND Terms and conditions with regard to their essential IPRs.

D2. If licensing statements are used, when must they be made? For instance: (1) Upon joining the SDO, (2) when a patent disclosure is made, (3) when a draft standard reaches a particular state of advancement, (4) when requested by the SDO.

In principle, members are required to issue (ISLD) licensing commitments when disclosing their patents. They are *encouraged* to issue GD licensing commitments already at an earlier stage.

In addition, the General Director will immediately request an owner of an IPR (member or not) for a licensing commitment when its (assumed) essentiality has been brought to the attention of ETSI.

Sources and additional details:

When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions [...] (RoP, Annex 6, §6.1)

Members are encouraged to make general IPR undertakings/licensing declarations that they will make licenses available for all their IPRs under FRAND terms and conditions related to a specific standardization area and then, as soon as feasible, provide (or refine) detailed disclosures. (ETSI Guide, §2.1.1)

D3. Are there differences between licensing commitment policies between working groups or standardization activities? To what degree do the commitment requirements depend on whether a member/participant is actually participating in a working group (or standardization activity) or not?

ETSI has a harmonized policy that is applicable to all groups and activities.

As indicated above, the disclosure obligation is stricter for a member that is actively participating and that submits a technical proposal (in that case, it must be understood that disclosing its own IPR is indeed part of 'reasonable endeavor'). See also question C1, C3, and question C7 in particular.

There are no differences in *licensing* obligations, though.

D4. Does the SDO make available specific (paper or electronic) licensing commitment forms? If so, is the use of these forms mandatory?

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Members should make commitments using the mandatory forms (GD or ISLD).

Non-members that are requested to issue a licensing declaration do not seem to be bound to this form, but are asked whether they are willing to grant licenses *in accordance to §6.1*, so it seeks that non-member use the same wording. An ETSI representative clarified that “However, they are encouraged to use the forms to be in line with the requirements of the ETSI IPR POLICY..”

Judging on the form of published (older) disclosures, the disclosure form underwent several changes over time. In the other forms, the actual text of the commitment was part of an open field called ‘notes’, and although most parties did refer to §6.1 of the ETSI policy in this text, it also allowed them to divert from it, use other wording, or add restrictions, limitations, or conditions. Nowadays, it is not possible to deviate from the forms now that they are mandatory.

Sources and additional details:

MEMBERS shall use one of the ETSI IPR Licensing Declaration forms at the Appendix to this ETSI IPR Policy to make their IPR licensing declarations. (RoP, Annex 6, 6bis.).

Obviously, the binding part (see the word ‘shall’) can only apply to members, as the policy is not binding to non-members.

If the IPR owner is a third party [...] [the Director-General of ETSI will] request ultimately that licences be granted according to Clause 6.1 above. (RoP, Annex 6, §8.1.2)

D5. Are issued licensing commitments binding to other members of the SDO only, or to any implementer of the standard requesting a license?

The commitment is binding to any party wishing to implement the standard, member or not.

Sources and additional details:

This can be indirectly understood from Section 3.1 of the ETSI IPR Policy where the objectives are being stated and where there is a reference to

ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable.

D6. Is there a specific or ‘minimal’ commitment type required or requested by the SDO? (e.g. FRAND, FRAND-z, RF, non-assertion) If so, does this specific or ‘minimal’ commitment type depend on the working group or standardization activity?

The minimal commitment that is sought is Fair, Reasonable and Non-Discriminatory. (Sought, however, means that an IPR owner is always free to refuse to grant a FRAND commitment under its essential IPRs). It is the same for any ETSI activity. The policy does not specifically recommend FRAND-z or RF.

In fact, ETSI does not even offer the possibility to indicate a party is willing to license FRAND-z or RF, it just offers the possibility to indicate FRAND. If a party after all is willing to give an RF license, it is of course free to do so, but this is not something than can be indicated in the

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licensing commitment at ETSI.

D7. Is there any 'opt-out' option for patent holders (indicating it is not willing to license certain patents), or any 'opt-down' option (e.g. from RAND-z to RAND)? How does it work and when does it need to be exercised? What are the consequences of such a choice?

Patent owners, also members, are in principle free to refuse to license any of their IPR at FRAND conditions. The owner should realize, however, that ETSI might alter the (draft) standard so its IPR is not essential anymore, or even halt the work on the standard altogether.

Once given, a commitment is irrevocable.

