

解説

ITU-T/ITU-R/ISO/IEC 共通特許ポリシーの実施ガイドライン

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はじめに

ITUとISOとIECは、2001年に3組織によるWorld Standards Cooperationを設立して、国際標準化に関して協調路線を歩むことになった（<http://www.itu.int/ITU-T/wsc/> 参照）。2005年2月のITU/ISO/IEC World Standards Cooperation (WSC)会議で、3組織のスタッフによるTask Force on Patent Policiesを設立した。このTask Forceのミッションは、ISO/IECの特許ポリシーとITU-Tの特許ポリシーを調和させることが可能かと、特許所有者が特許声明書を提出して3組織共通の特許ポリシーに準拠することを示すようなメカニズムが可能かの調査であった。ただし、ITUの無線部門であるITU-Rは、ITU-Tの特許ポリシーを準用していたので、共通の特許ポリシー制定のためのTask Forceに参加しなかった。

上記のTask Forceは、2006年1月にミッションの第3ステップ（最終ステップ）としてITU/ISO/IEC 共通特許ポリシー（以下、“共通特許ポリシー”と略す。）の最終案テキストを作成し、2006年2月のWSC会議に提出した。2006年2月のWSC会議は、最終案テキストの正式承認を得るためにISO CouncilとIEC Council BoardとITU-T TSB（ITU-Tの事務局）の事務総長の下にあるIPR AdHoc Groupを経由してITU-TのTSAG（Telecommunication Standardization Advisory Group）に提出することを承認した。その結果、特許ポリシーは、2007年3月に3組織で正式に承認された。ITU-RのRAG（Radiocommunication Advisory Group）は、TSAG会議の後のRAG会議で準用を承認した。

なお、ITU/ISO/IEC 共通特許ポリシーの実施ガイドライン（以下、“共通ガイドライン”と略す。）は、共通特許ポリシーの解説書としての役割をもつため、共通ガイドラインの中に参考資料として、ITU/ISO/IECに共通の共通特許ポリシーとITU/ISO/IEC 特許声明兼実施許諾宣言書（以下、“共通特許声明書”と略す。）とを**附属書1**と**附属書2**に含んでいる。

この解説は、それらの共通特許ポリシー、共通特許声明書及び共通ガイドラインを作成した経緯及び内容の詳細事項などを解説するとともに、現状の共通特許ポリシーでは解決されていない問題点、その他の標準化団体の特許ポリシーに関する動向・問題点などを解説する。

1. ITU/ISO/IEC 共通ガイドライン

1.1 共通特許ポリシーができるまでの経緯

ITU/ISO/IECの共通特許ポリシーが制定される以前のISO/IEC特許取扱規定を、**附属書A**に示す。このISO/IEC特許取扱規定は単独の文書ではなく、ISO/IEC Directives Part 1（標準作成の手続きに関する規定）に特許ポリシー部分が、ISO/IEC Directives Part 2（標準の書き方）に特許に関する注意書き部分が規定されていた。共通特許ポリシーと以前のISO/IEC特許取扱規定との大きな違いは、ISO/IEC特許取扱規定には、(1) 特許声明書が存在しなかったことと、(2) 特許の無償ライセンスの選択肢がなかったことである。

同様に共通特許声明書が制定される以前のITU-T特許声明書を**附属書B**に示す。一見してITU-T特許声明書が共通特許声明書に似ていることが分かる。つまり、共通特許声明書が、ITU-Tの特許声明書を参考に行っていることが容易に推測できる。

1.2 特許声明書の存在理由

共通特許ポリシーができる前には、ISOとIECには特許声明書が存在しなかったが、それでは特許声明書が存在しないと何がまずいのか、つまり自由書式では何がまずいのか、について解説する。それは、特許のライセンス条件に、例えば、「弊社は現在A社と洗濯機の特許で係争中であり、このDVDの標準案に含まれる弊社の特許については、A社には当分の間ライセンスをしない。」などと書かれると、それを特許データベースに記入することが困難になるのである。つまり、共通特許ポリシーのように、無償、妥当な条件、その他、という選択肢からの三者択一で、それらの条件文の改変を禁止してあれば、特許情報データベースに記入するのが容易になる。つまり、共通特許声明

書を導入することによって、ISO と IEC はそれぞれ、ITU と同様の特許データベースを構築できることになったのである。

ところで、この事実を知っている人は少ないが、共通特許声明書を作成したのは、WSC が最初ではない。附属書 C を参照してほしい。それは、JTC1/SC29: Coding of audio, picture, multimedia and hypermedia information (JPEG、MPEG などの標準化を担当する ISO/IEC JTC1 の Sub Committee 29) が、ITU-T との共通テキストの標準を作成したときに作成して使用した特許声明書である。その後、附属書 C は、共通特許ポリシーと共通特許声明書ができたので、廃止されてしまった。しかし、附属書 C は現在の共通特許声明書に酷似しており、共通特許声明書の見本と言うか、原本になったと言っても過言ではないだろう。

1.3 特許情報データベース

ISO と IEC では、特許声明書を使うのが初めての経験であり、特許情報データベースを構築するのも初めての経験なので、特許声明書と特許情報データベースとの間の問題点を認識していないかもしれない。

それに対して ITU-T では、特許声明書もたくさんの改変の経緯がある。例えば、ずっと以前の特許声明書には、Reciprocity (互惠主義) という考えがなかった。その頃に受領した特許声明書に基づいて特許情報データベースに入力した情報内容と、最近に受領した特許声明書に基づいて特許情報データベースに入力した情報内容とは、たとえば Reciprocity にマークが付いていたかどうか、後で判定できなくなる恐れがある。そこで ITU では、特許声明書を使用したかどうか、また、何年版の特許声明書を使用したかを、ITU の特許情報データベースに記載しているのである (以下の画像の Declaration Form 欄を参照)。

また、以下の参照例では、特許声明書の提出日と特許データベースへの登録日が 1 日しか違っていない。つまり、ITU-T では特許データベースへの登録作業には 1 日しか要していないという、極めて迅速な処理をしている。

さらに、ITU-T では、勧告に対して必須でなくなった特許について特許情報データベースからの削除の申請があった場合、特許情報データベースから削除するのではなく、そのような削除申請があったことが記録されているという。

<http://www.itu.int/ipr/IPRSearch.aspx?iprtype=PS>

Recommendation number: [E.681](#)
Statement Id: E681-01
Patent holder/Organization: AT&T Corp.
Main contact: Mr. Thomas Frost, AT&T Intellectual Property Management
Address: Room 2E37 - Bldg 2
180 Park Ave, Florham Park, New Jersey 07932
United States
Tel. No.: +1 973 236 6760
Fax. No.: +1 973 236 6452
Declaration form version: 01 January 1999 (Individual)
Licensing declaration: Option 2_ The Patent Holder is prepared to grant - on the basis of reciprocity for the above ITU-T Recommendation - a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to manufacture, use and/or sell implementations of the above ITU-T Recommendation. Such negotiations are left to the parties concerned and are performed outside the ITU-T.

Patent info:

None

ITU-T registration date: 2001-11-14

Statement declaration date: 2001-11-13

Statement remarks:

以下は ISO のホームページにある JTC1 の特許情報データベースの一部である。Id Number: ISO/IEC 11172-1:1993-08 には、標準の番号とタイトル、特許権者の住所・氏名しか掲載されていない。特許声明書がなかったころの申告だと思われるが、当時はライセンス条件も RAND しかなかったのも、特許番号も実施許諾の条件も記載されていない。それに対して、Id Number: ISO/IEC 10918-1:1994-02 には、特許番号とライセンスの条件も記載されている。こちらは、ライセンスの条件から ITU/ISO/IEC 共通特許声明書を使用したものと推察される。ただし、こちらは JPEG 標準のものであるが、有償となっている。たしか JPEG は無償の声明書を集めたと聞いているので、その方針と一致しない。また、特許声明書の版が記載されていないので、声明書が将来に改版されても、どの版を使ったのか不明になってしまう。ところで、ライセンス条件は共通特許声明書の内容になっているが、この ISO/IEC 10918-1 標準の発効日が 1994 年になっている。1994 年には、まだ共通特許声明書ができていなかったはずである。さらに、Reciprocity の Mark-here 欄がないので、マークが記載されていたのかも不明である。さらに、さらに、特許声明書の提出日と特許データベースへの登録日が記載されていない。つまり、標準が発行された後になって特許声明書を提出したのか、特許データベースにいつ登録されたのか不明である。このように ISO と JTC1 の特許情報データベースは、その内容に信ぴょう性があるとは言い難く、将来にわたってデータベースとして役立つのかは、はなはだ疑問である。

http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3770791/JTC1_Patents_database.html

ISO document reference: ISO/IEC 11172-1:1993

Domain: MPEG-1

Id Number: ISO/IEC 11172-1:1993 - 08

Committee Reference: JTC 1/SC 29/WG 11

Title: Information technology -- Coding of moving pictures and associated audio for digital storage media at up to about 1,5 Mbit/s -- Part 1: Systems

Organization: Daimler Benz AG

P.O. Box 800 230 Epplstrasse 225 DE-7000 Stuttgart 80 Germany

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Fax. No.:

URL:

Main Contact: Mr. Becher

E-mail:

Patent License Declaration:

Patent Title:

Patent Number:

Patent Status:

Patent Version:

Patent Country:

Patent date:

ISO document reference: ISO/IEC 10918-1:1994

Domain: JPEG

Id Number: ISO/IEC 10918-1: 1994-02

Committee Reference: JTC 1/SC 29/WG 1

Title: Information technology -- Digital compression and coding of continuous-tone still images: Requirements and guidelines

Organization: IBM - N.Y. North Castle Drive US-Armonk, N.Y. 10504 USA

Tel. No.: +1 914 765 43 50

Fax. No.:

URL:

Main Contact: Mr. Richard Holleman

E-mail:

Patent License Declaration: The Patent Holder is prepared to grant a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to make, use and sell implementations of the above document. Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO or IEC.

Patent Title: Symmetrical adaptive data compression/decompression system

Patent Number: 4 633 490

Patent Status:

Patent Version:

Patent Country: USA

Patent date: 1993-08-03

Patent ITU reference: T 081-01

1.4 無償のライセンス条件

従来 ISO と IEC では、無償のライセンス条件は、有償の合理的なライセンス条件に含まれると考えていた。このため、特に「無償」という選択肢が必要とは考えていなかった。もしかすると、「無償」という選択肢を取り入れることに対して、特許を多数所有している企業からの反対意見があったのかもしれない。

ところで、JTC1/SC29（JPEG、MPEG などの標準化を担当する Sub Committee）では、ITU-T との共通テキストの標準を作成しており、特に JPEG（静止画）グループではすべての特許を無償にして JPEG 標準の普及を図ろうと考えていたため、ISO/IEC の特許取扱規定では「無償」が明確に含まれていないため、ISO/IEC の特許取扱規定を採用しにくい状況にあった。そこで、JTC1/SC29 は ITU-T と相談して「無償」の選択肢を含んでいる ITU-T の特許声明書を参考に、ITU-T/JTC1 共用の特許声明書（附属書 C 参照）を作成して採用した。これによって、JPEG 標準化の参加企業は、ITU-T/JTC1 共用の特許声明書を使用して「無償」を宣言できることになった。

ただし、せっかくすべての特許を無償として JPEG 標準の普及を図ったのだが、JPEG 標準がデジタルカメラなどに普及した後になって、あの JPEG 特許の Hold-up 事件を生むことになったのは皮肉な結果である。

ところで、ITU-T の特許声明書にある「無償」は、始めから今の定義だったわけではない。以下は、2001 年 8 月 10 日版の ITU-T の特許ポリシーである。

2 If an ITU-T Recommendation is developed and such information as referred to in paragraph 1 has been disclosed, three different situations may arise:

2.1 The patent holder waives his rights; hence, the Recommendation is freely accessible to everybody, subject to no particular conditions, no royalties are due, etc.

2.2 The patent holder is not prepared to waive his rights but would be willing to negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions. Such negotiations are left to the parties concerned and are performed outside the ITU-T.

2.3 The patent holder is not willing to comply with the provisions of either paragraph 2.1 or paragraph 2.2; in such case, no Recommendation can be established.

上記の 2.1 にある「無償」の意味は、「特許権者は、特許を放棄する」となっている。これに対して、現在の共通特許声明書の「無償」の説明には、「無償という言葉は、特許権者が必須特許に関する権利のすべてを放棄するという意味ではない。」となっていて、特許権を放棄しないことになっている。では、なぜ「放棄する」から「放棄しない」に変わったのだろうか。

そこで、以下に注目していただきたい。現在の共通特許声明書の「無償」の説明には、「しかし、

この場合、特許権者が金銭を課しないと約束しても、その特許権者は、根拠法、使用分野、互惠主義、保証等に関する合理的な条件を含む実施許諾の契約に上記文書（勧告・規格類）の実施者が署名することを要求する権利を保持する。」という文章がある。この文章は、「“Free” だからと言って特許を黙って勝手に使用してよいということではなく、関係する法規（問題が生じた場合はどこの裁判所を使うとか）、特許の使用分野（例えば、玩具に限るとか）、互惠主義（Reciprocityを参照）を使うのか、瑕疵担保条件（特許が有効でなかった場合など）はどうするのか、などを記載した特許使用許諾に合意してから特許を無償で使用するよう要求することができる。」ということの意味する。

ここで、特許権者は「無償」を選んでいることに注意していただきたい。「無償」を選んでいるにもかかわらず、「ライセンス契約」を結ぶ権利を保持するのである。ライセンス料が「無償」なのだから、契約を結んだからといって、ライセンス料が入ってくるわけではない。しかも、「無償」にしているのだから、世界中の大勢の予定実施権者からライセンス契約の申請が来るはずなので、その事務作業量は大変なものになるはずである。一般的に考えると、特許権者は「無償」の場合はライセンス契約をしない方を選ぶはずである。では、どのような場合に特許権者は「無償」のライセンス契約を結んで、利益を得るのだろうか。それは、特許権者が特許声明書で申告した必須の特許の他に、必須ではないが多数の周辺特許を所有している場合が考えられる。つまり、「無償」のライセンス契約を求めてきた予定実施権者に対して、周辺特許も使っているはずだとして、それらの周辺特許のライセンス契約も要求するのである。このような目的のために、「無償」の選択肢には、ライセンス契約を結ぶ権利を保持させているのである。

ちなみに、インターネット標準の作成団体であるIETFの特許ポリシーは、以下のようになっている。それは、全体で3種類あり、**a)** 無償で契約を要するもの、**b)** 有償で契約を要するもの、**c)** 無償で契約を要しないもの、に分類されている。

- **a)** under a royalty-free and otherwise reasonable and non-discriminatory license, or **b)** under a license that contains reasonable and non-discriminatory terms and conditions, including a reasonable royalty or other payment, or **c)** without the need to obtain a license from the IPR holder

1.5 Reciprocity（互惠条件）

上記の2001年8月10日版のITU-Tの特許ポリシーにはReciprocity（互惠条件）の記述がないが、以下の2001年10月のITU-Tの特許声明書には、選択肢の1と2にReciprocityの記述がある。ただし、以下の特許声明書には、オプション選択肢としてのMark here はない。つまり、ITU-Tの特許ポリシーと特許声明書は、全く同じ文章というわけではない。また、特許声明書の方に先にReciprocityが記載されたのである。

- | | |
|--------------------------|---|
| <input type="checkbox"/> | 1 The Patent Holder is prepared to grant - on the basis of reciprocity for the above ITU-T Recommendation - a <u>free</u> license to an unrestricted number of applicants on a worldwide, non-discriminatory basis to manufacture, use and/or sell implementations of the above ITU-T Recommendation. |
| <input type="checkbox"/> | 2 The Patent Holder is prepared to grant - on the basis of reciprocity for the above ITU-T Recommendation - a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to manufacture, use and/ or sell implementations of the above ITU-T Recommendation. |
- Such negotiations are left to the parties concerned and are performed outside the ITU-T.

さらに、附属書Bに示す2004年7月版のITU-Tの特許声明書の中のReciprocity部分を以下に示す。2004年7月版は、2001年10月版に対して、Mark here が第1項だけに追加されているのが分かる。

- ☐ 1 The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation – a free license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and under other reasonable terms and conditions to make, use and sell implementations of the above ITU-T Recommendation.
- Negotiations are left to the parties concerned and are performed outside the ITU-T.
- Also mark here ___ if the Patent Holder reserves the right to license on reasonable terms and conditions (but not for free) to applicants who are only willing to license their patent claims, whose use would be required to implement the above ITU-T Recommendation, on reasonable terms and conditions (but not for free).*
-
- ☐ 2 The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation – a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to make, use and sell implementations of the above ITU-T Recommendation.
- Negotiations are left to the parties concerned and are performed outside the ITU-T.

さらに、現状の共通特許声明書の同じ部分を以下に示す。ここでは、Mark here が 3 か所に増えている。

- ☐ 1. The Patent Holder is prepared to grant a free of charge license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and under other reasonable terms and conditions to make, use, and sell implementations of the above document.
- Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO or IEC.
- Also mark here ___ if the Patent Holder's willingness to license is conditioned on reciprocity for the above document.*
- Also mark here ___ if the Patent Holder reserves the right to license on reasonable terms and conditions (but not free of charge) to applicants who are only willing to license their patent claims, whose use would be required to implement the above document, on reasonable terms and conditions (but not free of charge).*
-
- ☐ 2. The Patent Holder is prepared to grant a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to make, use and sell implementations of the above document.
- Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO, or IEC.
- Also mark here ___ if the Patent Holder's willingness to license is conditioned on reciprocity for the above document.*

ところで、Reciprocity の定義は、現状の共通特許声明書では、以下になっている。

- **Reciprocity:** As used herein, the word “reciprocity” means that the Patent Holder shall only be required to license any prospective licensee if such prospective licensee will commit to license its essential patent(s) or essential patent claim(s) for implementation of the same above document free of charge or under reasonable terms and conditions.

