Alliance for Open Media
An Alliance of Global Media Innovators

April 29, 2022

AOM Submission in response to Consultation on Horizontal Guidelines
Chapter on Standardization Agreements

This submission is made on behalf of the Alliance for Open Media ("AOM"), in response to the request for comments on the draft revised Horizontal Guidelines. This submission represents the collective position of AOM and should not be imputed to any individual member.

SUMMARY

AOM welcomes the draft, including in particular the acknowledgement of the value of royalty-free standards, as FRAND compliant (para 481). AOM invites the Commission to state more directly in the new Horizontal Guidelines that FRAND licensing terms include reciprocity on the same terms as the FRAND terms of the license, in both the context of royalty-bearing and royalty-free licensing to prevent hold-up. Specific amendments are suggested below.

DISCUSSION

For a background of AOM and its activities, and its overall perspective on standard setting and FRAND licensing, and the importance of royalty-free standards especially in the online area, we refer to AOM's submission in response to the consultation on the Horizontal Guidelines, submitted on October 5, 2021.

The following are AOM's comments on the section on standardization in the draft Horizontal Guidelines:

1. **Royalty free licensing**

- **HG para 482 ("*FRAND can also cover royalty-free licensing*"):**
    - AOM welcomes the Commission's proposal to move these words from a footnote to the body of the text. As explained in more detail in AOM's previous submissions, standards licensed on royalty-free terms are exemplary of FRAND licensing, since they lower barriers to implementation to a minimum, while driving innovation – as demonstrated by the dramatic innovation in several areas driven by royalty-free standards, including the web.
    - As explained in more detail in AOM's prior submissions, standards licensed on royalty-free terms are appropriately classified as a type of FRAND commitment because they preserve and protect the benefits of competition in the standard-setting context.

Moreover, they are procompetitive because, among other things, they drive innovation by promoting adoption through lower barriers to implementation, resulting in innovation in areas such as the web, IoT, USB, Bluetooth, etc.

- As the Guidelines now recognize in para. 469, firms may "value their IPRs through methods other than royalties."

- **HG para 476 (*"there exist different models for standard-setting and … competition within and between those models is a positive aspect of a market economy"):***

    - This is an important observation that should be preserved in the new Guidelines. AOM's experience is that royalty-free and royalty-bearing standard-setting models can and do exist side-by-side. The very existence of successive generations of royalty-bearing codecs alongside royalty-free codecs demonstrates that royalty-free standards do not dampen innovation of competing royalty-bearing standards, but that competition between them is a driver of ongoing innovation.
    - It is important, therefore, for EU antitrust law to preserve the integrity of different models for standard setting, including royalty-free licensing models where selected by the SDO in question.

- **HG para 474 ("*restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards"*); HG 491 ("*in the case of several competing standards or in the case of effective competition between the standardized solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition"*); HG 496 ("*restricting participation may not have restrictive effects on competition within the meaning of Article 101(1), for instance: (i) if there is competition between several standards and standard development organizations"*)**

    - These, too, are important observations. AOM and its competing SDOs thrive in an environment where there is effective competition between several standards, competing not only on quality and functionality, but also on price and business model. That market competition between them helps further drive ongoing innovation.

2. <u>Reciprocal licensing</u>

- **HG para 469 ("*They might therefore cross-license their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively."*)**

    - This sentence contains a crucial observation.[1] The concept of reciprocity and cross-licensing should be maintained, and its implication should be reflected elsewhere

[1] Obviously, the sentence on crosslicensing/reciprocity is irrelevant for the first two of the three undertakings mentioned in para 469 (NPEs and downstream-only companies).

in the draft Guidelines, as explained below. The most significant implication relates to reciprocity. It is common practice in the industry to require reciprocity and cross-licensing on FRAND terms, as a condition of a FRAND license.

- See, for instance, ETSI IPR Policy, Clause 6.1 ("*The above [FRAND] undertaking may be made subject to the condition that those who seek licences agree to reciprocate*"). Numerous other SSOs, such as W3C, ISO/IEC/ITU, ECMA, Bluetooth SIG, USB-IF, and AOM, provide explicitly for reciprocity.[2]
- The rationale is that if a licensor enables a licensee through FRAND licensing to enter the market for the downstream product, the licensee should reciprocate and in turn license its standard essential patents so as to allow the licensor to enter the downstream market as well, on the same or equivalent terms. Absent reciprocity, the outcome would be asymmetrical and limit competition. This should be reflected in the Guidelines.