An ETSI representative clarified that: "The Patent Holder should be advised to identify in the IPR Information Statement Annex, only patents for which he is willing to grant FRAND licences."

D8. Does the policy require, allow or forbid parties to include specific licensing terms as part of their commitment (such as conditions of bilateral or universal reciprocity, scope of use, etc.)? Does the policy (or the forms) explicitly specify such options, or does it simply tolerate it in practice?

The policy explicitly allows commitments to be made subject to the condition that those who seek licenses agree to reciprocate. (RoP, Annex 6, 6.1) The exact interpretation of 'reciprocity' is not defined or indicated.

No other conditions or terms are mentioned in the ETSI policy or forms, and likely should be considered as incompatible.

An ETSI representative clarified that: "Specific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI (§4.1 ETSI Guide on IPRs)"

An ETSI representative furthermore clarified that: "The forms are mandatory and the forms only will be reflected in the ETSI IPR database."

Sources and additional details:

Both the ISDL and the GD (both made mandatory in 2008) provide the option to select a condition of reciprocity, both using the same wording.

In the ETSI IPR database, for older declarations, some parties have included the condition of reciprocity in the 'notes' field of their declaration. An ETSI representative furthermore clarified that: "The reciprocity clause is in the ETSI IPR policy at least since Version 5 of the directives, March 1993."

D9. Does a commitment (1) cover any patents that are essential to the developed standards, (2) only cover those patents that are actually disclosed, or (3) only cover patents relating to the own contributions of the patent holder?

For ISDL, the commitment only covers those patents that are actually disclosed in the annex of the form (and its family members, see question D11 below):

To the extent that the IPR(s) disclosed in the attached IPR Information Statement Annex are or become, and remain ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION identified in the

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attached IPR Information Statement Annex, the Declarant and/or its AFFILIATES are prepared to grant irrevocable licences under this/these IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy. (RoP, Annex 6, Appendix A).

“An undertaking pursuant to Clause 6.1 with regard to a specified member of a PATENT FAMILY shall apply to all existing and future ESSENTIAL IPRs of that PATENT FAMILY unless there is an explicit written exclusion of specified IPRs at the time the undertaking is made. The extent of any such exclusion shall be limited to those explicitly specified IPRs.” (RoP, Annex 6, §6.2)

For the “GD”, all essential IPRs for an indicated STANDARD or TECHNICAL SPECIFICATION, for an indicated ETSI PROJECT, or for any ETSI STANDARD or TECHNICAL SPECIFICATION. On this form, there is an option to restrict the commitment only to the “IPR(s) contained within technical contributions made by the Declarant and/or its AFFILIATES, or”

As a result, if a company ONLY submits a GD, and does use the latter option, its essential IPRs that are not part of its own contribution are NOT covered by the commitment.

D10. Is a patent holder still bound to a licensing commitment should an earlier disclosed patent eventually turn out not to be essential? (e.g. differences in adopted standard, differences in granted patent)

The commitment is only made for patents that are actually essential. If they never became essential, or if they lost their essentiality, the party is not bound any more to the commitment.

An ETSI representative clarified that: “My understanding is that in that case, the patent holder should act in good faith and inform ETSI that the IPR should be reflected as being non essential”

The above clarification does have some implications on whether or not a patent holder that issued a disclosure has an obligation to update that disclosure (see question C17).

Sources and additional details:

To the extent that the IPR(s) disclosed in the attached IPR Information Statement Annex are or become, and remain ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION identified in the attached IPR Information Statement Annex, the Declarant and/or its AFFILIATES are prepared to grant irrevocable licences under this/these IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy. (RoP, Annex 6, Appendix A).

D11. What is the geographic scope of the commitments? Relatedly, do commitments relate only to the disclosed patents, or also to all equivalent patents in other jurisdictions (i.e. patent family members)?

In principle, the geographical scope is worldwide. The commitment is by default for all patent family members, worldwide, of the disclosed patent, unless a specific patent family member has been explicitly excluded in the commitment.

This specific clause has been introduced in November 2008.

Sources and additional details:

“An undertaking pursuant to Clause 6.1 with regard to a specified member of a PATENT FAMILY shall apply to all existing and future ESSENTIAL IPRs of that PATENT FAMILY unless there is an explicit written exclusion of

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specified IPRs at the time the undertaking is made. The extent of any such exclusion shall be limited to those explicitly specified IPRs.” (RoP, Annex 6, §6.2)

D12. Are commitments limited to the use of these patented technologies only in order to produce products that comply to specific standards? Or all standards developed by the SDO, or not limited at all?