上記の共通特許ポリシーの Reciprocity の定義は、「相手が特許声明書で選択肢の第 2.1 項又は第 2.2 項を選んだ場合は、こちらは自分が選んだ選択肢のとおりライセンスをしなければならない。」という意味になる。これに対して日本から、「こちらが選択肢の第 2.1 項（無償）を選んで、相手が選択肢の第 2.2 項（有償）を選んだ場合、相手はライセンス料を取るのに、こちらは無償でライセンスしなければならないのは不公平である。」という意見を ITU-T IPR Ad Hoc に提出した。この日本からの意見は取り上げられたが、Reciprocity の定義を途中で変更すると混乱が生じるとして Reciprocity の定義を変更せずに、選択肢第 2.1 項の中に 2 つ目の Mark here を追加したのである。

ちなみに、上記の意見を提出した（社）情報通信技術委員会（TTC）の IPR 規定の中の互惠条件の文章は以下になっている。つまり、TTC の IPR 規定での互惠条件とは、ITU-T の特許声明書の中の 3 つの Mark here をひとまとめにしたものになっていて、Mark here のオプション選択はない。

- ただし、当該 TTC 標準等の内容の全部又は一部を実施する上で必須の工業所有権等を所有し

当該 TTC 標準等を実施する他の者が、上記第 2 項の権利所有者が本項で選択した条件とは対等でない条件を当該権利所有者に対して主張した場合は、当該権利所有者は当該他の者を本項の(1)又は(2)の対象から除外することができる。 注：(1)は無償、(2)は有償の条件。

1.6 RAND（非差別的かつ合理的）条件

一般にRAND（Reasonable and Non-Discriminatory）の条件という、「妥当な価格」を意味するようにとられているが、いろいろな標準化団体の特許ポリシーを調べてみると、必ずしもそのような意味では使われていない。例えば、共通特許ポリシーと共通特許声明書には、以下の記述がある。

- with other parties on a non-discriminatory basis on reasonable terms and conditions
- on a worldwide, non-discriminatory basis and under other reasonable terms and conditions

上記で、元々の略語「RAND」のフルスペルである「Reasonable and Non-Discriminatory Terms and Conditions」がなぜ使われていないのかを考えてみる。上記のRANDのフルスペルで問題になったのは、非差別的の意味の「Non-Discriminatory」が契約条件のうちのライセンス料率にも適用されるのか、という点である。つまり、ITU/ISO/IECは誰にでも同じライセンスの料率で契約することを要求しているのか、ということである。もしも、ITU/ISO/IECでのRANDが、誰に対しても非差別のライセンス料率だとすると、(1) ライセンス契約は一般的に秘密契約であり、他社がいくらかで契約したか分からない、(2) クロスライセンス契約の場合があるので、相手ごとにライセンス料率が違うはずである、(3) パテントプールに加入した会社に対して個別契約をすると、プール料率と個別契約料率との二重価格になってしまう、などの矛盾が生じてしまう。

以上から、RANDの構成要素であるNon-Discriminatory（被差別的）は、ライセンス料率には適用されない、というのが最近のIPR社会の共通理解になってきたようである。そのように考えると、Reasonable and Non-Discriminatory Terms and Conditions と書くとライセンス料率も非差別と誤解を生じるので、reasonableとnon-discriminatoryとを分けて、on a non-discriminatory basis on reasonable terms and conditions とか、on a worldwide, non-discriminatory basis and under other reasonable terms and conditions というようになったと考えられる。

また、RANDは有償という意味で使われることが多いが、上記の共通特許ポリシーにもあるように、無償の場合でも、to grant a free of charge license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and under other reasonable terms and conditions というように使われている。ここで、共通特許ポリシーでは、「無償」にはきちんと free of charge という言葉が使われているのに対して、「有償」には「有償」に相当する言葉が使われていない、という特徴がある。これに対して、他の標準化団体、例えばインターネット標準のIETFでは、reasonable and non-discriminatory terms and conditions, including a reasonable royalty or other payment と、有償（妥当な価格）であることを明示している。

それでは、RANDの構成要素であるNon-Discriminatoryとは、何を非差別とするのか。これは、特許権者が、「A社は当社と同じファミリー企業の一員だから、特許をライセンスしてあげるが、B社は競合相手の会社なのでライセンスしてあげない」というようなやり方を禁止しているようである。しかし、前記のように、ライセンス料率は同じでなくてもよいという理解が正しいとすると、A社には1%で、B社には15%ということもありうる。これはこれで、なんとなく「被差別的に」という単語に違反するのでは、という疑念がわく。はたして、「被差別的」とは、何を意味しているのだろうか、再び疑問になってきた。

1.7 Essential（必須）

共通特許ポリシーでは読み落としてしまうかもしれないが、ITU/ISO/IECに申告する特許は、勧告・規格類を実施するためには使わざるを得ない特許、侵害しないと勧告・規格類が実施でき

ない特許、勧告・規格類を実施するために必要な特許、をさしている。これを一般に「必須特許 (essential patents)」と称している。これに対して、使わなくても勧告・規格類が実施できる周辺特許、使うと便利な特許、使うと安価に実施できる特許などは、申告すべき特許の範囲に含まれていないのである。この「必須の特許」だけを申告するという考え方は、ほとんど世界中の標準化団体に共通の理解である。その理由は、必須でない特許までも含めると、申告すべき特許の範囲が広がって、限界がなくなるからだと考えられる。

「必須の特許」に限るということは、共通ガイドラインの用語に、**Patents:** Patents refer to essential patents or similar rights という記述があり、共通特許声明書の **Licensing declaration:** に、granted and/or pending applications for patents, the use of which would be required to implement the above document という記述がある。しかし、肝心の共通特許ポリシーには、「必須特許に限定する」という記述がない。

ところで、必須特許には2種類が存在する。一方は、技術的必須 (technically essential) といひ、もう一方を商業的必須 (commercially essential) という。技術的必須は、一般的な必須の意味であり、それを使わないと勧告・規格類が実施できない特許技術を指す。それに対して商業的必須は、理論的・技術的には代替案があるが、代替案を採用しても価格が高くなって技術的必須の技術に対抗できないとか、代替案を採用しようとしても技術的に未熟・不安定で事実上採用できない、という場合をさす。

ITU/ISO/IEC共通特許ポリシーでは、必須の定義に商業的必須を含まずに、技術的必須だけを採用していると考えられる。それに対して、他の標準化団体では、「商業的必須を含む／含まない」と規定している団体もある。例えば、欧州電気通信標準化機構 (ETSI) では、Essentialを以下のように、(but not commercial) と定義している。つまり、商業必須は含まないと断っている。

- 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.

それに対して、(社) 情報通信技術委員会 (TTC) の IPR 規定は、以下のように商業必須を含めている。そうなった背景は、2005 年 6 月に公正取引委員会によるガイドライン「標準化に伴うパテントプールの形成等に関する独占禁止法上の考え方」が公開され、このガイドラインで必須特許には商用必須が入っていたため、当時 (2005 年 11 月頃) の TTC の声明書の審議において、定義を明確化することにして下記の注書きを入れたと思われる。

- 必須の工業所有権等とは、当該 TTC 標準等の内容の全部又は一部を日本国内において実施する際に当該工業所有権等を侵害することが技術的に回避できない、あるいは技術的には回避可能であってもそのための選択肢は費用・性能等の観点から実質的には選択できないことが明らかと、当該権利所有者が信じるものをいう。

また、Trusted Computing Group (TCG) というコンソーシアムの IPR 規定は、以下になっている。つまり TCG では、「商業的に合理的で侵害しない代替技術が存在しない場合」を必須と定めている。ということは、価格が合理的でない代替技術は、必須に含まれることになる。

- (c) **Necessary Claims** shall mean claims of a patent or patent application other than design patents and design registrations, throughout the world that: (i) (中略) and (ii) are necessarily infringed by implementing those portions of the Specification that are within the bounds of the Scope, provided that a claim is necessarily infringed only when there is no commercially reasonable non-infringing alternative for implementing such portions of the Specification within the bounds of the Scope.

1.8 情報開示の時期

特許の情報開示の時期については、共通特許ポリシーでは“当初から”と早い時期からの開示を求めている。しかし、共通特許ポリシーにもあるように、「しかし、最初の原案が提出される時点では、内容があまりにも漠然としていることや、引き続き大きな修正が加えられることがあるので、不可能かもしれない。」という事実がある。また、標準案がまだ作業原案などの早い時期に特許情報を開示すると、担当する作業班では開示した特許を回避しようという意思が働く。そこで、特許を所有する企業は、なるべく遅い時期に開示しようとするのである。

ところで、標準化団体は、標準案が最終案になって、承認寸前に必須特許を開示するように要請するが、その開示特許の調査期間は一般的に2～3週間となっている。しかも、標準化団体によっては、同じ時期に100件もの標準案の承認手続きをすることもある。それに対して参加企業側の知財部門は、100件もの最終原案を読んで、自社の特許ポートフォリオの中から関連する特許を選び出し、必須かどうかを判断しなければならない。この時点で、必須特許の開示をしそこなうと、後で裁判になり特許のライセンス料がもらえなくなる恐れがある。また、誤って大会社が必須でない特許を開示すると、嫌がらせをしたとか、不公正な行為があったとして、公正取引委員会などから疑われることもあり得る。ここが、参加各社の頭の痛いところである。特に中小企業では、専任の弁理士がいるわけでもなく、標準案に対して自社特許の必須性を確認することは容易ではない。

また、最終原案になる前に特許を開示すると、最終原案になった頃には標準案の内容が変わってしまっていて、開示した特許が必須ではなくなるかもしれない。それどころか、開示した特許が最終原案に対して全く関係がなくなる場合もありえる。しかし、現状の共通特許ポリシーでは、以前に開示した特許を取り消す手続きが規定されていない。つまり、いったん特許を標準案に対して必須だとして開示すると、永久に必須特許として特許情報データベースに登録され続ける恐れがある。この問題に対して、ITU-T IPR Ad Hocで、最終原案の承認手続きの際に、最終的に必須特許の開示を要請するのと同時に、必須でなくなった特許の取り下げもLast Callとして申告させるべきではと提案したが、この提案はいまだに取り上げられていない。

1.9 他人の特許の情報開示

共通特許ポリシーの第1項には、「ITU、ISO、IECのいずれかの作業に参加するあらゆる関係者は、当初から、自己又は他人のものであるかを問わず、あらゆる既知の特許又は申請中の特許出願について、x x x事務局に、注意を促すことが望ましい。」とある。また、共通ガイドラインには、「上記に加えて、技術的な委員会等に参加していない誰でも、自己のものか第三者のものかを問わず、既知の特許について組織に注意を促すことができる。」とある。つまり、自分の特許だけでなく、他人の特許も標準案に対して関係していると思われるときは、標準化団体に通知してほしいということである。

この要請は米国の企業には受け入れられていないようである。それは、米国の「3倍賠償制度」があるからである。米国では、故意に他人の特許を侵害すると、過失で侵害した場合の特許侵害賠償額の3倍を取られる法律条文がある。つまり、もし他人の特許を通知すると、その会社の特許の存在を知っていたことが明白であり、しかも証拠書類が標準化団体に残るので、特許侵害の裁判で非常に不利になるからである。したがって、米国の企業は他人の特許を絶対に通知しない。

1.10 特許調査の努力の程度

共通ガイドラインの「特許の情報開示」には、「情報は誠実に、かつ、最善の努力で提供されるべきであるが、特許検索の要求はない。」という文章がある。ここで、「誠実に」は「in good faith」という英語が使われている。同様の言葉として、欧州電気通信標準化機構(ETSI)では、「on a bona fide basis(誠実に)」という言葉を使っている。ETSIは、新しい流行語を作るのが好きなのかもしれない。

その次にある「最善の努力で」の英語「on a best effort basis」に問題がある。「best effort」を

欧米の識者に聞くと、(1) 通信網をATM方式からIP方式に変換したときに、それまで絶対にロス（紛失）をしないと約束していた網の品質が、「best effort」つまり、努力はするが絶対にロスしないとは約束できない、という意味で使われた、(2) 株式相場が暴落しているときに、持ち株を証券会社に持ち込んで、今日中にすべてを売却してくれと頼んだときに、証券会社の窓口担当者は、「best effort」つまり、やってみるが全部の売却を約束はできない、という意味で使われているようである。しかし、米国系の某社の知財担当者に聞いたところ、IP通信技術や株式売買の世界ではなく、法律の世界では「best effort」とは「最善の努力」を意味していて、裁判になった時に「最善の努力をした」ことを証明するのが困難であるので困る、と言っていた。「best effort」は、標準案に対して必須の特許を探す場合の努力の程度を示しているの、必須特許を開示しそこなったときに、最善の努力をしたのか、表面的な調査で見落としをしたのかを争うこともありうるので、「best effort」を使ってくるな、というのがその知財担当者の意見であった。その意見を踏まえて、欧州電気通信標準化機構（ETSI）では、「use reasonable endeavours」として「合理的な努力」という言葉に変えている。これは、上記の某社の意見を取り入れたものかもしれない。

さらに、「特許検索の要求はない」という言葉だが、「特許検索」は文字通りコンピュータ上の特許データベース（例えば特許庁の）をキーワードなどで検索して、該当する特許を洗い出し、そこから必須の特許を探し当てようとすることを意味している。上記の欧州電気通信標準化機構（ETSI）でも、「no obligation to conduct IPR searches」としている。同様に、インターネット標準のIETFでも、「But this requirement should not be interpreted as requiring the IETF Contributor or participant (or his or her represented organization, if any) to perform a patent search to find applicable IPR」として特許の検索を不要としている。

それでは、なぜ「特許検索」を不要とするのか。それは、キーワードで特許データベースを検索すると、ものすごい数の特許が発見されることになり、それらの発見された特許群と、勧告・規格類の原案とを読み比べて、必須かどうかを判定することになるのである。この判定は、特許弁護士又は弁理士が担当することになり、彼らの報酬は安くはない。したがって、特許検索をしても、役立つ情報が得られないばかりでなく、膨大な費用が発生するので、参加企業は特許検索を嫌うのである。特に大量の特許を保有する企業ほど特許検索を嫌っている。

1.11 提出済みの特許声明書の実施条件の変更

一度提出した特許声明書の実施許諾の条件は、訂正や変更ができるのだろうか？ 共通ガイドラインには以下の記述がある。

- 特許声明書に記載された声明は、例えば明らかな誤りの場合で、差し替えられない限り、効力を維持する。

上記の説明は、明らかな誤りの場合以外は、修正できないように読める。これに対して、共通ガイドラインのITU 包括特許声明書の説明には、以下の説明がある。

- 包括特許声明書は、同一の特許権者からの特定の勧告に関する個別の（勧告毎の）特許声明書によって覆うことができる（これは稀にしか発生しないことを期待する）。

上記の説明は、包括特許声明書の実施許諾条件は、個別の特許声明書で置き換えることができるように読める。しかし、頻繁に修正されることを期待していないような注釈になっている。

それでは、例えば、いったん無償と宣言しておいたものを、有償に変更できるのだろうか。あるいは、いったん有償と宣言しておいたものを、実施許諾しないと変更できるのだろうか。共通ガイドラインや共通特許ポリシーには、この点を詳しく記述していない。

この点について、（社）情報通信技術委員会（TTC）のIPR 規定では、以下のように記述している。

- 会員は、声明書第3 項に記載した条件を変更する場合は、理事長宛に声明書を再提出する。ただし、声明書第3 項における条件の、(1)から(2)または(3)、もしくは(2)から(3)への変更は認

められない。 注：(1)は無償、(2)は有償、(3)は実施許諾しない。

また、VITA（VMEbusの標準化団体）のIPRポリシーでは以下のように規定している。

- The Declaration is irrevocable. If a subsequent Declaration covering previously disclosed information is submitted, the subsequent Declaration may only supersede the prior Declaration if the subsequent Declaration is less restrictive upon prospective licensees than the former Declaration. Otherwise, the former Declaration continues to apply.

ところで、最近にITU-T IPR Ad Hocでもこの点についての議論があり、TTCと同様の制限を設定するような議論がある。さらに、包括特許声明書についても、同様に扱うと。もしそうになると、現在の共通ガイドラインの包括特許声明書の説明にある「包括特許声明書は、同一の特許権者からの特定の勧告に関する個別の（勧告毎の）特許声明書によって覆うことができる」は、否定されることになり、すでに包括特許声明書を提出してある企業にとっては、重要な問題になり得る。なぜなら、包括特許声明書は、無償を宣言する企業・個人はいないはずなので、RAND（合理的な条件の有償）で宣言されている。そのRAND宣言を覆う個別声明書は、「無償」にするか、「ライセンスしない」とするかである。そこで、もし上記の制限を設けると、「ライセンスしない」という個別声明書は提出できなくなるのである。

1.12 特許声明書の選択肢 3 の選択

共通特許声明書には、第3項として以下の選択肢がある。

- 3. 特許権者は、上記1、2 のいずれの条件でも実施許諾する意志がない。

では、この第3項を選択すると、どういうことになるのか、それをここで説明する。選択肢の第3項の意味は、必須特許の所有者が標準案に対して必須の特許を使用許諾しないと宣言することである。もし標準案にA社の必須特許が含まれていて、A社がその必須特許の使用許諾をしないと宣言すると、その標準案を他社が実施・実装すると必ずA社の特許を侵害することになる。もし、特許侵害にならないとすれば、A社の特許は標準案に対して必須ではないということになる。この事実を無視して標準案を他社が実施すると、その会社はA社から特許侵害で訴えられ、莫大な損害賠償額を請求されることになる。つまり、この標準案の利用者はA社だけとなるので、標準案は普及しない。そこで標準化組織は、この標準案を修正してA社の必須特許を侵害しないようにするか、それができなければ標準案を廃案にすることになる。その結果、A社は市場を独占しようと考えて必須特許の使用許諾を拒否しても、結果的に標準案はA社の特許を回避するか、標準案は廃案になって、A社はその標準を利用して市場を独占することはできなくなる。

1.13 特許声明書の選択肢 3 を選択したときの提出書類

共通特許声明書の第3項を選択した場合には、以下の書類を提出することになっている。

- 特許登録番号又は申請番号（申請中の場合）
- 上記文書（勧告・規格類）の影響を受ける部分の明示
- 上記文書（勧告・規格類）に関わる請求事項の記述

上記の書類を要求している理由は何から来ているのであろうか。だいぶ以前になるが、ITU-Tで、必須特許を所有しているが実施許諾を拒否する、という特許声明書が提出されたことがあるという。このような第3項を選択する特許声明書が提出されると、標準化の作業は停止してしまう。それを打開するためには、特許声明書に記載してある特許の内容を誰かが審査して、その特許技術を使わないように標準案を修正するか、又は特許声明書に記載してある特許技術が標準案に対して必須でないことを証明するしかない。しかし、その当時の特許声明書の様式には、上記の3点を提出する義務が記載されていなかった。その結果、標準案は数箇月にわたって凍結されたままになった。