- AOM invites the Commission to use "reciprocal licensing" as the appropriate term, rather than, or in addition to, "cross-licensing". A cross-license tends to be reflected in a single document, whereas "reciprocal licensing" can be in separate parallel documents or even undocumented practice. Accordingly, the sentence should read:

  "*They might therefore grant reciprocity for, or cross-license, their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively."*[3]

- Licensors of patents in a royalty-free standard who license on FRAND terms should be allowed to require a reciprocal license on the same FRAND terms. If they would have to accept royalty-bearing terms for the reciprocal license, the royalty-free standard would cease to be royalty-free, and would become royalty-bearing.[4] The effect would be to

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[2] Supra Fn 12; ETSI IPR Policy, Clause 6.1, "T*he above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.*" W3C Patent Policy, Section 5.4, "*a W3C Royalty-Free license… may be conditioned on a grant of a reciprocal RF license... to all Essential Claims owned or controlled by the licensee. A reciprocal license may be required to be available to all, and a reciprocal license may itself be conditioned on a further reciprocal license from all*."

[3] "*Reciprocity shall mean conditioning an offer to license FRAND Patents Essential to a Standard on receiving a cross license to the licensee's FRAND Patents Essential to the same Standard under terms and conditions consistent with the licensee's FRAND Commitments covering such patents; provided that, if the relevant FRAND Commitment of either Respondents or a Potential Licensee commits to providing a royalty-free license based on reciprocity, such term shall be interpreted as conditioning the offer of a royalty-free license on receiving a royalty-free cross-license to FRAND Patents Essential to the same Standard.*" Docket No. C-4410, *In the Matter of Motorola Mobility and Google Inc*., Decision and Order, clause Y.

[4] A licensor would not accept to license on royalty-free terms if the reciprocal license were royalty-bearing, and therefore asymmetrical, tilting the competitive playing field between them.

turn a RF standard into a royalty-bearing standard, effectively reducing or eliminating competition from RF standard models, depriving implementers of choice based on price/quality, conferring market power on royalty-bearing SEP owners, raising prices for SEPs and downstream products incorporating them, and reducing innovation – thus preserving the status quo where incumbents may have little incentive to improve their standards – all to the detriment of users and consumers. It would effectively constitute a price cartel by excluding a "maverick" (an RF standard), by imposing a royalty-bearing business model on it. This raises prices in the same way as a horizontal agreement. [5]

- **HG para 484 ("*At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. This can ensure continued incentives to contribute the best available technology to the standard.*")**

    - This sentence can be misread as an assumption that "royalties" are the only way to obtain a reasonable return on investment. As the Guidelines explain elsewhere (469, 476), there are other business models and *"competition within and between those models is a positive aspect of a market economy"* (476). Specifically, "*undertakings may also value their IPRs through methods other than royalties"* (469). These other methods include:

        - (a) cross-licensing with closed purses, where each party licenses the other to individual patents or entire portfolios with consideration "in kind";
        - (b) use of IPRs defensively (as mentioned in para 469) where parties simply tolerate others' use of their patents, on a reciprocal understanding; or
        - (c) royalty-free reciprocal licensing to encourage wide adoption of a standard that creates demand for downstream products and services, whose sale in turn offers a return on investment in upstream R&D.

            - RF licensing promotes broad adoption of the standardized product, expanding output, creating opportunities for return on investment. RF licensing maximizes the standard's openness and accessibility for implementers and therefore increases the potential for the standard to promote interoperability. Greater interoperability, in turn, expands output of, and stimulates demand for, downstream products to the benefit of all stakeholders. RF standards thus allow a downstream return on upstream investment in a timely manner, with minimum transaction costs.

[5] Requiring a reciprocal license is also non-discriminatory: SEP owners who offer an RF license, should be allowed to invite reciprocity. There is perfect symmetry. All licensors and licensees are treated exactly the same.

- RF standards have a proven track record. They are common and widely embraced, including, for example, web standards (e.g., HTML, CSS), USB, Bluetooth, JavaScript, and numerous standards in IoT, payment security, mobile device hardware and software interfaces, geospatial and mapping standards, 3D graphics, AR/VR, and internet security transactions. Voluntary contributors to these standards come from companies of all sizes, geographical locations, patent portfolios, and positions of the industry. The wide embrace of RF standards evidences their benefits and represents a revealed preference for RF standards across a broad range of stakeholders as an effective way to earn a return on investment in innovation.

- Accordingly, the sentence in para 484 should be changed as follows:

> *"At the same time, FRAND commitments allow IPR holders to ~~monetise their technologies via FRAND royalties and~~ obtain a reasonable return on their investment in R&D, which by its nature is risky, through FRAND royalties, royalty-free reciprocal licensing, or other FRAND terms or practices. This can ensure continued incentives to contribute the best available technology to the standard."*

- **HG 486 ("*It may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment… (ex post).*"**

  - There is a concern that any "ex post" terms reflect market power created by the standard. This is recognized in para 487 (*"These methods assume that the comparison can be made in a consistent and reliable manner and are not the result of undue exercise of market power."*) The text should be adjusted so as to ensure that it applies also to the use of "ex post" comparators mentioned in para. 486.

    - This could be achieved by moving the sentence to a new paragraph between what is now 487 and 488, so that it applies to both para 486 and 487.

3. Disclosure

- **HG Para 483 (which requires disclosure of patents).**

  - The sentence at the end of this paragraph should be maintained ("*Since the risks with regard to effective access are not the same in the case of a standard development organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context"*).