The licensing commitment is to the use of these patented technologies only in order to produce products that comply to the specific standards indicated by the submitter.

Sources and additional details:

The IPR policy as such does not specify such a restriction, but still it can be understood from the language on the commitment forms that this is nevertheless the case.

For the ISDL the phrases on the form are as follows:

the Declarant hereby irrevocably declares that it and its AFFILIATES are prepared to grant irrevocable licenses under its/their IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy, in respect of the STANDARD(S), TECHNICAL SPECIFICATION(S), or the ETSI Project(s), as identified above, to the extent that the IPR(s) are or become, and remain ESSENTIAL to practice that/those STANDARD(S) or TECHNICAL SPECIFICATION(S) or, as applicable, any STANDARD or TECHNICAL SPECIFICATION resulting from proposals or Work Items within the current scope of the above identified ETSI Project(s), for the field of use of practice of such STANDARD or TECHNICAL SPECIFICATION. (RoP, Annex 6, Appendix A, at the General Declaration)

For the GL the phrases on the form are as follows:

[...] the Declarant hereby irrevocably declares that it and its AFFILIATES are prepared to grant irrevocable licenses [...] for the field of use of practice of such STANDARD or TECHNICAL SPECIFICATION. (RoP, Annex 6, Appendix A, at the General Declaration)

Note that this text appears in the current-day ISDL and GL forms, and was not present when earlier declarations (i.e. declarations before 2008) were made.

D13. Does the policy specify any legal restriction concerning commitments? (For instance, a policy may specify that a FRAND commitment implies that an injunctive relief may not be sought.)

The ETSI policy does not mention any such restrictions. Recently, some companies have lobbied for the inclusion of such elements, and I understand they have been topics that have been discussed at recent meetings of the ETSI IPR Special Committee.

D14. Does the policy explicitly require that commitments are irrevocable? If so, does the policy mention allowable exceptions (such as defensive suspension, or if the licensee refuses to offer a reciprocal license)?

The policy explicitly specifies that commitments as well as the licenses are irrevocable. No allowable exceptions are specified.

See question D8 for reciprocity.

Sources and additional details:

When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions under such IPR [...] (RoP, Annex 6, §6.1)

D15. What does the policy specify about the eventual transfer of patents for which commitments have been made?

If a member assigns or transfers ownership of an ESSENTIAL IPR that it disclosed to ETSI, the member shall exercise reasonable efforts to notify the owner of any licensing commitment it has made. Note that only the new owner needs to be informed, not ETSI itself.

The policy does not specify that the old owner should ensure that the new owner will accept to respect the existing commitment or to take on a similar commitment.

ETSI notes that it depends on the each individual legal jurisdiction whether such commitments are 'automatically' transferred to the new owner.

Sources and additional details:

"In the event a MEMBER assigns or transfers ownership of an ESSENTIAL IPR that it disclosed to ETSI, the MEMBER shall exercise reasonable efforts to notify the assignee or transferee of any undertaking it has made to ETSI pursuant to Clause 6 with regard to that ESSENTIAL IPR." (RoP, Annex 6, 6.1)

Taking into account the importance of a robust standards system, those implementing ETSI standards should be able to rely on licensing undertakings provided in accordance with Clause 6.1 of the ETSI IPR Policy, regardless of any change in the ownership of the relevant IPRs. To that end, it is desirable that, to the maximum extent possible in each legal jurisdiction, when ownership of an ESSENTIAL IPR is transferred, any applicable licensing undertaking should automatically transfer to the new owner. Some legal jurisdictions may already provide for achievement of this result. However, ETSI recognises that this result may not be certain in all legal jurisdictions. (IPR Guide, §4.2)

Therefore, ETSI encourages:

- Prospective assignees or transferees to check for applicable licensing declarations, for example, by searching for registrations of such declarations in the ETSI IPR database;
- MEMBERS that have given General IPR licensing declarations to draw the attention of any assignee or transferee to the possibility that undertakings given in such declarations might apply to the IPRs that are to be assigned or transferred. (IPR Guide, §4.2)

An ETSI representative clarified that: *"With this provision, ETSI acknowledges that in some jurisdictions, the transfer of an Essential IPR automatically leads to the transfer of the FRAND undertaking that has been made with respect to that Essential IPR. In jurisdictions where such a transfer is not automatic, ETSI is willing to encourage the transfer of the FRAND undertaking(s) to the new owner by encouraging the*

(i) assignor to exercise reasonable efforts to notify the assignee of any FRAND undertaking it

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has made to ETSI; and

(ii) prospective assignees or transferees to check for applicable licensing declarations, for example, by consulting the ETSI IPR database;

(See sections 6.1 of the ETSI IPR Policy and section 4.2 of the ETSI Guide on IPRs).