このことは、何を意味するのかというと、第3項を選択した特許声明書が提出されると、標準案

が数箇月～数年の間凍結されるので、後発メーカーはガセネタの特許声明書を提出することによって、製品開発の遅れを取り戻すことができってしまう。後になって、適当な特許情報を提出することによって、それが必須でないことが判明すると標準案は発行されるが、その声明書を提出したメーカーは、相当の時間を稼いだ上に、「ゴメン、ゴメン」で済むことになる。

そこで、このような故意のガセネタの声明書の提出を防ぐために、前記のような 3 種類の証拠書類を提出するようになったと聞いている。つまり、前記の 3 種類の証拠書類は、ガセネタを見破るための手段なのである。

ここで、「ITU には必須で、ISO と IEC には強く求められる」という文章は何を意味するのだろうか。元々、上記の 3 種類の証拠書類の要求は、ITU のものであった。それに、ISO と IEC が後から相乗りしたのだが、ISO の中央事務局の知財担当者は、組織の立場ということを考えたようだ。ITU は国連傘下の組織であり、メンバーは国連加盟の各国である。それに対して、ISO と IEC は、スイスに本部を置く民間団体であり、そのメンバーは各国の民間標準化団体である。そこで、ISO の知財担当者は、ISO や IEC のメンバー（各国の標準化団体）ではない特許所有者（一般に企業か個人）に、強制的に 3 種類の証拠書類を提出させることはできないと考えたようだ。

たしかに、ITU には国家メンバー（Member state という）以外に、企業メンバー（Sector member という）という規定があり、年会費を払って参加している企業がある。ISO と IEC では各国の民間標準化機関がメンバーになっている。しかし、ITU の場合でも、第 3 項選択の特許所有者が、ITU の国家メンバーや企業メンバーとは限らない。つまり、ITU でも、ISO と IEC でも、第 3 項を選択した企業・個人は、必ずしも ITU や ISO や IEC のメンバーではないことが想定される。したがって、「ITU には必須で、ISO と IEC には強く求められる」という規定は、まったく意味がないと考えられる。

1.14 会議の運営

共通ガイドラインには、以下の記述がある。

- **技術的な委員会等**の議長は、適宜、各会議の適当な時間に、検討中の**勧告・規格類**を実施する上で必要となる**特許**について知っている人がいるかどうかを尋ねることになる。質問したという事実は、あらゆる肯定的な回答とともに、会議の報告書に記録しなければならない。

これも、元々は ITU の規定である。ITU では、技術的な会議の冒頭に議長が必須の特許について参加者に質問をして、必須の特許について知っている参加者は手をあげて「知っている」と答えて議事録に残しているようである。しかし、ISO と IEC では、そのようなことを実施するようになったとは聞いていない。ISO と IEC では、この規定は徹底していないのが実情のようである。

その理由を考えてみた。まず気が付いたのは、上記の文章が「will, if appropriate,」となっていることである。ISO や IEC の規定は、「shall」を使うのが一般的であり、「will」では義務にはならない。しかも、議事録に記録する部分は、「The fact that the question was asked shall be recorded」となっているので、質問をしたことと返事があったことは議事録に記載されるが、質問をしなかったことは、議事録に記載する必要はないのである。これが、ISO と IEC で実施されていない一因かもしれない。

また、ISO と IEC の場合、共通特許ガイドラインは ISO/IEC Directives Part 1 に掲載されている。これに対して JTC1 では、JTC1 Directives を作成・制定して、ISO/IEC Directives Part 1 の変更点を列記している。つまり、JTC1 の各委員会の参加者は、主として JTC1 Directives を読んでいて、ISO/IEC Directives Part 1 を読まないのではなかろうか。

1.15 特許声明書に特許情報を記載しないと

特許声明書の特許情報を記載する表の上部には、以下の英文がある。

- desired but not required for options 1 and 2

これは大変重要な意味をもつ文なのだが、日本人にとってこの英語は難解で辞書を引いても意味がとれないだろう。この部分の対訳は、「以下の表に記入することは、選択肢1と2については要望だが必須ではない」としている。つまり、“選択肢の1か2を選ぶ場合は、以下の欄に特許情報を記入して欲しいが、義務ではないので記入しなくてもよい”という意味である。このような寛容な要求になった理由を以下に説明する。

特許を1万件も所有している企業にとって、世界中の標準化団体の標準案を読んで、自社の特許データベースから関係しそうな特許を選び出し、それらの特許が各標準案に必須となるかを検討するのは容易な作業ではない。しかもお金と時間がかかる。もし必須の特許を書き忘れれば、後になってあの時に記載しなかったのだから、その特許は無償にしろと言われ、必須でない特許を記載すると、大企業の横暴で嫌がらせをした、と言われるかもしれない。したがって、このような大企業にとって、短期間での調査で特許声明書に必須の特許を誤りなく記入するのは、やりたくない作業なのである。中小企業の場合も、必須性を調べるのは容易ではないので、やりたくない作業であろう。このような特許権者の要望に応えたのが、上記の文章であると思われる。

つまり、ここに特許情報を記入しないということは、「もし標準案の実施に必要な必須特許を当社が所有していることが判明した場合には、それらの特許はすべて上記の選択肢（無償又は有償）で使用許諾する用意がある」という宣言をすることになる。ただし、すべての必須特許を無償で許諾することはありえないので、この場合は必ず有償になる。なお、特許情報を1件でも記入したときは、上記の“みなし申告制度”は無効になり、記入した特許だけが特許声明書の対象となるので、特許情報を記入するときは正確な特許調査と細心の注意が必要である。

また、上記のような“みなし申告制度”の結果、特許リストが空欄の特許声明書が多く提出されることになっている。その結果、標準化団体の特許データベースは、特許情報が空欄の特許データベースになり、特許データベースと言えない状況になりつつある。元々、製造業者は製品を製造するときに特許を調査する責任があるのだから、標準化団体の特許データベースに頼ろうとするのが間違いなのかもしれない。また、標準化団体の立場から見ると、各標準にどの位の特許が関係しているのかが分かればよいので、個々の特許番号までは必要ないのである。

1.16 申請中の特許の申告

共通特許ポリシーでは、公開された特許と申請中で公開前の特許も申告するように要請している。ところで、申請中で公開前の特許を申告して、問題はないのだろうか？ ここでは、標準化団体の立場からではなく、特許を申請中の企業の立場から考えてみる。

申請中の特許は、申請後一定期間が過ぎると公開される。公開されてしまえば、企業にとって機密ではなくなる。しかし、申請中の特許は、公開前であれば企業にとっては重要な機密である。なぜなら、その情報が漏れると他社が似たような特許を申請するかもしれないし、特許申請中の企業がどの分野の研究開発に注力しているのかも分かってしまうし、競争相手が公開情報としてしまうかもしれないのである。したがって、たとえ共通特許ポリシーで申請中の特許の情報を申告してくれと言われても、それが公開されるまでは、企業は機密として申告したくないのである。

では、そのような場合に、企業はどのようにして非公開の申請中の特許を申告すればよいのだろうか。幸いにも、共通特許声明書は、特許番号を書かなくても良いことになっている。そこで、これを利用して特許の情報を書かずに申告すればよいのである。もちろん、特許の申請状態、特許の申請番号、特許の表題などもまったく記入しないことをお勧めする。

1.17 包括特許声明書

包括特許声明書は、個々の標準案に対して、最終標準案が提出されるたびに特許を調査して個別の特許声明書を提出するのが面倒な企業・個人に対して、“default”という意味の宣言書として使

うための ITU 独自の特許声明書である。この声明書は ITU-T と ITU-R だけが採用している。いったんこの包括特許声明書を提出しておけば、個々の最終標準案が出るたびに個別の特許声明書を提出する必要はない。また、特定の最終標準案に対して包括特許声明書とは異なる実施許諾条件を宣言したいときは、個別の特許声明書を提出して、包括特許声明書の宣言を修正できるのである。ただし、「1.11 提出済みの特許声明書の実施条件の変更について」を参照されたい。

また、この包括特許声明書は今日現在で約 40 枚が ITU-T に提出されている。これは、比較的に少ない枚数であり、あまり好意的に受け入れられているとは思えない。その理由については、明確ではないが、以下が推測できる。企業によっては、特許を各事業部や兄弟会社の所有財産として分割して保有している場合がある。このような企業では、ある事業部が特許声明書を提出しようとする、その声明書にはどんな特許が含まれるのかを他の事業部や兄弟会社がチェックすることになる。つまり、特許番号を記入しない特許声明書や包括特許声明書は、他の事業部や兄弟会社にとっては決して承認できない声明書なのである。

1.18 標準に掲載する特許の注意書き

ITU 側の注意書きは、「この勧告の承認日において、ITU はこの勧告を実施する上で必要となるかもしれない、特許によって保護された知的財産の通知を受け[取っている／取っていない]。しかし、上記が最新情報を表すとは限らないことを実施者に警告し、ITU 特許情報データベースを調べるよう強く要請する。」となっていて、特許情報データベースを参照するように要請している。

それに対して、ISO と IEC では、「国際標準化機構(ISO) [及び／又は] 国際電気標準会議(IEC)は、この文書に準拠することは、（...細分箇条...）に記載されている（...主題...）に関する特許を使用することが必要になる、という主張がある事実注意到を喚起する。」として、特許の情報を個別に標準の序文に掲載することを要求している。

ISO と IEC の上記のやり方は、標準毎に特許情報を掲載するので、標準発行直前の忙しい時に個別の特許情報の印刷を要求している。それに対して、ITU は特許情報データベースを見ろとしていて、個別の特許情報の印刷を要しない。当然、ITU の実施方法の方が簡単である。

JTC1 の特許情報データベースが構築される前に、JTC1/SC27 情報セキュリティでは、事務局のドイツの DIN にあるサーバーに SC27 の特許情報データベースを構築して、SC27 の標準に「DIN のサーバーにある特許情報データベースを参照」と記載（以下を参照）したことがあった。

- In this respect, the statement of the holder of this patent right is registered with the ISO and IEC.
Information may be obtained from:
ISO/IEC JTC 1/SC 27 Standing Document 8 (SD8) "Patent Information"
Standing Document 8 (SD8) is publicly available at: <http://www.ni.din.de/sc27>

この件に関して、ISO の中央事務局の IPR 担当者に、「データベースを参照するような文章に変更しては」と提言したが、ISO の IPR 担当者は「ISO 規格のユーザの中には、インターネットでデータベースを見られない人もいるだろうから、紙に印刷した方が親切である」という回答であった。

1.19 特許情報データベースの登録タイミング

特許に関する注意書きを特許データベースに変更するには、問題点が一つある。それは、特許情報データベースにどの時点で記載されるか、という問題である。標準案が作成されている間に特許声明書が提出され、特許についての特段の問題もなく標準案が承認されて発行されたとする。この発行の時に、発行された標準に、「この標準に関係する特許については、特許情報データベースを参照してほしい」と書いたとすると、その標準に関係する特許は、標準の発行時点で特許情報データベースに記載されていなければならない。

しかし、ISO の特許情報データベースが構築された当初は、これまでに受領していた紙ベースの

大量の特許情報を特許情報データベースに掲載しなければならず、そのために約1年以上を要していた。このため、特許情報の提出が多いISO/IEC JTC1 (ISOとIECが共同で設立したJoint Technical Committee 1で、情報技術分野を担当)では、ISOとは切り離してJTC1だけの特許情報データベースを構築して対応した。ISO、IEC及びJTC1のそれぞれの特許情報データベースは、ISO-CS (ISOの中央事務局)とIEC-CS (IECの中央事務局)とISO-ITTF (Information Technology Task Force) といって、ISOの中央事務局にあるJTC1担当の部門)のそれぞれが担当者を決めて入力している。しかし、ITTFの人数はそれほど多くはないようだし、データベースに入力すべき特許情報が多いので、常に遅れ気味である。(ITUにおけるデータベース登録のタイミングについては、1.3 特許情報データベース参照)

1.20 パテントプール

JTC1/SC29で開発した動画圧縮に関する標準MPEGには多数の特許が含まれていて、それらを所有する企業がそれぞれの特許の実施料を徴収すると、製品原価の数倍の特許使用料が発生することになる。それを防ぐために考案されたのが、MPEG-LA (MPEG特許のライセンス代理店)によるパテントプール制度である。ただし、パテントプール制度は、ITU/ISO/IEC 共通特許ポリシーの範囲ではない。

このMPEGのパテントプールに関与した三菱電機に加藤恒氏の著書「パテントプール概説」(発明協会の出版)によれば、パテントプールは独占禁止法と深くかかわっており、パテントプールを開設する場合は常に公正取引委員会の審査を受ける必要があるとされている。

また、MPEG-LAで必須と認定した特許件数は膨大な数で、MPEG2 Videoの場合で実に863件となっている。このように多数の必須特許がある理由は、(1) 特許の請求事項ごとに1件と数えていることと、(2) 世界各国に同様の特許が申請されている(注)ので、それらを別々に数えている、という理由である。このように膨大な数の必須特許がありながら、特許の実施料はパテントプール制度のおかげで、デコーダ/エンコーダ1台当たり\$2.50となり、DVDディスク1枚当たり\$0.03となっている。

MPEG-LAの成功例に端を発して、その後いくつかのパテントプールが設立されている。日本でも、デジタルテレビ放送に関するARIB(電波産業会)標準に含まれる各社の特許を扱う目的で、アルダージ株式会社をライセンス機関としてパテントプールが設立されている。

(注): ETSI (欧州通信標準化機構)では、上記のような世界各国への同様の特許申請をFamily Patent (家族特許?)と称している。ETSIの最新版の特許声明書には、中心になる特許と、それに対応する各国でのファミリー特許を記入する欄がある。(附属書L—ETSI IPR Policy 参照)

2. ITU/ISO/IEC 共通特許ポリシーで解決できない問題

2.1 第三者の特許

共通特許ポリシーでは、標準化の作業に参加した企業・個人は特許声明書を提出する義務を負うことになっているが、標準化作業に参加していない企業・個人には特許声明書を提出する義務はない。この点で、標準の出版が遅れることがある。それは、標準化に参加した企業か個人が第三者の特許の存在を通知した場合で、ISOやIECの知財担当者はその特許の所有者にコンタクトして、特許声明書を提出するように依頼するからである。しかし、特許所有者にとっては特許声明書を提出する義務がないのと、提出した結果得をする部分が見えないので、提出を拒否されるか提出が大幅に遅れることがよくある。その間、標準案の最終原案は凍結されたままになっている。これに関しては、解決策がない。

2.2 特許声明書の第3項の選択

特許声明書の選択肢の第3項は、必須特許をライセンスしないという選択肢である。いったんこの選択肢を選んだ特許声明書が提出されると、標準化のプロセスは凍結されてしまう。それを解決するには、(1) 特許所有者に対して、第1項（無償）か、第2項（妥当なライセンス料率）を選び直してもらうか、(2) 特許の必須性を調べて必須でないことを確認するか、(3) 第3項を選択した特許を回避するように標準案を修正するか、などを検討することになる。しかし、第3項を選んだ特許所有者は、必ずしも正直であるとは限らない。それを見破るために、第3項を選択した特許所有者には、別途3点の証拠書類を要求している。この3点の証拠書類であるが、必ずしも英語で書かれているとは限らない。また、それを元に必須性を調べるとなると、誰が調べるのかが問題となる。標準化団体は、特許声明書の中身の正確さや特許の有効性などについて関知しないとなっているからである。そこで通常は、その標準案を作成している委員会の中でボランティアを募って、その分野の専門家が必須性を検討しているのが実情である。JTC1/SC29では、MPEG標準に関して第3項を選択した特許声明書が提出されたことがあったという。この件に関しては、MPEGの専門家が集まってその特許を調査したところ、その特許は必須でないという結論になり、標準案を発行したという。しかし、その第3項を選択した特許声明書が取り下げられたかは不明である。

また、だいぶ以前の話であるが、ITU-Tではある通信分野の標準化に対してA社とB社の2社の提案があり、どちらを採用するかを選択することになった。委員会で議論の結果、性能の良いA社の提案を採用しようということになった。これに対して、B社はA社の提案に対しても必須特許を所有していて、A社の提案を採用するのならB社は特許を実施許諾しないとして、第3項を選択する特許声明書を提出した。その結果、どうなったのかは不明であるが、このような行為はいわば脅迫行為である。

つまり、第3項を選択した特許声明書は、いろいろな使い道がある。脅迫、おとり、人質に使えるのである。しかも罰則はない。

2.3 米国の潜水艦特許

1995年まで米国の特許法には通称「潜水艦特許」という特許申請があった。潜水艦特許と言われるのは、その存在が長い期間にわたって公には知られずに（水中に潜ったまま、公開されない）、突然表に現われて（特許が確定して出版される）、関係する市場・業界を驚かせるものである。潜水艦特許の最長記録は、申請してから40年後に成立したものがある。その場合でも、旧米国特許法による特許の有効期限は、特許成立後17年間となる。したがって、1995年以前に申請された特許は、潜水艦特許となって突然現れて高額の特許侵害賠償金を請求して、標準のユーザを驚かせることが当分の間はある。これに関しては、特許声明書や特許ポリシーで防ぐことはできない。

2.4 パテントトロール

倒産した企業やある業種から撤退した企業から特許を買い集める会社がある。そのような会社は、買い集めた特許で、製品のメーカーを特許侵害で訴える。このような行為は、パテントトロールといわれている。パテントトロールを行っている会社は、一般的に製品を製造していないので、クロスライセンスによって特許実施料を値切ることはできない。また、パテントトロールの会社は、標準化の作業に参加していないので、標準案の作成段階で特許声明書を提出することはない。

2.5 譲渡された特許

特許は他の企業に譲渡されることがある。しかし、特許を譲渡した企業が特許声明書を提出してあっても、特許を購入した企業は、以前の所有者が提出した特許声明書のとおりの特許を使用許諾する義務はないといわれている。しかも、共通特許ポリシーには特許の譲渡についての規定はなく、特許声明書には「この文書は契約書ではない」と書かれているので、声明書に記述された特許の実

施承諾の条件が特許の譲渡先に及ぶことはないとされている。

この件については、米国で N-Data 社が National Semiconductor 社から特許の譲渡を受けたが、National Semiconductor 社が特許の使用料を 1000 ドルの一時金を徴収していたのに、N-Data 社が再び特許の使用料 1500 ドル(?)を一時金で徴収しようとして、米国の公正取引委員会 (FTC) から訴追を受けている。この訴追がどういう理由に基づいているのか不明であるが、標準化団体は (特に ANSI は) 成り行きに注目している。

この件に関して、ETSI (欧州通信標準化機構) の IPR Policy は以下のように、必須特許の譲渡に関して譲渡先に「ETSI に特許声明書を提出してある」ことを告げるように要請している。

- 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.