The intentions for this formulation are both addressing the IPR owner that he has to spend efforts to make this transfer happen if it is not coming automatically as per legislation in the respective jurisdiction. Transfer of an Essential IPR should not be used to circumvent a FRAND licensing undertaking. And this is the primary goal. But I also interpret this formulation as an appeal to the legislators to help that the transfer is coming automatically. Please take into account that the European Commission as ETSI Counsellor has been participating to the IPR discussions in ETSI and continues to do so also today."

D16. Does the policy specify anything about ex-ante disclosure of most restrictive licensing terms? (e.g. forbidden, voluntary, mandatory, recommended, endorsed)

ETSI indicates that voluntary ex-ante disclosure of most restrictive licensing is 'not prohibited',

ETSI adds that "Licensing terms from such disclosures may, in some circumstances, improve transparency for individual Members in considering technologies for inclusion in STANDARDS and TECHNICAL SPECIFICATIONS"

If parties wish to use ex-ante disclosure, ETSI will work as a repository that contains information on where and how the licensing conditions for this ex-ante disclosure can be found. While the ETSI website contains a section for such references, to date does this list is still empty.

Sources and additional details:

This is addressed in the IPR Guide, not the RoP, as it is simply clarified that it is not prohibited.

Specific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI. Technical Bodies are not the appropriate place to discuss IPR Issues. Technical Bodies do not have the competence to deal with commercial issues. Members attending ETSI Technical Bodies are often technical experts who do not have legal or business responsibilities with regard to licensing issues. Discussion on licensing issues among competitors in a standards making process can significantly complicate, delay or derail this process.

Without prejudice to ETSI IPR Policy and other sections of this Guide, voluntary, unilateral, public, ex ante disclosures of licensing terms by licensors of Essential IPRs, for the sole purpose of assisting members in making informed (unilateral and independent) decisions in relation to whether solutions best meet the technical objectives, are not prohibited under ETSI Directives. Licensing terms from such disclosures may, in some circumstances, improve transparency for individual Members in considering technologies for inclusion in STANDARDS and TECHNICAL SPECIFICATIONS. (IPR Guide, §4.1)

No detailed licensing terms should be available from ETSI to avoid a misleading impression. ETSI may act as a depository, where IPR owners (licensors) can make available information on how and where to access such disclosed licensing terms, and provide links to URLs of IPR owners, which contain the details of licensing terms and conditions, so that information about the availability of licenses can be disseminated to all users of ETSI standards.

However, this provision does not create any obligation for any Member to

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disclose any licensing terms related to any of its IPRs. The lack of disclosure by a Member of its licensing terms does not create any implication under the ETSI Directives. Specifically, the requested undertaking in writing of an IPR owner that it is prepared to grant licenses on fair, reasonable and non-discriminatory terms and conditions pursuant to Clause 6.1 of the ETSI IPR Policy is sufficient when selecting technologies for ETSI standards and technical specifications. (IPR Guide, §4.1)

An ETSI representative further clarified that: "It is ETSI's objective to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector" (ETSI IPR Policy - RoP Annex 6 - §3.1)

Please note that specific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI and in particular within Technical Bodies (see articles 4.1 of the ETSI Guide on IPRs and D.2.3 of ETSI Guidelines for Antitrust Compliance ("please do not discuss any disclosure of licensing price or terms"). This can be explained by compliance with competition law and in particular by compliance with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Therefore, discussions inside ETSI Technical Bodies and arguments exchanged in the meetings of these committees shall not use commercial arguments; rather, Technical Bodies should focus on technical issues.

Without prejudice to the foregoing, we offer to our Members the possibility to make ex-ante disclosures of licensing terms (see articles 4.1 of the ETSI Guide on IPRs and C.4.2 of ETSI Guidelines for Antitrust Compliance). This means that an entity can make an unilateral commitment to licensing terms for a given standard draft, before its protected technology is selected as part of a standard, on a voluntary basis. Please note that there is no checking by ETSI of the FRAND nature of the ex ante disclosure.

Therefore, in the course of decision making inside of each ETSI member you are allowed to base your individual decision - on a particular technology or proposal - on available knowledge about technologies, market conditions, costs, prices etc., but you are not allowed to start discussing these topics inside ETSI. Therefore the term 'technical objectives' is broader than the discussion on specific technical aspects inside a committee meeting.

We would like to bring to your attention that the ex-ante disclosure of licensing terms is fully compliant with paragraph 299 of the 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' and will not, in principle, restrict competition within the meaning of Article 101(1) of the TFEU:

"299. Finally, standard-setting agreements providing for ex ante disclosures of most restrictive licensing terms, will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1). Such unilateral ex ante disclosures of most restrictive licensing terms would be one way to enable the standard-setting organisation to take an informed decision based on the disadvantages and advantages of different alternative technologies, not only from a technical perspective but also from a pricing perspective."

D17. Is there any link between the IPR policy – or the SDO in general – and a patent pool or other licensing programs? Can you describe this link?

ETSI also adopted the DVB standards, and the original developer of these standards has such a link. While a study of that is outside the scope of this forum, we refer to the following sources:

- The website of the Digital Video Broadcasting Project (DVB) <http://www.dvb.org/>
- Eltzroth, C. (2008). IPR Policy of the DVB Project: Negative Disclosure, FR&ND arbitration

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Unless Pool rules OK Part 1. J. of IT Standards & Standardization Research, 6(2), 18-39.
- Eltzroth, C. (2009). IPR Policy of the DVB Project: Negative Disclosure, FR&ND arbitration
Unless Pool rules OK Part 2. J. of IT Standards & Standardization Research, 7(2), 1-22.

D18. Are all licensing commitments being made public? Where and in what form? Is there any information in the disclosures that is not made public?

ETSI publishes the received ISDL's (and also the earlier disclosure statements, before they were called that way) as well as the GD's every 6 months as ETSI Special Report SR000 314. They are also published in an online database on the ETSI portal, which is more regularly updated.

An ETSI representative clarified that *"IPRs reflected in the ETSI IPR Database are patents only, as usually copyright licences are granted for free."*

An ETSI representative clarified that *"Extra information, not requested in the forms [is not made public in the IPR database]."*

Part E: SDO procedures and public

E1. What are the remedies available to SDO in case of non-compliance with the policy (e.g. failure to disclose, failure to provide licensing commitments, other violations of the policy)?

Like any breach of policy, a breach of the (binding parts of the) ETSI IPR policy may be sanctioned by the General Assembly (only). This is explicitly confirmed for 'intentional delay; of disclosure.

Sources and additional details:

Any violation of the POLICY by a MEMBER shall be deemed to be a breach, by that MEMBER, of its obligations to ETSI. The ETSI General Assembly shall have the authority to decide the action to be taken, if any, against the MEMBER in breach, in accordance with the ETSI Statutes. (RoP, Annex 6, §14)

"Intentional Delay", where proven, should be treated as a breach of the IPR Policy (Clause 14 of the ETSI IPR Policy) and can be sanctioned by the General Assembly. (IPR Guide, §2)

E2. How does the policy deal with companies that chose not to enter into licensing commitments (insofar as the policy allows such a choice)?

- If, prior to the publication of the standard or TS, a holder of an essential IPR informs ETSI it is not willing to commit to FRAND licenses, a technical viable alternative is sought that does not depend on that IPR. When such an alternative does not exist, work on the standard or TS will cease, while the Director-General will request the IPR owner to take such a commitment. An ETSI representative added that *"The matter will anyway be brought to the General Assembly."*

- If ETSI become aware of non-availability of licenses after the publication of a standard, the Director-General will request the IPR owner to take such a commitment. If the party refuses to do so, the GA will vote on whether the standard should be modified. If the GA decided not, ETSI will consult the EC to see what action to take, including possible non-recognition of the standard in

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question.

Details: See RoP, Annex 6, §8 (and also RoP, Annex 6, §6.3) where the procedure is described.

E3. How does the SDO deal with non-members (third parties), for instance when it is brought to the attention of the SDO that such a third party owns IPR essential to one of its standards?