さらに、EPCglobal の IPR 規定では、必須特許の譲渡に関して以下のように「譲渡にはライセンス義務が付帯していることを譲渡契約書に記載しなければならない」と規定している。

- 3.6 Transfer of Necessary Claims to Third Parties.
Any transfer by Participant to a third party of a patent having Necessary Claims shall include, in the transfer agreement, a provision that the transfer is subject to existing obligations of the transferor.

2.6 Reasonable でない RAND と Ex-Ante

第 3 世代の携帯電話では、RAND の声明書を提出しておきながら、蓋を開けてみたら高額の特許実施料を徴収したとして有名になった企業がある。この事件から「合理的とはいくらなのか」という議論が盛んになっている。さらに、特許実施料の最大値を標準化団体で合法的に決める手段はないのかも議論されている。

その手段として浮かび上がったのが、標準化団体 VITA (米国の VME bus の標準化組織) による Ex-Ante (事前予告) 方式である。Ex-Ante 方式とは、特許声明書を提出する際に、ボランティア (自発的) に特許ライセンス料の最大値を予告する方式である。これによって、標準が制定されて各社が生産をはじめる頃になって、Reasonable のはずだったライセンス料が予想外に高額だったという事態が回避できるはず、ということである。

ここで、標準化団体の中で特許ライセンス料の相談が行われるのは、談合として独占禁止法に触れるのでは、という疑問がわく。しかし、Ex-Ante 方式は独占禁止法に触れないように、Ex-Ante ライセンス料を決める際に他社と相談しないこと、Ex-Ante の宣言は義務ではなくボランティア (自発的) で任意であること、標準化団体は Ex-Ante ライセンス料の記入欄を“記入は任意”として用意するだけで Ex-Ante 宣言を必須義務としないこと、などを考慮している。その結果、VITA の Ex-Ante 方式は、市場の製品価格を押し上げるものではなく、競争原理を阻害していない、として米国司法省 (DoJ) から“独占禁止法の観点から違法性はない”という Business Letter をもらうことができた。その後、米国の IEEE や欧州の ETSI (欧州通信標準化機構) も Ex-Ante 方式を採用しようとする動きがある。

ここで、Ex-Ante の有効性について考察してみる。Ex-Ante とは、有償の特許のライセンスの料率を特許の所有者が、他社と相談なしに独断でボランティアに事前予告することである。このやり方は、だいぶ前になるが ANSI で採用していたが、各社が将来に起こるかもしれない異常事態を考慮して、ありえない程の高額のライセンス料の最大値を記入したので、予告の意味がなくなったとして廃止された経緯がある。

もしも、標準に採用しようとする技術が、必須特許を持つ A 社と B 社の 2 社だけで、A 社対 B 社の競争状態になったとする。このような場合は、周囲の同業者を自分のグループに引き入れるために、A 社も B 社もライセンス料を無償にするはずである。しかも、主な標準化団体の特許声明書に

は無償のチェックボックスがすでに用意されている。したがって、ライセンス料率を 0.1 %～1.0 % のような数値を示しても、同業者は無償の方に乗るはずである。

それに対して、必須特許の多い MPEG のような場合を考えてみる。この場合、必須特許の所有者が多数ある中で、ある 1 社が Ex-Ante でライセンス料を 0.1%に宣言したとしても、必須特許を所有している企業が多いので、Ex-Ante を宣言した 1 社の技術だけを採用して、他社の特許を回避することはできないはずである。つまり、このように多数の特許を複数の企業が所有する場合は、少数の企業が Ex-Ante を宣言するよりも、必須特許を所有している企業すべてが無償を宣言するか、パテントプールを設定する以外に規格を普及させる手段はないのかもしれない。

しかも、第 3 世代の携帯電話で高額のライセンス料を狙ったような企業は、標準化団体が Ex-Ante 方式の特許声明書を用意したからといって、格安のライセンス料を自発的に事前予告するとは思えないのである。その理由は、Ex-Ante の宣言はボランティアなので、Ex-Ante の宣言をしなくても叱責や非難されることはない。Ex-Ante がうまく機能するかは、しばらく様子を見る必要があるだろう。

3. ITU/ISO/IEC 以外の標準化団体の IPR 規定

3.1 Ecma International の IPR 規定

日本の JIS 規格を Ecma International (以下、Ecma と略す。)に持ち込んで英訳して Ecma 規格にして、それを ISO や JTC1 に Fast Track で持ち込む、というプロセスをよく聞く。そこで、Ecma の IPR 規定はどうなっているのだろうか。Ecma の IPR 規定と特許声明書を**附属書 D**に添付する。

その規定によると、Ecma では標準案が最終段階に達すると、メンバーの企業から特許声明書を集めることになっている。その特許声明書は、**附属書 D**に示すように、RAND の条件でライセンスすることを約束するものであるが、特許の情報を記載する箇所がない。つまり、必須の特許を所有しているメンバー企業は、特許の情報を記載しないで、RAND のライセンスを宣言するのである。

さらに、以下のガイダンスの文章にあるように、特許声明書の提出は義務ではない。もしもメンバー企業が期限内に特許声明書を提出しない場合は、そのメンバー企業は RAND でライセンスするとみなされるのである。つまり、毎回到特許声明書を提出しなくても、特許を所有しているメンバー企業は、RAND でライセンスするとみなされるだけで、罰則はないのである。ということは、現状の特許ポリシーでは、特許を調べなくても良いことになる。したがって、Ecma には特許情報データベースが存在しない。

- Submission of a patent declaration is not mandatory for Ecma members because the members of the Association are assumed to agree with the Ecma Code of Conduct in patent matters.

Ecma の議事録によると、2007 年 11 月に ITU/ISO/IEC 共通特許声明書と酷似した (新) Ecma 特許声明書案を作成してみたが、(1) 特許ポリシーを変更せずに特許声明書だけを変更するといろいろと弊害が出る、(2) 標準案が最終段階になる度に特許の検索をしなければならなくなる、などの理由で新特許声明書案は採用されていない。

3.2 フォーラムの IPR 規定とライセンス相手の範囲

ITU/ISO/IEC 共通特許声明書では、特許の実施許諾をする相手の範囲を次のように定めている。

- 特許権者は、人数に制約なくすべての申請者に対し、世界中に 特許実施許諾を認める用意がある。

上記は、実施許諾の相手が世界中の誰でも実施許諾することを意味する。それに対して、フォーラムやコンソーシアム等の IPR 規定には、以下のようなものがある。以下は、Trusted Computing

Group (TCG)の例である。その規定は、TCGの会員以外に対してはライセンスしなくてもよいことになっている。このような規定をもつフォーラム・コンソーシアムは多い。

- Member and its Affiliates hereby agree to grant to other Members and their Affiliates, under reasonable terms and conditions that are demonstrably free of any unfair discrimination, a nonexclusive, nontransferable, worldwide license under its Necessary Claims to such Specification to allow such other Members and their Affiliates

このような規定をもっている組織に対して、ITU-Tでは連携することを規制しようとする動きがある。しかし、ISOの中央事務局の知財担当者は、上記の規定に問題はないとしている。その理由は、TCGの規格をISO又はIECが採用する場合には、TCGの会員から共通特許声明書を提出させるので、その結果TCGの規定は無効になり、共通特許ポリシーが採用されることになるからとしている。

3.3 IETF の IPR ポリシー

Internetの標準を作成する団体であるIETF (Internet Engineering Task Force) のIPRポリシーの抜粋を**附属書E** に掲載する。IETFの設立時は無償のライセンスを要求する団体だったと考えていたが、古いIPRポリシーを遡ってみたがそのようなIPRポリシーは見つからなかった。IETFのIPRポリシーの特徴は、包括特許声明書 (blanket statement) の場合は、無償のものしか認めないことになっている。また、個別の特許声明書には、無償と合理的な条件 (有償) との選択肢があるが、必ず特許番号を記載することになっている。

3.4 W3C の IPR ポリシー

W3CのIPRポリシーを**附属書F**に示す。W3Cは、World Wide Web Consortiumの略で、Web関係の規格やXMLの規格を作成している有名な団体である。ここのIPRポリシーの特徴は、規格に含まれる特許は原則としてすべて無償になることである。ただし、この団体に参加するメンバーのすべての必須特許が自動的に無償になるわけではなく、“無償ライセンス拒否宣言” 制度を設けている。この“無償ライセンス拒否宣言” の取り扱いプロセスを以下に示す。

W3Cでの“無償ライセンス拒否宣言” 制度は、IPRポリシーの第4章： Exclusion from W3C RF Licensing Requirementsに記載されている。それを要約すると、Working Draft が公開されてから一定期間内に“無償ライセンス拒否宣言” を提出しなければならない。提出期間内に“無償ライセンス拒否宣言” を提出しそこなうと、必須特許は自動的に無償となるので、注意が必要である。また、“無償ライセンス拒否宣言” を提出したからといって、保有特許が“有償ライセンス” が承認されたわけではないことに注意が必要である。

以下に、Working Draftの種類と、“無償ライセンス拒否宣言” の関係について説明する。

(1) First Published Working Draft (第1回草案)

第1回草案から最終草案まで、各草案ごとにWeb上で適宜公開され、コメントを募集して改訂作業 が行われる。

(2) Latest Published Working Draft (最終草案)

最終草案の審議が尽くされたと判断した場合には、議決して勧告候補となる。

(3) Candidate Recommendation (勧告候補) ・ Last Call Working Draft (最終照会草案)

この勧告候補は最終照会草案としてWeb公開され、その日から60日以内に“無償ライセンス拒否の宣言” が提出できる。

“無償ライセンス拒否の宣言” が提出された場合は、その対象特許を外すように修正が図られ、再び60日間の照会がかけられ、“無償ライセンス拒否の宣言” が出てこなくなるまで繰り返される。

“無償ライセンス拒否の宣言”が出てこなくなれば最終勧告となる。

(4) Final Recommendation (最終勧告)

上記のプロセスでは、各草案ごとに“無償ライセンス拒否の宣言”を提出しなければならないので、自社特許が紛れ込んでいないかどうかを慎重に注視する稼働はかかるが、各草案の最新内容を知ることができるというメリットもある。

ここで注意すべき点は、W3Cは基本的に特許と規格の抵触関係については関与しないとしているが、現実には特許と規格案の抵触関係を草案策定グループが確認・評価していること、及び修正案を作成することにより、草案策定グループが黙示的に抵触性が回避されたとする“非抵触のお墨付き”を与えてしまうこと、という基本ポリシーに反する行動が取られていることである。

さらに、W3Cのような原則無償の団体は、脱退や新規参加の場合の特許申告義務のタイミングを厳しく定めている。その理由は、必須の特許を見つけながら、無償になるのを避けるために、Working Draft段階で加入や脱退をしようとするメンバーがいるからである。このような、中途加入と中途脱退のタイミングの規定をOpt-in/Opt-out 規定と称している。途中で加入・脱退する企業にとっては、上記の規定が特許に関して不利になる場合があるので加入・脱退のタイミングの規定に注意する必要がある。

3.5 EPCglobal の IPR ポリシー

EPCglobalのIPRポリシーを**附属書G**に示す。EPCglobalは、RFIDのタグ関係の規格を作成している団体である。このEPCglobalのタグは、1箱の段ボールの中にたくさんのRFIDが含まれていても外から同時に全部を読み取ることができるもので、米国の流通業界の注目を集めている。このIPRポリシーの特徴は、規格に含まれる特許は原則としてすべて無償になることである。ただし、この団体に参加するメンバーが必須特許を無償でライセンスすることを拒否すると通告すれば、例外的に無償ライセンスを避けることができる。この通告のプロセスを以下に示す。

EPCglobalでの無償ライセンス拒否の通告の手続きは、IPRポリシーの3.3 Limited Agreement to Discloseに記載されている。それを要約すると以下になる。無償ライセンスをしない参加者は、一定期間の間にそのことを通告しなければならない。つまり、仕様書 (Specification) がWorking Groupで承認されると、最終承認される予定日の60日前までに最終案内が管理者 (Trustee) からWorking Groupのメンバーに送付される。それを受けて無償ライセンスをしない参加者は、最終承認日から30日以前に無償ライセンス拒否の通告書を管理者 (Trustee) に提出する。無償ライセンス拒否の通告書には、関係する特許の請求範囲や審議中の仕様書の影響を受ける部分を指摘しなければならない。

もしも管理者 (Trustee) が無償ライセンス拒否の通告書を受け取った場合は、管理者 (Trustee) は次の三択から以後の手続きを選ぶことになる。(1) 通告書にある特許請求範囲を避けるために、仕様書原案をWorking Groupに差し戻す、(2) 合理的で非差別的なライセンス条件 (3.4 Reasonable and Non-Discriminatory Licensing) でライセンスする方向で最終承認へと進む、(3) 仕様書の最終承認を断念して廃案とする。無償ライセンス拒否の通告書を提出期間内に提出しそこなうと、必須特許の無償ライセンスに同意したことになる。

3.6 VITA の IPR ポリシー

VITAのIPRポリシーを**附属書H**に示す。VITAは、VMEbusの規格を作成している米国の標準化団体である。VITAは、Rambus事件の舞台となったことで有名になった。また、VITAのIPRポリシーはEx-Ante方式を含んでおり、最初に米国司法省 (DoJ) が承認したことでも有名である。**附属書 I**に米国司法省の見解を示す。

このIPRポリシーの特徴は、ANSIの傘下であるにもかかわらず、ANSIのIPRポリシーのRF (無償) とRAND (合理的な有償) とライセンス拒否の三択方式ではなく、RANDだけしかなくライセ

ンス料をEx-Anteの記入欄で表明するようになっている。また、特許声明書の提出のタイミングが複雑（60日と30日と15日とがある）で、複数回にわたって申告する必要がある。

別件ではあるが、VITAのような米国のフォーラム・コンソーシアムの会則・規約には、Affiliateという言葉がよく見られる。しかし、日本の標準化団体やITU/ISO/IECの会則・規約・IPRポリシーには見かけない言葉である。その理由は、デジュール系の場合は、1国1票の投票規定があり、国のAffiliate（属国）が標準化の世界には存在しないからである。それに対して、デファクト系の世界では、1社1票が投票の原則となっているので、子会社やファミリー企業がこぞって参加することがあり得る。このような場合の投票権と特許声明の責任者がどうなるのかが問題となる。一般的に米国の標準化団体では、子会社やファミリー企業の投票権や特許声明書の責任者を、資本関係で規定している。それが、Affiliate 規定である。VITAの規定も他の米国の標準化団体と同様で、以下のように50%超の資本関係で規定している。この規定を日本の標準化団体とそれらに参加している企業にあてはめると、いわゆるファミリー企業になっている通信事業者、大手の電気機器メーカーなどがAffiliate 規定に引っ掛かるのではないだろうか。米国の企業から見ると、日本の標準化組織の投票権のルールやファミリー企業の特許声明書とライセンス契約の責任者は、異様なものに見えるのである。

- For purposes of this definition, with respect to a business entity, control means direct or indirect beneficial ownership of or the right to exercise (i) greater than fifty percent (50%) of the voting stock or equity in an entity; or (ii) greater than fifty percent (50%) of the ownership interest representing the right to make the decisions for the subject entity in the event that there is no voting stock or equity.

余談ではあるが、VITAの特許声明書にある「VSO Policies and Procedures」のPoliciesはPolicyの複数形なのである。ちなみに、警察のPoliceは複数でもPoliceとつづる。

3.7 IEEE の IPR ポリシー

IEEEのIPRポリシーもEx-Anteを含んでいる。附属書JにIEEEのIPRポリシー（会則の抜粋）と声明書（IEEEでは“保証の書簡 Letter of Assurance”という）を示す。それとともに、附属書KにIEEEの特許ポリシーに対する米国司法省の見解を示す。

IEEEの声明書は、他の標準化団体とはちょっと違っていて、次のようになっている。

特許権者のポジション

- 1： 必須の特許を所有している
 - a： 無償でライセンスする
オプション： ライセンス契約の見本
 - b： 有償でライセンスする
オプション： 有償の上限値（Ex-Ante）
オプション： ライセンス契約の見本
 - c： 特許をenforceしない（無償で開放する？）
 - d： 特許をライセンスしない
- 2： 必須特許を探してみたが、所有していない／見つからない

保証の範囲

- 1： 以下に示す特許
 - 特許の詳細情報を記入する
- 2： 特許情報を示さない： 標準に対して必須となる特許全てを対象とする

上記でどこが他と違うかというと、必須特許がある場合が四者択一になっていることと、“必須特許を所有していない／見つからない”という選択肢があることである。この“必須特許を所有していない”とか“必須特許が見つからない”という声明書を提出するのは、とても勇気が要ることである。なぜなら、一般的に“必須特許を所有していない／見つからない”場合は、声明書の提出は不要になっているからであり、もしもこれを選択した後で必須特許が見つかったら大きな恥をかくことになるからである。

3.8 ETSI の IPR ポリシー

ETSI（欧州通信標準化機構）のIPRポリシーを**附属書L**に示す。ETSIは、ITU-T/ITU-Rに対応する欧州の標準化団体で、ISOに対応するCEN、IECに対応するCENELECと同列である。ETSIは、ITU-Tと同様にIPRポリシーの議論に積極的である。VITAがEx-Anteを導入したのを受けて、ETSIでも早々にEx-Anteの導入を検討している。

ETSIの特許声明書はITU/ISO/IEC共通特許声明書とは似ていない。つまり、RF（無償）がなく、RAND（合理的な有償）とライセンス拒否の二者択一になっている。また、第三者の特許も同じ特許声明書で申告するようになっている。さらにReciprocityも導入されている。ただし、2008年11月版には、Ex-Ante方式が記載されていない。

ETSIのホームページによると、Ex-AnteはETSIのIPRポリシーとは別物になっている。それによると、ETSIは特許声明書とは別に、Ex-Ante声明のリストのページを用意しており、もしEx-Anteの申告があったら、そのページに掲載することになっている。ただし、2009年2月現在はEx-Anteを申告した企業はないらしく、リストは空白になっている。（**附属書L**の最後のページ参照）

ISO/IEC Directives — Part 1: Procedures, 2004

2.14 Reference to patented items

2.14.1 If, in exceptional situations, technical reasons justify such a step, there is no objection in principle to preparing an International Standard in terms which include the use of items covered by patent rights – defined as patents, utility models and other statutory rights based on inventions, including any published applications for any of the foregoing – even if the terms of the standard are such that there are no alternative means of compliance. The rules given below and in the ISO/IEC Directives, Part 2, 2004, Annex F shall be applied.

2.14.2 If technical reasons justify the preparation of a document in terms which include the use of items covered by patent rights, the following procedures shall be complied with.

a) The originator of a proposal for a document shall draw the attention of the committee to any patent rights of which the originator is aware and considers to cover any item of the proposal. Any party involved in the preparation of a document shall draw the attention of the committee to any patent rights of which it becomes aware during any stage in the development of the document.

b) If the proposal is accepted on technical grounds, the originator shall ask any holder of such identified patent rights for a statement that the holder would be willing to negotiate worldwide licences under his rights with applicants throughout the world on reasonable and non-discriminatory terms and conditions. Such negotiations are left to the parties concerned and are performed outside ISO and/or IEC. A record of the right holder's statement shall be placed in the registry of the ISO Central Secretariat or IEC Central Office as appropriate, and shall be referred to in the introduction to the relevant document [see ISO/IEC Directives, Part 2, 2004, F.3]. If the right holder does not provide such a statement, the committee concerned shall not proceed with inclusion of an item covered by a patent right in the document without authorization from ISO Council or IEC Council Board as appropriate.

c) A document shall not be published until the statements of the holders of all identified patent rights have been received, unless the council board concerned gives authorization.

2.14.3 Should it be revealed after publication of a document that licences under patent rights, which appear to cover items included in the document, cannot be obtained under reasonable and non-discriminatory terms and conditions, the document shall be referred back to the relevant committee for further consideration.

附属書 A — ISO/IEC 特許取扱規定 2004 年版（続き）

ISO/IEC 専門業務用指針第1部 2004年版 （翻訳はJSAによる）

2.14 特許対象項目の参照 (Reference to patented items)

2.14.1 例外的ではあるが、技術上の理由からその様な参照が妥当であるなら、特許権 — 特許、実用新案、その他の発明に基づく制定法上の権利として定義され、上記のいずれかに関する開示された出願を含む — の対象となる項目の使用を含む条件で国際規格を作成することを、たとえ規格での要求として他に適用しうる代替手段がないような場合でも、原則として妨げるものではない。この場合は、ISO/IEC専門業務用指針2004年版第2部の附属書Fで定めている規則及び次の項目を適用する。

2.14.2 技術的な理由から、明らかに特許権が適用される項目の使用を含む文書を作成することが妥当である場合には、次の手順に従わなければならない。

a) 提案文書の起案者は、自らが周知し、提案の項目に適用されると考える特許権について、委員会の注意を喚起しなければならない。文書の作成に携わる関係者は、文書の作成段階において気づいた特許権について、委員会の注意を喚起しなければならない。

b) 技術的見地から提案が承認された場合、起案者は、このように確認された特許権の所有者に対して、所有者が合理的かつ非差別的条件に基づいて、全世界の申請者と、所有者の権利に基づく世界的ライセンスの交渉を進んで行うとする声明書を求めなければならない。このような交渉は関係者に任せられ、ISO及び／又はIECの外部で行われる。特許権の所有者の声明書は、適宜、ISO中央事務局又はIEC中央事務局に登録され、関連規格文書の序文で引用される。(ISO/IEC専門業務用指針2004年版第2部、F.3参照)。権利の保有者がこのような声明を行わない場合、当該委員会は、ISO理事会又はIEC評議会の承認なく、特許権の対象項目を規格文書に含めてはならない。

c) 理事会が承認を与えない限り、確定された特許権所有者の許諾を受領するまで、文書を発行してはならない。

2.14.3 ある文書の発行後に、その文書に記載されている項目に適用されと思われる特許権に基づくライセンスが、合理的かつ非差別的条件に基づいて獲得できないことが判明した場合、その文書は当該委員会に差し戻されて、検討される。

ISO/IEC Directives, Part 2, 2004

Annex F
(normative)
Patent rights

F.1 All drafts submitted for comment shall include on the cover page the following text:

“Recipients of this draft are invited to submit, with their comments, notification of any relevant patent rights of which they are aware and to provide supporting documentation.”

F.2 A published document for which no patent rights are identified during the preparation thereof, shall contain the following notice in the foreword:

“Attention is drawn to the possibility that some of the elements of this document may be the subject of patent rights. ISO [and/or] IEC shall not be held responsible for identifying any or all such patent rights.”

F.3 A published document for which patent rights have been identified during the preparation thereof, shall include the following notice in the introduction:

“The International Organization for Standardization (ISO) [and/or] International Electrotechnical Commission (IEC) draws attention to the fact that it is claimed that compliance with this document may involve the use of a patent concerning (...subject matter...) given in (...subclause...).

ISO [and/or] IEC take[s] no position concerning the evidence, validity and scope of this patent right.

The holder of this patent right has assured the ISO [and/or] IEC that he/she is willing to negotiate licences under reasonable and non-discriminatory terms and conditions with applicants throughout the world. In this respect, the statement of the holder of this patent right is registered with ISO [and/or] IEC. Information may be obtained from:

... name of holder of patent right ...

... address ...

Attention is drawn to the possibility that some of the elements of this document may be the subject of patent rights other than those identified above. ISO [and/or] IEC shall not be held responsible for identifying any or all such patent rights.”

ISO/IEC 専門業務用指針第2部—2004年版（翻訳はJSAによる）

附属書F
(規定)
特許権

F.1 コメントのためのすべての原案には、その表紙に次の文章を記載する。:

"この原案の受領者が周知している関連特許権があれば、コメントを付けて通告書を提出されるとともに、関係書類を提供されるよう求める。"

F.2 作成段階において特許権が確認されなかった発行文書には、次の注意書きを記載する。

“この文書の一部の要素は、特許権の対象となる可能性があることに注意が必要である。ISO [及び／又は] IECは、このような特許権の一部又は全部を特定する責任を負うものではない。”

F.3 作成中に特許権が確認された発行文書は、その序文に次の注意書きを記載する。:

“国際標準化機構(ISO) [及び／又は]国際電気標準会議(IEC)は、この文書に準拠することは、(...項番号...)に示されている(...主題...)に関する特許の使用を要することがある点に注意を喚起する。

ISO [及び／又は] IECは、この特許権の証拠、有効性及び適用範囲について関知するものではない。

この特許権の保有者は、合理的で差別のない条件で、世界中の申請者と使用許諾について交渉する用意のあることをISO [及び／又は] IECに確約している。これに関して、この特許権の保有者の声明は、ISO [及び／又は] IECに記録されている。情報は、下記から得られる。

[...特許権保有者の氏名...]

[...住所...]

この文書の一部の要素は、上記で確認できた以外にも特許権の対象となる可能性があることに注意が必要である。ISO (及び／又は) IECは、このような特許権の一部又は全部を特定する責任を負うものではない。”

附属書 B – ITU-T 特許声明書 JULY 2004

Patent Statement and Licensing Declaration

This declaration does not represent an implied license grant

Please return to: Director
Telecommunication Standardization Bureau
International Telecommunication Union

Place des Nations
CH-1211 Geneva 20, Switzerland
Fax: +41 22 730 5853

<u>Patent Holder/Organization:</u>	
Legal Name	_____
<u>Contact for license application:</u>	
Name & Department	_____
Address	_____ _____ _____
Tel.	_____
Fax	_____
E-mail	_____
URL (optional)	_____
<u>ITU-T Recommendation:</u>	
Number	_____
Title	_____
<u>Licensing declaration</u>	
The Patent Holder believes to hold granted patents and/or pending applications, whose use would be required to implement the above ITU-T Recommendation and hereby declares, in accordance with the Statement on ITU-T Patent Policy (see ITU-T website), that (check one box only).	
<input type="checkbox"/>	<p>1 The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation – a <u>free</u> license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and under other reasonable terms and conditions to make, use and sell implementations of the above ITU-T Recommendation.</p> <p>Negotiations are left to the parties concerned and are performed outside the ITU-T.</p> <p><i>Also mark here _____ if the Patent Holder reserves the right to license on reasonable terms and conditions (but not for free) to applicants who are only willing to license their patent claims, whose use would be required to implement the above ITU-T Recommendation, on reasonable terms and conditions (but not for free).</i></p>
<input type="checkbox"/>	<p>2 The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation – a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to make, use and sell implementations of the above ITU-T Recommendation.</p> <p>Negotiations are left to the parties concerned and are performed outside the ITU-T.</p>
<input type="checkbox"/>	<p>3 The Patent Holder is unwilling to grant licenses according to the provisions of either 1 or 2 above. In this case, the following information must be provided as part of this declaration:</p> <ul style="list-style-type: none">• patent registration/application number;• an indication of which portions of the Recommendation are affected;• a description of the patent claims covering the Recommendation.

附属書 B – ITU-T 特許声明書 JULY 2004 (続き)

Free: The word “free” does not mean that the Patent Holder is waiving all of its rights with respect to the essential patent. Rather, “free” refers to the issue of monetary compensation; *i.e.*, that the Patent Holder will not seek any monetary compensation as part of the licensing arrangement (whether such compensation is called a royalty, a one-time licensing fee, etc.). However, while the Patent Holder in this situation is committing to not charging any monetary amount, the Patent Holder is still entitled to require that the implementer of the ITU-T Recommendation sign a license agreement that contains other reasonable terms and conditions such as those relating to governing law, field of use, reciprocity, warranties, etc.

Reciprocity: As used herein, the word “reciprocity” means that the Patent Holder shall only be required to license any prospective licensee if such prospective licensee will commit to license its essential patent(s) or essential patent claim(s) for implementation of the same ITU-T Recommendation for free or under reasonable terms and conditions.

Signature

Organization _____

Name of authorized person _____

Title of authorized person _____

Signature _____

Place, Date _____

FORM: 10 JULY 2004

Patent Information (desired but not required)			
No.	Registration Number/ Country	Title/ Inventor	Status [granted/ pending]
1			
2			
3			
4			
5			
6			

ITU
International Telecommunication Union
Telecommunication Standardization Sector



ISO
International Organization for Standardization



IEC
International Electrotechnical Commission



Patent Statement and Licensing Declaration

(One or more per ITU-T Recommendation | ISO/IEC International Standard)

This declaration does not represent an implied license grant

Please return to:

Director
Telecommunication Standardization Bureau
International Telecommunication Union

Place des Nations
CH-1211 Geneva 20,
Switzerland
Fax: +41 22 730 5853

Secretary General
International Organization for Standardization
1 rue de Varembe
CH-1211 Geneva 20
Switzerland
Fax: +41 22 734 1079

Patent Holder/Organization:

Legal Name _____

Contact for license application:

Name & Department _____

Address _____

Tel. _____

Fax _____

E-mail _____

ITU-T Recommendation | ISO/IEC International Standard:

Number _____

Title _____

Licensing declaration

The Patent Holder believes to hold granted patents and/or pending applications, whose use would be required to implement the above ITU-T Recommendation | ISO/IEC International Standard and hereby declares, in accordance with the Statement on ITU-T Patent Policy (see ITU-T web site) and the ISO/IEC Patent Policy (JTC 1 Directives), that (check one box only).



1. The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation | ISO/IEC International Standard – a free license to an unrestricted number of applicants on a worldwide, non-discriminatory basis to manufacture, use and/or sell implementations of the above ITU-T Recommendation | ISO/IEC International Standard.



2. The Patent Holder is prepared to grant – on the basis of reciprocity for the above ITU-T Recommendation | ISO/IEC International Standard – a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to manufacture, use and/or sell implementations of the above ITU-T Recommendation | ISO/IEC International Standard. Such negotiations are left to the parties concerned and are performed outside the ITU-T | ISO/IEC.



3. The Patent Holder is unwilling to grant licenses according to the provisions of either 1 or 2 above. In this case, the following information must be provided as part of this declaration:

- patent registration/application number;
- an indication of which portions of the ITU-T Recommendation | ISO/IEC International Standard are affected.
- a description of the patent claims covering the ITU-T Recommendation | ISO/IEC International Standard;

Signature

Organization _____

Name of authorized person _____

Title of authorized person _____

Signature _____

Place, Date _____

附属書 C — ITU-T/JTC1 共用特許声明書 October 2001（続き）

Patent Information (desired but not required)			
No.	Registration Number/ Country	Title/ Inventor	Status [granted/ pending]
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			

Code of Conduct in Patent Matters

1. Policy

General Declaration: The General Assembly of Ecma shall not approve recommendations of Standards which are covered by patents when such patents will not be licensed by their owners on a reasonable and non-discriminatory basis.

1.1 In case the proposed Standard is covered by issued patents of Ecma members only: Members of the General Assembly are asked to state the Company licensing policy with respect to these patents.

1.2 In case the proposed Standard is covered by issued patents by non Ecma members: A written statement from the patentee is required, according to which he is prepared to grant licences on a reasonable, non-discriminatory basis.

The General Assembly and/or the Management shall decide in this case which steps must be undertaken in order to obtain such a statement.

1.3 In case the proposed Standard is covered by patent applications of Ecma members (which is not known, neither during the work of the TC nor at the time of the vote in the General Assembly):

1.3.1 Each member of the TCs and/or of the General Assembly of Ecma will determine whether any proposed standard may be covered by any patent for which his company has a pending application; if such a patent application exists, his continued participation to the relevant committee will imply that such a patent, when obtained later, will be made available from his company for licensing on a reasonable, non-discriminatory basis.

1.3.2 Each member of the TCs and/or of the General Assembly of Ecma will determine whether any proposed standard may be covered by any patent for which his company has a pending application; if such a patent application exists, the favourable vote of the Company to the General Assembly will imply that such a patent, when obtained later, will be made available from his company for licensing on a reasonable, non-discriminatory basis.

1.4 In case the proposed Standard is covered by patent applications of third parties (which is not known during the work of the TC nor at the time of the vote in the General Assembly): In this case practically nothing can be done at the time of the vote. When afterwards said patents are issued, it should be tried to obtain reasonable, non-discriminatory licences. If this proves to be impossible, the standard will have to be cancelled.

2. Procedure

2.1 The questions related to protective rights are in the competence of the General Assembly of Ecma and should not be discussed at the TC level.

2.2 Each draft standard shall be submitted two months ahead of a General Assembly. All members are required to state no less than two weeks before the GA or at the end of the postal voting period whether they claim any issued protective rights covering the subject matter of the proposed standard and/or have knowledge of such rights of third parties.

2.3 Replies to this request will be circulated in due time before the General Assembly.

2.4 When an answer is not received from a Company, the General Assembly may proceed to a vote on the assumption that this Company will act in accordance with the General Declaration, that is to license possible relevant issued patents on a reasonable and non-discriminatory basis.

Form for the Ecma Patent Declaration
(to be typed on Company stationery)

Dr. I. Sebestyen
Secretary General Ecma International
Ecma Headquarters
114 rue du Rhône
CH-1204 GENEVA
Switzerland

(Date)

Dear Dr. Sebestyen,

This letter is to inform you that, in the event that Ecma International adopts an Ecma Standard for *(the title of the standard here)*, *(the name of your Company here)* will grant, on a non-discriminatory basis, to any party requesting it, licenses on commercially reasonable terms and conditions, for its patent(s), if any, deemed to be necessary for the implementation of the Ecma Standard.

This declaration remains valid only as long as the corresponding Ecma Standard remains valid.

We trust that this declaration complies with the Ecma Code of Conduct in Patent Matters related to standardized systems.

Yours faithfully,

Signature: _____

Name of authorized person: _____

Title: _____

Date: _____

Notes:

- 1) Please, do not add, change or delete any words to the above text in black.*
- 2) Text in italics (including these notes) constitutes only instructions and must not appear in the final document.*

RFC 3979 March 2005 + RFC 4879 (Third Party Fix) April 2007

6.4.1. The disclosure must list the numbers of any issued patents or published patent applications or indicate that the claim is based on unpublished patent applications. The disclosure must also list the specific IETF or RFC Editor Document(s) or activity affected. If the IETF Document is an Internet-Draft, it must be referenced by specific version number. In addition, if the IETF Document includes multiple parts and it is not reasonably apparent which part of such IETF Document is alleged to be Covered by the IPR in question, it is helpful if the discloser identifies the sections of the IETF Document that are alleged to be so Covered.

6.4.2. If a disclosure was made on the basis of a patent application (either published or unpublished), then, if requested to do so by the IESG or by a working group chair, the IETF Executive Director can request a new disclosure indicating whether any of the following has occurred: the publication of a previously unpublished patent application, the abandonment of the application and/or the issuance of a patent thereon. If the patent has issued, then the new disclosure must include the patent number and, if the claims of the granted patent differ from those of the application in manner material to the relevant Contribution, it is helpful if such a disclosure describes any differences in applicability to the Contribution. If the patent application was abandoned, then the new disclosure must explicitly withdraw any earlier disclosures based on the application.

New or revised disclosures may be made voluntarily at any time.

6.4.3. The requirement for an IPR disclosure is not satisfied by the submission of a blanket statement of possible IPR on every Contribution. This is the case because the aim of the disclosure requirement is to provide information about specific IPR against specific technology under discussion in the IETF. The requirement is also not satisfied by a blanket statement of willingness to license all potential IPR under fair and non-discriminatory terms for the same reason. However, the requirement for an IPR disclosure is satisfied by **a blanket statement of the IPR discloser's willingness to license all of its potential IPR** meeting the requirements of Section 6.6 (and either Section 6.1.1 or 6.1.2) to implementers of an IETF specification **on a royalty-free basis** as long as any other terms and conditions are disclosed in the IPR disclosure statement.