That third party will be requested to issue a statement that it is commits itself to licensing these patents for FRAND terms and conditions as defined in Clause 6.1 of the ETSI IPR policy.

Sources and additional details:

“When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions under such IPR [...]”(RoP, Annex 6, §6.1)

As can be understood of the above, this is independent on whether the IPR owner is an ETSI member or not.

An ETSI representative added “There is no distinction between members and non-members. It might be the case that the member is not involved in the development of a standard and therefore did not identify an IPR as essential. In this case the same procedure as for a non member applies, but of course the member than has the usual obligations.”

E4. What are the policy and practices about (1) handling and possible rejection of incomplete disclosure or licensing statement, (2) correction of clerical errors (including patent identities), (3) resubmission of statements in any of the above cases?

An ETSI representative commented, “It is addressed in the policy as the forms are mandatory and the declarant has to use it. This implies that incomplete forms are not accepted. The declaration is also checked for consistency at the time of declaration as far as possible, and linked automatically to the EPO database.

See also the question C19.

Part F: Conflicts and enforcement

F1. Can you please describe the main disputes (if any) that have arisen in terms of respecting or interpretation the IPR policy?

An ETSI representative replied: “I am not aware of disputes caused by non-respecting the policy.

There have been cases based on different interpretations of the policy or terms of the policy, e.g. regarding transferability of FRAND undertakings: for instance, a complaint was lodged with the European Commission alleging that IPCOM had failed to license on FRAND terms a portfolio of patents acquired from Robert Bosch. The court system has solved this and we have clarified the provisions of the ETSI IPR Policy and of the ETSI Guide on IPRs regarding transfer of ownership of an ESSENTIAL IPR (see question 8 below).

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Disputes about the geographical coverage of a FRAND commitment have led to the introduction of the concept of patent families as it is today in our policy.

The assessment of essentiality is out of scope of ETSI, this is not disputed in ETSI discussions (see sections 3.2 and 3.2.1 of the ETSI Guide on IPRs)."

Part G: Other

G1. Is the content of meetings of Technical Committees, Technical Bodies or similar groups considered to be public information? This is especially relevant for patent examiners, who need to consider whether such information should or should not be considered when examining prior art in (new) patent applications.

The information disclosed to Technical Bodies is public. However, an exception is made if the provider of the information requested it to be treated as confidential, and the Chairman of the TB has agreed to accept this request.

Sources and additional details:

The proceedings of a COMMITTEE shall be regarded as non-confidential except as expressly provided below and all information submitted to a COMMITTEE shall be treated as if non-confidential and shall be available for public inspection unless:

- the information is in written or other tangible form; and
- the information is identified in writing, when submitted, as confidential; and
- the information is first submitted to, and accepted by, the chairman of the COMMITTEE as confidential. (RoP, Annex 6, §10)

The IPR Guide at §2.3.6 basically restates this principle.

G2. Are there any specific provisions on software / copyright when that software is part of the content of the standard? (This question does not concern the copyright on the text of the standard as such.)

The newest version of the ETSI IPR policy includes a new part on copyrights on software that is included as part of a standard or technical specification. Software can be sets of instructions in any programming language (compiled or not), such as instructions for audio and video codecs, and software also includes data and stream definitions (such as XML).

In the IPR Guide, it is stressed that the inclusion of such software can result in quite complex situations and issues (not only access to licenses but also maintenance etc.) and, in effect, the IPR Guide discourages such inclusion where it can be avoided.

The policy determines that:

1. When software is included in any element of a standard or technical specification, the implementer is free whether to use that particular piece of software or to develop/use

alternative software that fulfills the same functionality.

Note: from this it follows that the software (whose copyright is an IPR) meant here is not essential IPR as defined earlier on in the policy – otherwise there cannot be alternative software that fulfills the same functionality. As a consequence, the regular disclosure and commitment regime is not applicable and this set of rules does not ‘overlap’ with the regular regime.

2. For the purpose of *testing or evaluating* the software by members or any other implementers of the standard, the company that offered such software for inclusion must provide a royalty free license.

3. For the purpose of *implementing the standard* (for commercial products, for instance), the company that offered such software may, at the time of contribution, submit a commitment to license that software on FRAND terms. If it does not do so, it is bound to provide royalty free licenses.

Sources and additional details:

Quite strangely, this policy is part of Clause 9 of the RoP which is about ‘ETSI ownership of IPRs’.