6.5. What Licensing Information to Detail in a Disclosure

Since IPR disclosures will be used by IETF working groups during their evaluation of alternative technical solutions, it is helpful if an IPR disclosure includes information about licensing of the IPR in case Implementing Technologies require a license. Specifically, it is helpful to indicate whether, upon approval by the IESG for publication as RFCs of the relevant IETF specification(s), all persons will be able to obtain the right to implement, use, distribute and exercise other rights with respect to an Implementing Technology **a) under a royalty-free and otherwise reasonable and non-discriminatory license, or b) under a license that contains reasonable and non-discriminatory terms and conditions, including a reasonable royalty or other payment, or c) without the need to obtain a license from the IPR holder.**



2. Licensing Goals for W3C Recommendations

In order to promote the widest adoption of Web standards, W3C seeks to issue Recommendations that can be implemented on a [Royalty-Free](#) (RF) basis. Subject to the conditions of this policy, W3C will not approve a Recommendation if it is aware that [Essential Claims](#) exist which are not available on Royalty-Free terms.

To this end, Working Group charters will include a reference to this policy and a requirement that specifications produced by the Working Group will be implementable on an RF basis, to the best ability of the Working Group and the Consortium.

3. Licensing Obligations of Working Group Participants

The following obligations shall apply to all participants in W3C Working Groups. These obligations will be referenced from each Working Group charter and Calls for Participation.

3.1. W3C RF Licensing Requirements for All Working Group Participants

As a condition of participating in a Working Group, each participant (W3C Members, W3C Team members, invited experts, and members of the public) shall agree to make available under [W3C RF licensing requirements](#) any [Essential Claims](#) related to the work of that particular Working Group. This requirement includes Essential Claims that the participant owns and any that the participant has the right to license without obligation of payment or other consideration to an unrelated third party. With the exception of the provisions of section 4 below, W3C RF licensing obligations made concerning the work the particular Working Group and described in this policy are binding on participants for the life of the patents in question and encumber the patents containing [Essential Claims](#), regardless of changes in participation status or W3C Membership.

3.2. Limitation on Licensing Requirement for Non-Participating Members

Only the affirmative act of joining a Working Group, or otherwise agreeing to the licensing terms described here, will obligate a Member to the W3C RF licensing commitments. Mere Membership in W3C alone, without other factors, does not give rise to the RF licensing obligation under this policy.

3.3. Licensing Commitments in W3C Submissions

At the time a [W3C Member Submission](#) [[PROCESS](#), section 11] is made, all Submitters and any others who provide patent licenses associated with the submitted document must indicate whether or not each entity (Submitters and other licensors) will offer a license according to the [W3C RF licensing requirements](#) for any portion of the Submission that is subsequently incorporated in a W3C Recommendation. The W3C Team may acknowledge the Submission if the answer to the licensing commitment is either affirmative or negative, and shall not acknowledge the Submission if no response is provided.

3.4. Note on Licensing Commitments for Invited Experts

Invited experts participate in Working Groups in their individual capacity. An invited expert is only obliged to license those claims over which s/he exercises control.

4. Exclusion From W3C RF Licensing Requirements

Under the following conditions, Working Group participants may exclude specifically identified and disclosed Essential Claims from the overall W3C RF licensing requirements:

4.1. Exclusion With Continued Participation

Specific Essential Claims may be excluded from the [W3C RF licensing requirements](#) by a participant who seeks to remain in the Working Group only if that participant indicates its refusal to license specific claims no later than 150 days after the publication of the [first public Working Draft \[PROCESS, section 7.4.1\]](#) by specifically [disclosing](#) Essential Claims that will not be licensed on W3C RF terms. A participant who excludes Essential Claims may continue to participate in the Working Group.

If any claims are made essential by the final [Recommendation \[PROCESS, section 7.1.1\]](#) as a result of subject matter not present or apparent in the latest public [Working Draft \[PROCESS, section 7.1.1\]](#) published within 90 days after the first public Working Draft, the participant may exclude these new Essential Claims, and only these claims, by using this exclusion procedure within 60 days after the publication of the [Last Call Working Draft \[PROCESS, section 7.4.2\]](#). After that point, no claims may be excluded. (Note that if material new subject matter is added after Last Call, then a new Last Call draft will have to be produced, thereby allowing another exclusion period for 60 days after that most recent Last Call draft.)

4.2. Exclusion and Resignation From the Working Group

A participant may resign from the Working Group within 90 days after the publication of the first public Working Draft and be excused from all licensing commitments arising out of Working Group participation.

If a participant leaves the Working Group later than 90 days after the publication of the first public Working Draft, that participant is only bound to license Essential Claims based on subject matter contained in the latest Working Draft published before the participant resigned from the Working Group. In addition, departing participants have 60 days after their actual resignation to exclude Essential Claims made essential by documents not referenced in the Call for Exclusion (see section 4.5) if:

1. such claims are essential to subject matter that is contained in the latest Working Draft published before the participant resigns, and
2. such subject matter is not present or apparent in the latest Working Draft published within 90 days after the first public Working Draft.

The participant follows the same procedures specified in this section 4 for excluding claims in issued patents, published applications, and unpublished applications. Participants resigning from a Working Group are still subject to all disclosure obligations described in section 6.

4.3. Joining an Already Established Working Group

Participants who join a Working Group more than 90 days after the publication of the first public Working Draft must exclude Essential Claims covered in the latest Working Draft published within 90 days after the first public Working Draft at the later of 150 days after the publication of the first public Working Draft or upon joining the Working Group.

4.4. Exclusion Procedures for Pending, Unpublished Patent Applications

Exclusion of Essential Claims in pending, unpublished applications follows the procedures for exclusion of issued claims and claims in published applications in section 4.1 through 4.3, except that the final deadline for exclusion of unpublished claims is at Last Call plus 60 days for any material, regardless of whether or not it was contained in the documents referenced in the Call for Exclusion document. Nevertheless, participants have a good faith obligation to make such exclusions as soon as is practical after the publication of the first Working Draft that includes the relevant technology.

Any exclusion of an Essential Claim in an unpublished application must provide either:

1. the text of the filed application; or
2. identification of the specific part(s) of the specification whose implementation makes the excluded claim essential.

If option 2 is chosen, the effect of the exclusion will be limited to the identified part(s) of the specification.

4.5. Exclusion Mechanics

A Call for Exclusion will be issued by the Working Group Team Contact indicating the relevant documents against which participants must make exclusion statements as well as precise dates and deadlines for making any exclusions. In case there is any dispute about the dates for exclusion, the dates indicated in the Call for Exclusion are controlling. The Call for Exclusion will be sent to the Working Group mailing list and the Advisory Committee Representatives of all organizations participating in the Working Group. In the event that a Working Group issues more than one Recommendation-track document, the exclusion procedure will be employed for each series of documents individually.

5. W3C Royalty-Free (RF) Licensing Requirements

With respect to a Recommendation developed under this policy, a W3C Royalty-Free license shall mean a non-assignable, non-sublicensable license to make, have made, use, sell, have sold, offer to sell, import, and distribute and dispose of implementations of the Recommendation that:

1. shall be available to all, worldwide, whether or not they are W3C Members;
2. shall extend to all [Essential Claims](#) owned or controlled by the licensor;
3. may be limited to implementations of the Recommendation, and to what is required by the Recommendation;
4. may be conditioned on a grant of a reciprocal RF license (as defined in this policy) 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.
5. may not be conditioned on payment of royalties, fees or other consideration;
6. may be suspended with respect to any licensee when licensor is sued by licensee for infringement of claims essential to implement any W3C Recommendation;
7. may not impose any further conditions or restrictions on the use of any technology, intellectual property rights, or other restrictions on behavior of the licensee, but may include reasonable, customary terms relating to operation or maintenance of the license relationship such as the following: choice of law and dispute resolution;
8. shall not be considered accepted by an implementer who manifests an intent **not** to accept the terms of the W3C Royalty-Free license as offered by the licensor.

License term:

9. The RF license conforming to the requirements in this policy shall be made available by the licensor as long as the Recommendation is in effect. The term of such license shall be for the life of the patents in question, subject to the limitations of 5(10).
10. If the Recommendation is rescinded by W3C, then no new licenses need be granted but any licenses granted before the Recommendation was rescinded shall remain in effect.

All Working Group participants are encouraged to provide a contact from which licensing information can be obtained and other relevant licensing information. Any such information will be made publicly available along with the patent disclosures for the Working Group in question.

6. Disclosure

6.1. Disclosure Requirements

Disclosure is required when both of the following are true:

1. an individual in a Member organization receives a disclosure request as described in section 6.3; and
2. that individual has actual knowledge of a patent which the individual believes contains Essential Claim(s) with respect to the specification for which disclosure is requested.

Anyone in a Member organization who receives a disclosure request and who has such knowledge must inform that AC Rep. Where disclosure is required, the AC Rep will do so.

6.2. Disclosure Exemption

The disclosure obligation as to a particular claim is satisfied if the holder of the claim has made a commitment to license that claim under [W3C RF licensing requirements](#) and the claim is no longer subject to exclusion under section 4. An Essential Claim is no longer subject to exclusion if a patent holder has affirmatively agreed to license the Essential Claim (effectively waiving its right to exclude such patent under section 4) or if the relevant exclusion period under section 4 has lapsed.

6.3. Disclosure Requests

Disclosure requests will be included in the "Status of This Document" section of each Recommendation track document as it reaches each new maturity level (Working Draft, Last Call Working Draft, Candidate Recommendation, Proposed Recommendation, Recommendation). Separate requests may be issued by the W3C to any party suspected of having knowledge of Essential Claims. Such disclosure requests will instruct the recipient to respond through their AC Rep (in the case of Members) or a W3C contact (in the case of non-Members). Disclosure requests other than those that appear in the specification itself should be directed to the AC Rep.

Disclosure requests will provide administrative details for making disclosures.

6.4. Disclosure Contents

Disclosure statements must include:

1. the patent number, but need not mention specific claims
2. the Working Group and/or Recommendation to which it applies

6.5. Disclosure of Laid-Open or Published Applications

In the case of laid-open or published applications, the Member's good faith disclosure obligation extends to unpublished amended and/or added claims that have been allowed by relevant legal authorities and that the Member believes to be Essential Claims. To satisfy the disclosure obligation for such claims, the Member shall either:

1. disclose such claims, or
2. identify those portions of the W3C specification likely to be covered by such claims.

6.6. Disclosure of Pending, Unpublished Applications

If a W3C Member includes claims in a patent application and such claims were developed based on information from a W3C Working Group or W3C document, the Member must disclose the existence of such pending unpublished applications.

6.7. Good Faith Disclosure Standards

Satisfaction of the disclosure requirement does not require that the discloser perform a patent search or any analysis of the relationship between the patents that the Member organization holds and the specification in question.

Disclosure of third party patents is only required where the Advisory Committee Representative or Working Group participant has been made aware that the third party patent holder or applicant has asserted that its patent contains [Essential Claims](#), unless such disclosure would breach a pre-existing non-disclosure obligation.

6.8. Timing of Disclosure Obligations

The disclosure obligation is an ongoing obligation that begins with the Call for Participation. Full satisfaction of the disclosure obligation may not be possible until later in the process when the design is more complete. In any case, disclosure as soon as practically possible is required.

6.9. Termination of Disclosure Obligations

The disclosure obligation terminates when the Recommendation is published or when the Working Group terminates.

6.10. Disclosure Obligations of Invited Experts

Invited experts or members of the public participating in a Working Group must comply with disclosure obligations to the extent of their own personal knowledge.

6.11. Disclosures to Be Publicly Available on Recommendation Track

Patent disclosure information for each specification on the Recommendation track will be made public along with each public Working Draft issued by the Working Group.

8. Definition of Essential Claims

8.1. Essential Claims

"Essential Claims" shall mean all claims in any patent or patent application in any jurisdiction in the world that would necessarily be infringed by implementation of the Recommendation. A claim is necessarily infringed hereunder only when it is not possible to avoid infringing it because there is no non-infringing alternative for implementing the normative portions of the Recommendation. Existence of a non-infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation.

EPCglobal Intellectual Property Policy

Working Group Declaration

Rev. 12/15/2003 A

Whereas EPCglobal Inc. (hereinafter “EPCglobal”) intends to facilitate the cooperative development and publication of useful standards for radio- frequency identification (RFID) tags, in order to provide a common set of Specifications by which manufacturers and end users of such RFID tags may utilize an interoperable system for making and using RFID tags in reliance on this Declaration relative to intellectual property claims; this Declaration is intended as a binding agreement with EPCglobal and an admission required to participate in a Working Group of EPCglobal for the purpose of developing useful Specifications for radio-frequency identification tags.

EPCglobal Working Group activity is generally intended to encompass sufficient aspects of (i) tag programming, operation and tag-reader communication protocols, (ii) reader compatibility and interface protocols with data processing systems, and (iii) information exchange protocols based upon data obtained from RFID tags, to provide a sufficient standard platform for the use of radio-frequency identification tags. The intent of the policies embodied herein is to facilitate adoption of such a set of Specifications while avoiding uncertainty to the extent possible regarding intellectual property claims in the Specifications. EPCglobal seeks to encourage the development, exploitation and competition of proprietary technology and innovative approaches to implementing such specifications, while avoiding blocking proprietary claims or monopolization of use of the Specifications.

Therefore, I/We, The Working Group Participant named below as an individual and/or as an agent of the below identified Participant, intending to be legally bound hereby, declare and agree to terms of participation in the Working Group activities of EPCglobal Inc. as follows:

1. DEFINITIONS

1.1 “Participant” means an individual or legal entity bound hereby.

1.2 “Representatives” means the individual(s) authorized by the Participant to represent the Participant in the activities of a Working Group. Such Representatives shall be specifically identified upon enrollment in a Working Group.

1.3 “Trustee” means EPCglobal Inc., its assigns or successors in interest. Actions of Trustee as referenced herein are actions authorized by the Board of Governors of EPCglobal.

1.4 “Specification” means a technical specification approved by the Working Group and ratified by the Trustee.

1.5 “Certified Compliant System” means any system (e.g. an RFID tag, an RFID reader, an ONS server), which has been certified in a manner established by the Trustee to comply with a Specification and is subject to compliance certification conditions established by Trustee. Such certification conditions shall include licensing obligations by the party seeking certification commensurate with those set forth herein in Section 3.1.

“Candidate Certified Compliant System” means any system developed, or under development, solely for the purpose of obtaining compliance certification.

1.6 “Compliant Portion” means a portion, module, or component of a Certified Compliant System or a candidate Certified Compliant System which implements no more than is required to operate in accordance with the Specification and which performs or implements such function only as set forth in the Specification.

1.7 “Necessary Claims” means all present, pending and hereafter acquired patent claims that would be necessarily infringed by implementing the Specification. A claim is necessarily infringed only when it is not possible to avoid such infringement because there is no non-infringing alternative for implementing the Specification.

1.8 “Contribution” means any submission of concepts, data, suggestions, or revisions to a draft Specification, whether in written or oral form, made with the intention of inclusion thereof into the Specification.

1.9 “Affiliate” means any entity that directly or indirectly controls another entity via beneficial ownership of more than fifty percent of the voting power or equity in another entity (“Control”), or is controlled by another entity, or is under common Control with another entity, so long as such Control exists.

1.10 “Working Group” shall mean a body constituted by the Trustee for the purpose of developing a Specification.

2. GENERAL

2.1 Participant understands, admits and consents to the terms hereof as a condition of our/my participation in a Working Group of EPCglobal, and in which we intend to participate for the purpose of establishing a Specification for Certified Compliant Systems. It is our intention that the Specification is to be made freely available for use in developing Candidate Certified Compliant Systems and for use in Certified Compliant Systems free of claims of infringement, or subject to defined licensing terms under Section 3.4 hereof, to the extent that such Certified Compliant Systems operate in accordance with the Specifications.

2.2 Designation of the Representative(s) by Participant is hereby made by an officer or equivalent individual having the power to bind the Participant to the terms and conditions hereof.

2.3 Participation in a Working Group shall not constitute an undertaking to make or use any system or component in accordance with the Specification and a Participant shall not be required to implement any Specification.

2.4 The Trustee shall ensure that all Participants in a Working Group have committed to this Declaration as a condition for participation in a Working Group.

2.5 The terms and conditions hereof are intended to be limited to and binding relative to each Working Group in which the Participant participates.

3. INTELLECTUAL PROPERTY

3.1 Agreement to Grant Licenses.

Subject to Section 2.5, 3.2, 3.3, 3.4 and 4.3 hereof, the Participant and its Affiliates shall not assert, and shall grant to the extent that it owns or has a right to grant, a nonexclusive, nontransferable, non-sublicensable, worldwide royalty-free and otherwise reasonable and non-discriminatory license upon request in, its Necessary Claims to other Participants in the Working Group, and to allow Participants and others to make, have made, use, import, offer to sell, lease and sell and otherwise distribute Compliant Portions, provided that such agreement to license shall not extend to any part or function of a product in which a Compliant Portion is incorporated, which part or function is not itself part of the Compliant Portion, and further provided that such Participants and others comply with Section 3.2 hereof. Participant and its Affiliates shall not transfer patents having Necessary Claims for the purpose of circumventing this Section, and any transfer shall be conditioned upon the obligation to license stated herein. The covenant of non-assertion and license herein shall not extend to any claims other than Necessary Claims.

With respect to component parts of a Compliant Portion that are otherwise not subject to certification, but which establish compliance with the Specification, such component parts shall be admitted to be capable of substantial non-infringing use with respect to Necessary Claims if suitable for use in connection with a Certified Compliant System, for the purposes of a claim of contributory infringement or provided under non-infringing intent for a claim of induced infringement. Participant shall license any intellectual property associated with any testing and compliance certification process in connection with the Specification on a royalty-free and otherwise reasonable and non-discriminatory basis for the purpose of conducting compliance certification tests and processes.

3.2 Reciprocity Required.

The Participant’s agreement to Section 3.1 and 3.4 shall not be effective as to any party that does not

make the patent license grant of Section 3.1 or 3.4 available on substantially equivalent respective terms with respect to the same Specification as that requiring a license from the Participant.

3.3 Limited Agreement to Disclose.

In the event that the Participant is unwilling to provide the license of Section 3.1 to a work-in-progress of the Working Group(s) in which Participant has joined, such Participant agrees to promptly provide written notification to the Trustee of such Participant's intent not to license. After the Specification is approved by the Working Group, Participants therein shall be provided with at least 60 days notice prior to the anticipated date of ratification of the Specification by the Trustee.

Notification of intent not to license shall be given no later than 30 days before the anticipated date of ratification of the Specification by the Trustee. Such notification shall specifically disclose and identify to the Trustee the claim(s) believed to be Necessary Claims and which are not subject to license. The Participant shall also identify any portion of a draft Specification or other work-in-progress, which is not subject to license. The Trustee shall have the discretion to return the draft Specification to the Working Group for revision to avoid the identified claim(s), to proceed under the provisions of Section 3.4 hereof, or to decline to ratify the Specification. Failure to provide such notification of intent shall constitute consent of the Participant to the provisions of Section 3.1.

Provision of notification under this section shall not operate to revoke licenses granted hereunder to the Participant.

3.4 Reasonable and Non-Discriminatory Licensing

Notwithstanding any contrary provision hereof, the Trustee shall have the option, upon notification received in accordance with Section 3.3 of determining whether identified Necessary Claims shall be permitted for inclusion in the Specification. Such option will be granted only in extraordinary circumstances. In such circumstances, the Participant shall agree to license such Necessary Claims on reasonable and non-discriminatory (RAND) terms, and the Specification shall identify the Necessary Claims available for such license. The Trustee may require the Participant affirm that the Participant is willing to offer a license to its Necessary Claims on RAND terms to all implementers of the Specification, and to specifically state the terms of such license, including the manner in which any royalty is to be computed. In no event shall the Trustee approve, or the Participant assert, a royalty right in any Specification for which the notification of intent of Section 3.3 was not provided by the Participant. The Trustee shall have the right to seek a determination of the validity of any claims identified under the terms of Section 3.3, and approval of RAND licensing terms shall not constitute an admission by Trustee that such claims are valid or infringed by practice of the Specification. Under no circumstances shall the Trustee be obligated to exercise its discretion under this Section.

Participants shall enjoy the benefit of any license obtained by the Trustee from a non-Participant granting rights in a patent having Necessary Claims.

3.5 No Other License

The Participant and its Affiliates retain the independent right to grant or withhold a nonexclusive license or sublicense of patents containing Necessary Claims for use other than in connection with the license granted in Section 3.1.

No patent license, immunity or other right is granted under this Declaration by any Participant, its Affiliates, or any other party to any other Participant, its Affiliates, or any other party either directly or by implication, estoppel or otherwise, other than the agreements to grant licenses expressly set forth herein. All rights not affected by this Declaration are expressly reserved by the Participant.

3.6 Transfer of Necessary Claims to Third Parties.

Any transfer by Participant to a third party of a patent having Necessary Claims shall include, in the transfer agreement, a provision that the transfer is subject to existing obligations of the transferor.

3.7 Contributions Otherwise Subject to Copyright

By making a Contribution of copyrightable material, including without limitation drawings, compilations of data, software, or text, the Participant shall grant to any party a worldwide, non-exclusive, royalty-free license to copy, publish, distribute and make derivative works that are

based on or incorporate all or part of the Contribution, for use (a) in developing and publishing the Specification and related materials for which such Contribution was made; (b) in developing and implementing a Candidate Certified Compliant System or a Certified Compliant System; and (c) by other standards development organizations, such as ISO, solely for the purpose of adopting the same or a substantially related Specification. Such license shall be revocable with respect to any party, which fails to make the license of this Section or Section 3.1 available.

VITA *Open standards, open markets*

Disclosure and Licensing of Patents In Standards

VITA is breaking new ground in the area of disclosure and licensing of patents in standards, becoming **the first standards developer in the world to receive guidance for 'ex ante'** procedures from any legal authority.

VITA Patent Policy

dated October 30, 2006, reviewed by the DOJ

10.0 Patent Policy

All VSO members, including study and working group members, shall follow the procedures set forth in this Section 10.

10.1 Early Patent and FRAND License Disclosure Policy

This section implements an early patent and FRAND license disclosure policy.

10.2 Disclosure of Patents

10.2.1 Disclosure Obligations

Each working group member ("WG Member")¹ shall disclose to the working group ("WG") in writing the existence of all patents and patent applications owned, controlled, or licensed by the VITA member company ("VITA Member Company") the WG Member represents, which are known by the WG Member and which the WG Member believes contain claims that may become essential to the draft VSO specification ("Draft VSO Specification")² of the WG in existence at the time, after the WG Member has made a good faith and reasonable inquiry into the patents and patent applications the VITA Member Company (or its Affiliates³) owns, controls or licenses. An "essential" claim for this purpose means any claim the use of which is necessary to create a compliant implementation and for which there is no technically and commercially feasible non-infringing alternative. The WG Member must provide, on behalf of the VITA Member Company, all patent disclosure information to VSO by completing a "Declaration of VITA Member Company" ("Declaration"), which is set forth in Appendix 6.

10.2.2 Patent Information to be Disclosed

All patents or patent applications to be disclosed under Section 10.2.1 shall include the following information: (a) for issued patents and published patent applications, the patent or patent application number, the associated country and, as reasonably practicable, the relevant portions of the WG's Draft VSO Specification; and (b) in the case of unpublished patent applications, the existence of the unpublished patent applications and, as reasonably practicable, the relevant portions of the WG's Draft VSO Specification.

¹ For purposes of Section 10, "WG Member" includes all three levels of membership described in Section 7.1.4 of *VSO Policies and Procedures*: sponsors, participants, and observers.

² For purposes of Section 10, "Draft VSO Specification" includes any eventual standard developed and adopted under Track 1 or Track 2 in Section 7.2 as an IEC Industry Technical Agreement, a VSO or VITA Specification, or an American National Standard.

³ For purposes of Section 10, an "Affiliate" is any entity that directly or indirectly controls, is controlled by, or is under common control with, another entity, so long as such control exists.

10.2.3 Timing of Patent Disclosure

For purposes of this definition, with respect to a business entity, control means direct or indirect beneficial ownership of or the right to exercise (i) greater than fifty percent (50%) of the voting stock or equity in an entity; or (ii) greater than fifty percent (50%) of the ownership interest representing the right to make the decisions for the subject entity in the event that there is no voting stock or equity.

A VSO member who proposes to VSO a specification for consideration to become a Draft VSO Specification must disclose all patents and patent applications owned, controlled, or licensed by the VSO member that

contain claims that may become essential to the Draft VSO Specification prior to the date the study group or WG, as applicable, adopts the proposed specification as a Draft VSO Specification.

Upon formation of a WG, all WG Members must disclose, on behalf of the VITA Member Company he or she represents, all patents and patent applications owned, controlled, or licensed by the VITA Member Company that contain claims that may become essential to the Draft VSO Specification within sixty (60) days after the formation of the WG.

In anticipation of a ballot to adopt the Draft VSO Specification as a VSO or VITA Specification (including an IEC Industry Technical Agreement or an American National Standard), all WG Members must disclose, on behalf of the VITA Member Company he or she represents, all undisclosed patents and patent applications owned, controlled, or licensed by the VITA Member Company that contain claims that may become essential to the Draft VSO Specification no later than fifteen (15) days from the date of publication of a Draft VSO Specification.

In addition, at the commencement of all face-to-face WG meetings, the WG Chairperson shall ask WG Members to disclose, on behalf of the VITA Member Company he or she represents, any undisclosed patents or patent applications owned, controlled, or licensed by the VITA Member Company that contain claims that may become essential to the Draft VSO Specification in accordance with the requirements set forth in this Patent Policy. If any WG Member thereupon discloses such a patent or patent application, the WG Chairperson shall ask the WG Member to submit and the WG Member shall submit, on behalf of the VITA Member Company he or she represents, a Declaration with information regarding that patent or patent application within thirty (30) days of the meeting at which the disclosure is made.

10.2.4 Disclosure of Third Party Patent Claims

Each WG Member who becomes aware of patents or patent applications owned or claimed by a third party that the WG Member believes to contain claims that may become essential to the Draft VSO Specification of the WG in existence at the time, including but not limited to any such patents that are licensed to the VITA Member Company the WG Member represents, must disclose them, provided that such disclosure is not prohibited by any confidentiality obligation binding upon the WG Member or the VITA Member Company he or she represents. Any WG Member that discloses third party patent claims does not take a position on the essentiality or relevance of the third party claims to the Draft VSO Specification.

10.3 Disclosure of FRAND License

10.3.1 License Terms

Each WG Member agrees, on behalf of the VITA Member Company he or she represents, that it will grant to any WG Member, VITA Member Company, or third party a nonexclusive, worldwide, nonsublicensable (except to the extent necessary “to have made”), perpetual patent license (or equivalent non-assertion covenant) for its patent claims essential to the Draft VSO Specification on fair, reasonable and nondiscriminatory terms to use, make, have made, market, import, offer to sell, and sell, and to otherwise directly or indirectly distribute products that implement the Draft VSO Specification. Such license need only extend to the portions of the Draft VSO Specification for which the license is essential to its implementation.

10.3.2 Declaration

Each WG Member must complete and execute a Declaration (Appendix 6) on behalf of its VITA Member Company. Each WG Member must declare the maximum royalty rate for all patent claims that the VITA Member Company he or she represents (or its Affiliates) owns or controls and that may become essential to implement the Draft VSO Specification. WG Members are encouraged to attach to the Declaration a draft licensing agreement for all patent claims essential to implement the Draft VSO Specification. The failure to do so precludes the VITA Member Company from including in its final licensing agreement a grantback, reciprocal license, non-assert provision, covenant not to sue, or defensive suspension provision that is broader or more restrictive upon licensees than the following:

1. A VITA Member Company may include in its final licensing agreement a term requiring the licensee to grant a license on fair, reasonable, and non-discriminatory terms to any of the licensee's patent claims on present or future improvements that are essential to the same Draft VSO Specification;
2. A VITA Member Company may include in its final licensing agreement a term requiring the licensee to grant a reciprocal license to all the licensee's present or future patent claims essential to the same Draft VSO Specification;
3. A VITA Member Company may include in its final licensing agreement a term under which the licensee commits not to assert or not to bring suit to enforce any of the licensee's present or future patent claims essential to the same final specification against the VITA Member Company based on its implementation of the Draft VSO Specification;

4. A VITA Member Company may include in its final licensing agreement a term providing that the license may be suspended with respect to the licensee if the licensee sues the VITA Member Company for infringement of any of the licensee's present or future patent claims essential to the same Draft VSO Specification.

License terms must in all other respects be fair, reasonable, and non-discriminatory.

The Declaration is irrevocable. If a subsequent Declaration covering previously disclosed information is submitted, the subsequent Declaration may only supersede the prior Declaration if the subsequent Declaration is less restrictive upon prospective licensees than the former Declaration. Otherwise, the former Declaration continues to apply. The Declaration will apply to the Draft VSO Specification and any reaffirmations or revisions to that Draft VSO Specification.

10.3.3 Record of Declarations

A record of all Declarations shall be placed and retained in the files of VSO.

10.3.4 Negotiation of License Terms

The negotiation or discussion of license terms among WG Members or with third parties is prohibited at all VSO and WG meetings.

10.4 Effect of Failure to Disclose Patents or License Terms

If a WG Member fails to adequately and timely disclose, on behalf of the VITA Member Company he or she represents, a patent claim or license terms for it as set forth in this Section 10, including at any of the times specified in Section 10.2.3, the VITA Member Company must license it to the extent it is essential to a Draft VSO Specification on a royalty free basis and in accordance with the license restrictions set forth in Section 10.3 for purposes of an implementation compliant with the Draft VSO Specification.

10.5 Arbitration Procedure

Any VSO member who believes a WG Member or the VITA Member Company that the WG Member represents has not complied with his/her or its obligations under this Patent Policy, including but not limited to obligations under Section 10.3 to grant licenses on terms that are fair, reasonable and nondiscriminatory, may submit his/her claim in this respect to the applicable WG Chairperson. If the claim is not thereupon resolved on an informal basis within fifteen (15) days of its submission, the WG Chairperson will commence an Arbitration Procedure in accordance with the provisions set forth below.

The Arbitration Panel will consist of three persons: one person selected by the party asserting noncompliance; one person selected by the party whose compliance or noncompliance is at issue; and a third person jointly selected by the other two selected persons. The first two selected persons cannot be affiliated with VITA members represented on the Working Group in question but may be affiliated with other VITA members if so desired. The third jointly selected person, who will act as Chair of the Panel, cannot be affiliated with any VITA member or with VITA. The entire panel must be selected within fifteen (15) days of the WG Chairperson's commencement of this Arbitration Procedure as referenced in the paragraph above. The VITA Technical Director will act as the non-voting Administrator of the Arbitration Procedure to convene, oversee and record the Panel's activity. The VITA General Counsel will specify and advise on the procedures to be followed, including procedures under which parties to the dispute and other interested parties asking to participate may be heard with respect to the dispute.

The Arbitration Panel will submit a Recommendation on the dispute to the VITA Executive Director within forty-five (45) days of commencement of the Arbitration Procedure. Within fifteen (15) days of receiving that Recommendation, the VITA Executive Director will consult with the VITA Board regarding the Recommendation and will then render a Decision on the dispute.

Any VSO member may request reconsideration of the Decision by notice to that effect to the VITA Board.

Upon receiving any such notice, the VITA Board will reconsider the Decision and thereupon render a Final Decision on the dispute within thirty (30) days of that notice.

All VSO members and the VITA Member Companies they represent are expected to accept either the Executive Director's Decision or, if there is reconsideration, the Final Decision as a final and binding determination of the dispute subject to this Arbitration Procedure.

The VITA Board must approve any fees or other costs to be incurred in connection with an Arbitration Procedure, and will also specify the party or parties responsible for payment of all such costs. General principles to be followed are that (a) a party who initiates an Arbitration Procedure but whose claim is ultimately rejected will pay all costs; and (b) a party ultimately found to have not complied with its obligations will pay all costs.

Appendix 6: Declaration of VITA Member Company

Section 10 of the *VSO Policies and Procedures* requires the undersigned WG Member⁴ to complete and execute this Declaration on behalf of the VITA Member Company he or she represents. The Declaration is irrevocable. Any subsequent Declaration covering information disclosed in this Declaration may only supersede this Declaration if the subsequent Declaration is less restrictive upon prospective licensees than the information set forth in this Declaration. This Declaration will apply to the Draft VSO Specification⁵ identified below in Section C and to all reaffirmations or revisions to such Draft VSO Specification.

A. VITA Member Company

Legal Name of Organization _____

B. WG Member Representing the VITA Member Company

Name & Department: _____

Address: _____

Telephone: _____ Fax: _____

E-Mail: _____ URL: _____

C. Draft VSO Specification

Number: _____

Title: _____

D. Disclosure of Patents Containing Essential Claims

1. In accordance with Section 10 of the *VSO Policies and Procedures*, the undersigned WG Member shall disclose, on behalf of the VITA Member Company he or she represents, all patents or patent applications that the VITA Member Company (or its Affiliates⁶) may own or control and that it believes may contain claims essential to create an implementation compliant with the Draft VSO Specification identified above in Section C of this Declaration.

Patent / Application No.: _____

Title: _____

⁴ For purposes of this Declaration, "WG Member" includes all three levels of membership described in Section 7.1.4 of the *VSO Policies and Procedures*: sponsors, participants, and observers.

⁵ For purposes of this Declaration, "Draft VSO Specification" includes any eventual standard developed and adopted under Track 1 or Track 2 in Section 7.2 of the *VSO Policies and Procedures* as an IEC Industry Technical Agreement, a VSO or VITA Specification, or an American National Standard.

⁶ For purposes of this Declaration, an "Affiliate" is any entity that directly or indirectly controls, is controlled by, or is under common control with, another entity, so long as such control exists. For purposes of this definition, with respect to a business entity, control means direct or indirect beneficial ownership of or the right to exercise (i) greater than fifty percent (50%) of the voting stock or equity in an entity; or (ii) greater than fifty percent (50%) of the ownership interest representing the right to make the decisions for the subject entity in the event that there is no voting stock or equity.

Patent / Application No.: _____

Title: _____

Patent / Application No.: _____

Title: _____

Attach additional pages if necessary.

2. Does the VITA Member Company the undersigned represents hold a license from another party to a patent that may include a claim essential to create an implementation compliant with the Draft VSO Specification identified above in Section C of this Declaration?

☐ Yes

☐ No

If yes, the undersigned shall disclose on behalf of the VITA Member Company all patents to which the VITA Member Company holds a license from another party that may include a claim essential to create an implementation compliant with the Draft VSO Specification identified above in Section C.

Patent No.: _____

Title: _____

Licensor: _____

Attach additional pages if necessary.

E. VITA Member Company's Declaration regarding the Licensing of Essential Patents

In accordance with Section 10 of the *VSO Policies and Procedures*, the VITA Member Company, by and through the undersigned, hereby declares for itself, its Affiliates, successors, assigns, and transferees of its patent rights its licensing position with respect to all patents that it may hold or control and that contain claims that may be essential to create an implementation compliant with the Draft VSO Specification identified above in Section C of this Declaration, as follows:

1. The VITA Member Company will grant to all interested parties a nonexclusive, worldwide, nonsublicensable (except to the extent necessary "to have made"), perpetual patent license (or equivalent non-assertion covenant) for its patent claims essential to create an implementation compliant with the above-referenced Draft VSO Specification on fair, reasonable and non-discriminatory terms to use, make, have made, market, import, offer to sell, and sell, and to otherwise directly or indirectly distribute products that implement the Draft VSO Specification. (The license need only extend to the portions of the Draft VSO Specification for which the license is essential to its implementation. Any other intended condition or limitation on this commitment is stated in a letter accompanying this Declaration.)

2. The VITA Member Company will grant a license to all such claims to all interested parties with a royalty rate that will not exceed: USD \$ _____, or _____% of product price, per unit.

3. ☐ The VITA Member Company attaches to this Declaration a draft licensing agreement for any claims essential to create an implementation compliant with the Draft VSO Specification identified above in Section C (the final licensing agreement will not be more restrictive upon licensees than this draft); **or**

☐ The VITA Member Company will not include in its final licensing agreement for all claims essential to create an implementation compliant with the Draft VSO Specification identified above in Section C a grantback, reciprocal license, nonassert provision, covenant not to sue, or defensive suspension provision that is broader and more restrictive upon prospective licensees than those specified in Section 10 of the current *VSO Policies and Procedures*.