9.2 In general, in the absence of any exceptional circumstances, where SOFTWARE is included in any element of a STANDARD or TECHNICAL SPECIFICATION there shall be no requirement to use that SOFTWARE for any purpose in order for an implementation to conform to the STANDARD or TECHNICAL SPECIFICATION.

9.2.1 Without prejudice to Clause 9.1, any MEMBER contributing SOFTWARE for inclusion in a STANDARD or TECHNICAL SPECIFICATION hereby grants, without monetary compensation or any restriction other than as set out in this Clause 9.2.1, an irrevocable, non-exclusive, worldwide, royalty-free, sub-licensable copyright licence to prepare derivative works of (including translations, adaptations, alterations) the contributed SOFTWARE and reproduce, display, distribute and execute the contributed SOFTWARE and derivative works for the following limited purposes:

a) to ETSI and MEMBERS to evaluate the SOFTWARE and any derivative works thereof for determining whether to support the inclusion of the SOFTWARE in that STANDARD or TECHNICAL SPECIFICATION;

b) to ETSI to publish the SOFTWARE in that STANDARD or TECHNICAL SPECIFICATION; and

c) to any implementer of that STANDARD or TECHNICAL SPECIFICATION to evaluate the SOFTWARE and any derivative works thereof for inclusion in its implementation of that STANDARD or TECHNICAL SPECIFICATION, and to determine whether its implementation conforms with that STANDARD or TECHNICAL SPECIFICATION.

9.2.2 (i) The copyright licence granted in Clause 9.2.1 shall also extend to any implementer of that STANDARD or TECHNICAL SPECIFICATION for the purpose of using the SOFTWARE in any compliant implementation unless (ii) the contributing MEMBER gives an irrevocable undertaking in writing at the time of contribution that it is prepared to grant an irrevocable copyright licence on fair, reasonable and non-discriminatory terms and conditions for the purpose of using the SOFTWARE in any compliant implementation.

9.2.3 Any MEMBER contributing SOFTWARE for inclusion in a STANDARD or TECHNICAL SPECIFICATION represents and warrants that to the best of its knowledge, it has the necessary copyright rights to license that contribution under Clause 9.2.1 and 9.2.2 to ETSI, MEMBERS and implementers of the STANDARD or TECHNICAL SPECIFICATION.

Other than as expressly provided in this Clause 9.2.3: (1) SOFTWARE contributed for inclusion in a STANDARD or TECHNICAL SPECIFICATION is provided “AS IS” with no warranties, express or implied, including but not limited to, the warranties of merchantability, fitness for a particular purpose and non infringement of intellectual property rights and (2) neither

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the MEMBER contributing SOFTWARE nor ETSI shall be held liable in any event for any damages whatsoever (including, without limitation, damages for loss of profits, business interruption, loss of information, or any other pecuniary loss) arising out of or related to the use of or inability to use the SOFTWARE.

9.2.4 With respect to the copyright licenses set out in Clause 9.2.1 and 9.2.2 , no patent licence is granted by implication, estoppel or otherwise. (RoP, Annex 6, §9)

For the purpose of this IPR Policy, "SOFTWARE" shall mean:

- a set of instructions written in any programming language that either directly, or when further compiled, performs a function when executed by hardware that processes data according to instructions, such as an audio or video CODEC; but also
- data and stream structure definitions, such as ASN.1, TTCN, or XML data representations; and
- schema examples, such as SDL diagrams and data flow charts;

which can be transformed, either directly, or when further compiled, into usable/implementable code. (RoP, Annex 6, §15)

G3. Are there any rules in relation to IPR in standards of other SSOs that are normatively referenced in a standard?

ETSI Drafting Rules (EDR), §12.10 (page 162 of the ETSI directives V29) contain guidance for including references to documents of other organizations in ETSI deliverables. EDR contain further information on the requirements for normative referencing.

12.10.4 Intellectual Property Rights (IPRs)

ETSI promotes a policy that any essential Intellectual Property Rights (IPRs) embodied in normatively referenced documents be available for use in ETSI deliverables on licensing and disclosure terms that do not materially differ from the terms defined in the ETSI IPR Policy. This normative reference policy, however, does not imply any obligation on the Technical Body, ETSI members or Technical Body members to investigate or ensure the availability of any essential normatively referenced IPRs, under any specific licensing and disclosure terms, at the time a normative reference is provided, explicitly or implicitly, within an ETSI deliverable.

<< end >>