F. Signature

By signing this Declaration, the undersigned represents that he or she is authorized to bind the VITA Member Company as stated herein. The undersigned acknowledges and agrees that this Declaration is a binding agreement between the VITA Member Company and VITA, and its terms are enforceable against the VITA Member Company, its Affiliates, successors, assigns, and transferees. The undersigned further acknowledges and agrees on behalf of the VITA Member Company that each licensee and prospective licensee of patent claims essential to implement the Draft VSO Specification identified above in Section C is an intended beneficiary of this agreement, and each such beneficiary is entitled to rely upon and enforce against the VITA Member Company the provisions set forth in this Declaration.

Signature: _____

Print Name: _____

Title: _____

Organization: _____

Date: _____

附属書 I – VITA の IPR ポリシーに対する司法省の見解



DEPARTMENT OF JUSTICE
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October 30, 2006

FACSIMILE TRANSMITTAL

Robert A. Skitol, Esq.
Drinker, Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209

Dear Mr. Skitol:

This letter responds to your request on behalf of VITA, an international trade association, and its standards development subcommittee, VSO, for a business review letter from the Department of Justice pursuant to our Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's antitrust enforcement intentions with respect to a proposed patent policy designed to ensure that participants in the VSO standard-setting process disclose patents that are essential to implement a new standard and declare the most restrictive licensing terms that will be required to license any such patents.

I. VITA and VSO

VITA is a non-profit standards development organization ("SDO") accredited by the American National Standards Institute ("ANSI"). VITA is comprised of developers, vendors, and users of real-time modular embedded computing systems originally based on the VMEbus computer architecture.⁽¹⁾ This architecture enables engineers to design application-specific computer systems that can be embedded in a wide range of high-performance and mission critical systems such as ultrasound and magnetic resonance imaging machines, semiconductor manufacturing equipment, and industrial control equipment. Since the mid 1990s, VME-based computers have also been increasingly embedded in the advanced avionics and radar systems of space exploration and weapons systems. In such applications, the components must be rugged enough to survive and operate under harsh environmental conditions.

The VME architecture is essentially a standard set of physical plugs that allow the various components of a computer to be physically connected together as well as logical protocols that allow the components to communicate with each other. The VME architecture is designed to allow computer engineers to mount a wide variety of components (processors, memory, and peripheral devices) on VME cards. Those cards can then be plugged into a VME backplane to form a VME computer system. Since its founding in 1981, VITA has promoted the development of standardized physical connectors and logical protocols that make such integration possible. It has finalized thirty-two standards and is currently developing twenty-six more. As the industry undergoes a major technology transition from parallel to serial data transport mechanisms, VITA management anticipates that VSO will actively

develop many new standards for serial buses.

VITA standards developed by VSO enable competition in the VME industry. Many firms can and do produce VME hardware (cards, chips, backplanes) because the VME architecture is defined in a series of open VITA standards. Embedded systems developers value the flexibility of being able to integrate a variety of components into a single system and they benefit from competition among manufacturers of both the components and the connecting VME hardware. In addition, VITA's standards are backward compatible, meaning that VME systems can be upgraded with the next generation of technology. Without such industry standards, the developers and users of high-performance application-specific computer systems, such as defense contractors and the military, likely would be unable to purchase off-the-shelf products from an array of vendors and instead likely would be locked in to a proprietary system from one supplier, which may not develop upgrades.

The VSO standard-setting process generally begins when a member proposes work on a new standard. If at least two other members are interested, they can form a working group and begin to draft a specification in a series of face-to-face meetings, teleconferences, and electronic communications. When the working group members are satisfied with the draft specification, the draft is published. Then the draft specification can be formally accepted as a VITA specification or an International Electrochemical Commission Industry Technical Agreement (IEC ITA) by the full VITA membership, or it can be approved as an ANSI standard through a slightly different process.⁽²⁾ To simplify the terminology used in this discussion, this letter will refer to an adopted VSO draft specification as a VITA standard.

VSO develops standards in an open process and invites all interested parties to participate. VSO also seeks to encourage the success of its standards by ensuring that industry is able to implement the open VME architecture. To facilitate implementation, VITA makes the actual specifications of the VITA standards easily available to interested parties. Sometimes, however, VSO working groups knowingly incorporate patented technologies when drafting specifications even though the owner of such a patent could impose licensing terms that would significantly restrict the use of a standard. VITA believes that incorporating patented technologies into its standards is consistent with its goal of designing an open VME architecture only "if patent holders agree to license their patents on terms that permit the use of those patents in commercially viable products."⁽³⁾ VSO has tried to achieve this goal by incorporating patented technology only when the patent holder commits to license on reasonable and non-discriminatory ("RAND") terms.⁽⁴⁾ Recent experience, however, has led VITA to conclude that the RAND requirement is insufficient to ensure that its standards remain open.

You represent that several firms in the recent past have claimed to have patents that were essential to the implementation of a VITA standard and have demanded royalties that were significantly higher than expected. In two cases, the VITA member patent holders had previously committed to license on RAND terms. In these cases, developing new standards that did not infringe the asserted patent claims was not a viable option because of the significant cost and delays that would result. Instead, VITA persuaded the patent holders not to assert their patents by developing evidence of prior art that would invalidate the patent claims essential to implement the VITA standard.⁽⁵⁾ These challenges were costly and delayed adoption of the standards. In another case, according to VITA, a standard was rendered commercially infeasible by the licensing terms demanded by the patent owner.⁽⁶⁾

VITA anticipates that future standards, such as those needed to facilitate the technology transition to serial buses, will likely incorporate more patented technologies. It has decided to revise its patent policy to enable its members to make better informed decisions in developing and adopting standards. VITA believes that this policy will reduce the likelihood of unexpected hold-up by patent owners that can threaten the openness and commercial viability of future VITA standards.

II. The Proposed VITA Patent Policy

To reduce the likelihood of unexpected licensing terms that threaten the success of future VITA standards and to expand the scope of competition between alternative technological solutions during the standard-setting process, VITA management plans to propose that its membership adopt a new patent policy (the "proposed policy"). The proposed policy is designed to elicit more information from those participating in VSO working groups about patented technologies essential to implementing the standard as well as more specific commitments regarding the fair, reasonable, and non-discriminatory ("FRAND") licensing terms that patent holders will charge once the standard has been set.

Under the proposed policy, each member of a working group must identify all patents or patent applications⁽⁷⁾ that he knows about and that he believes may become essential⁽⁸⁾ to the implementation of the future standard.⁽⁹⁾ In addition, working group members must declare the maximum royalty rates and most restrictive non-royalty terms that the VITA member company he or she represents will

request for any such patent claims that are essential to implement the eventual standard. These licensing commitments apply to the implementation of the particular draft VSO specification being developed, and any reaffirmations or revisions of that VITA standard, but they do not apply to other uses of the technology.⁽¹⁰⁾ Although disclosure declarations are irrevocable, patent holders may submit subsequent declarations with less restrictive licensing terms (including lower royalties). Working group members may consider the various declared licensing terms when deciding which technology to support during the standard-setting process, but the proposed policy forbids any negotiation or discussion of specific licensing terms among working group members or with third parties at all VSO and working group meetings.⁽¹¹⁾ Finally, the policy provides an arbitration procedure to resolve any disputes over compliance with the patent policy requirements.⁽¹²⁾

A. Disclosure of Patents

The proposed policy requires each working group member to make a "good faith and reasonable inquiry" into the patents owned, controlled, or licensed by the company she represents⁽¹³⁾ and to disclose all patents or patent applications that the company owns, controls, or has a license to, that she believes may become essential to the VSO specification the working group is developing.⁽¹⁴⁾ Each working group member also must disclose any known third-party patents or patent applications that he believes may become essential to a draft VSO specification unless doing so would violate a binding confidentiality agreement.⁽¹⁵⁾

Appendix 6 of the proposed policy contains the declaration form a working group member must use to disclose all essential patents and to declare the associated most restrictive licensing terms.⁽¹⁶⁾ The working group member must disclose the patent number(s) and published patent application number(s), the existence of unpublished patent applications, and the country in which each patent has been granted or application has been made. When practical, for each disclosed patent or patent application, the working group member is to identify the relevant portions of the working group's draft VSO specification that infringes or would require infringing the patented technology.⁽¹⁷⁾ The working group member must commit the VITA member company he or she represents to license essential patent claims on defined FRAND terms by specifying the maximum royalty rate (either in terms of dollars or as a percentage of the sale price) as well as the most restrictive non-price licensing terms the VITA member company he or she represents will request for patent claims that are essential to implement the draft VSO specification.⁽¹⁸⁾

B. Timing of Disclosures

Because the contents of a draft specification and the knowledge of working group members (of essential patents and patent applications) change over time, the proposed policy identifies three specific periods during the standard-setting process when working group members must identify any previously undisclosed essential patents, patent applications, and third-party patents.

First, a VITA member that proposes a new specification must make a patent declaration before a working group is formed to begin drafting the specification. Second, all working group members must make declarations within sixty days after the working group is formed. Third, all working group members must make declarations within fifteen days after the draft specification is published. In addition to these three specific periods, the proposed policy requires each working group member to disclose any previously undisclosed essential patents at the beginning of all face-to-face meetings of the working group. Any such disclosures made at face-to-face meetings must be followed by a declaration within thirty days.⁽¹⁹⁾

C. Consequences of Failing to Make Disclosures

If the working group member's declaration specifies a maximum royalty rate but does not include draft non-price licensing terms, the VITA member company he or she represents must accept specific limits on any grantback, reciprocal license, non-assert, covenant not to sue, or defensive suspension provisions in its licenses.⁽²⁰⁾ A working group member who fails to disclose a known essential patent, and/or fails to declare the associated most restrictive licensing terms according to the timing process described above, commits the VITA member company he or she represents to license the essential claims of the undisclosed patent for implementation of the VITA standard to all interested parties on a royalty-free basis and with the restricted non-price terms.⁽²¹⁾

D. Arbitration Procedures for Alleged Noncompliance

Section 10.5 of the proposed policy sets forth specific procedures which may be used if a VSO member believes that a working group member has breached any obligation under the proposed policy.⁽²²⁾ Complainants may file a claim with the chairperson of the applicable working group. If the working group is unable informally to resolve a claim within fifteen days, the chairperson must form an

arbitration panel.⁽²³⁾ Once formed, the arbitration panel has forty-five days to gather information and submit a recommendation to the VITA Executive Director on how the dispute should be resolved. The Executive Director must consult with the VITA Board and render a decision on the claim within fifteen days of receiving the panel's recommendation. Finally, if a VSO member calls on the Executive Director to reconsider the decision, the Executive Director must render a final decision within thirty days. The Executive Director may require one or both parties to pay for the costs of the arbitration process.

III. Historical Background Regarding Licensing Discussions Within SDOs

Collaborative standard setting can produce many procompetitive benefits. Performance standards can improve the health and safety of consumers and improve consumers' confidence in a product's quality. Interoperability standards can enable consumers to share information with each other and to interconnect compatible products from different producers. In addition, the collaborative standard-setting process can enable industry participants to share knowledge and develop a "best-of-breed" product or process. Especially in industries with network effects, the collaborative standard-setting process can enlarge markets by overcoming coordination failures among those interested in developing and using the standard so that the products are available to, and used, by more consumers.

The collaborative standard-setting process can also result in exclusionary and collusive practices that have been found to harm competition and violate the antitrust laws. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, for example, antitrust liability arose when SDO members drafted, revised, and interpreted a safety code for water boilers in an exclusionary way. The members injured competition by conspiring to discourage customers from purchasing one competitor's water boiler safety device by stating that it did not comply with the safety code, even though, in fact, it did.⁽²⁴⁾ And in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, steel conduit producers were found to have violated the Sherman Act because they manipulated the standard-setting process by stacking a vote in order to prevent the use of equally viable plastic conduit in the building industry.⁽²⁵⁾

In the wake of these cases, many SDOs implemented rules that strictly forbid all activities that could potentially result in antitrust liability, including restrictions on discussions about the terms and conditions of licenses to patents that are essential to a standard. VITA's proposed policy would relax these restrictions somewhat by requiring patent holders to declare the most restrictive terms they will require for licensing the essential claims of the patents they have been required to disclose as part of the VSO standard-setting process.⁽²⁶⁾ The proposed policy, however, maintains VSO's current prohibition on joint negotiation and discussion of patent licensing terms by working group members (or with third parties) at all VSO and working group meetings.

IV. Agency Analysis

Unless the standard-setting process is used as a sham to cloak naked price-fixing or bid rigging, the Department analyzes action during the standard-setting process under the rule of reason. The Department's analysis of VITA's proposed patent policy under the rule of reason examines both the policy's expected competitive benefits and its potential to restrain competition.

Early in the standard-setting process, VITA working group members often can choose among multiple substitute technological solutions, some of which may be patented. Once a particular technology is chosen and the standard is developed, however, it can be extremely expensive or even impossible to substitute one technology for another. In most cases, the entire standard-setting process would have to be repeated to develop an alternative standard around a different technology. Thus, those seeking to implement a given standard may be willing to license a patented technology included in the standard on more onerous terms than they would have been prior to the standard's adoption in order to avoid the expense and delay of developing a new standard around a different technology.

Requiring patent holders to disclose their most restrictive licensing terms in advance could help avoid this outcome by preserving the benefits of competition between alternative technologies that exist during the standard-setting process. Currently, VITA working group members choose between alternative technologies primarily based on technical merit. They generally have little information about how eventual licensing terms for alternative technologies are likely to differ. Under the proposed policy, each working group member also will be able to compare the most restrictive licensing terms associated with each alternative technology, including freely-available public domain technologies, when deciding which technology to support for inclusion in the draft VSO specification. Disclosure of this information, enforced by the requirement that nondisclosed patents be licensed royalty-free, permits the working group members to make more informed decisions when setting a standard. They might decide, for example, that a cheaper, less technologically elegant solution would be best or they

might determine that it is worth including the proffered technological elegance even on the most restrictive terms declared by the patent holder. At a minimum, the disclosure of most restrictive licensing terms decreases the chances that the standard-setting efforts of the working group will be jeopardized by unexpectedly high licensing demands from the patent holder.

The disclosure of each patent holder's most restrictive licensing terms would allow working group members to evaluate substitute technologies on both technical merit and licensing terms. Working group members are likely to use this information when deciding which technologies to include in the standard. This use likely will create incentives for each patent holder to compete by submitting declarations that will increase the chances that its patented technology will be selected

The proposed policy should not permit licensees to depress the price of licenses for patented technologies through joint action because it prohibits any joint negotiation or discussion of licensing terms among the working group members or with third parties at all VSO and working group meetings.⁽²⁷⁾ Moreover, working group members will not set actual licensing terms. The patent holder and each prospective licensee will negotiate separately, subject only to the restrictions imposed by the patent holder's unilateral declaration of its most restrictive terms.⁽²⁸⁾

Any efforts to reduce competition by using the declaration process as a cover to fix downstream prices of VME products would be a *per se* violation of section 1 of the Sherman Act, and the Department would not hesitate to condemn such activity. The same would be true of efforts by patent owners to rig their declarations of licensing terms. Thus, VITA, VSO, and its member companies vigilantly should continue to educate working group participants about the severe consequences of such activities.

V. Conclusion

The standards set by VSO are a critical element of the growth and continued innovation in the VME industry. VITA's proposed patent policy is an attempt to preserve competition and thereby to avoid unreasonable patent licensing terms that might threaten the success of future standards and to avoid disputes over licensing terms that can delay adoption and implementation after standards are set. The proposed policy does so by requiring working group members to disclose patents and patent applications that may become essential to implement a draft VSO standard, to commit to license on FRAND terms, and unilaterally to declare the most restrictive licensing terms that will be required. In addition, the proposed policy establishes an arbitration process which may be used to resolve compliance disputes. Adopting this policy is a sensible effort by VITA to address a problem that is created by the standard-setting process itself. Implementation of the proposed policy should preserve, not restrict, competition among patent holders. Any attempt by VITA or VSO members to use the declaration process as a cover for price-fixing of downstream goods or to rig bids among patent holders, however, would be summarily condemned.

The Department has no present intention to take antitrust enforcement action against the conduct you have described. This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you submitted will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Yours sincerely,

/S/

Thomas O. Barnett

FOOTNOTES

1. A bus is generally defined as a data path within a computer system. VME stands for VERSAmodule Eurocard, a bus system first developed in 1981 that "would be microprocessor independent, easily upgraded from 16 to 32-bit data paths, implement a reliable mechanical standard and allow independent inventors to build compatible products." VITA, VME Technology FAQ, <http://www.vita.com/vmefaq.html#anchor241615> (last visited Oct. 25, 2006). VITA's current standards development activities go beyond just VME technology

2. To be approved as an IEC ITA or as a VITA specification, the draft specification is made available to all VSO members. Seventy-five percent of them must vote on the draft and seventy-five percent of the votes must be affirmative. VITA Standards Org., VSO Policies and Procedures § 7.2.1.1 (rev. 2.0 June 2005), *available at* <http://www.vita.com/VOS-pp-draft2do.pdf>. To become an ANSI-approved standard, the draft specification must be available for public comment and two-thirds of ANSI qualified votes must approve the draft. VITA Standards Org., Procedures for the Development of American National Standards Within the VITA Standards Organization §§ 2-4 (drft. 0.4 2005), *available at* <http://www.vita.com/VSO-ansi-process-0d4.pdf>
3. Letter from Robert A. Skitol to Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice 2 (June 15, 2006) [hereinafter VITA-VSO Letter]
4. *Id.*
5. *Id.* at 2-3
6. *Id.*
7. For the purposes of this letter, the word "patents" also includes "patent applications."
8. The patent policy defines "essential" to mean "any claim the use of which is necessary to create a compliant implementation and for which there is no technically and commercially feasible non-infringing alternative." VITA Proposed Policies and Procedures § 10.2.1 (2006)
9. The members of a working group are *individuals who represent* a VITA member company. For purposes of the proposed patent policy, VITA defines "working group members" to include "all three levels of membership described in Section 7.1.4 of the VSO Policies and Procedures: sponsors, participants, and observers." *Id.* § 10.2.1 n.1
10. *Id.* § 10.3.2
11. *Id.* § 10.3.4. The proposed policy does not expressly address communications outside the context of VSO and working group meetings. Accordingly, this business review letter also does not address such potential communications
12. *Id.* § 10.5
13. The patent policy requires the working group member to search the member company and its affiliates, which the patent policy defines as "any entity that directly or indirectly controls, is controlled by, or is under common control with, another entity, so long as such control exists." *Id.* § 10.2.1 n.3
14. *Id.* § 10.2.1
15. *Id.* § 10.2.4. In disclosing a third party patent, a working group members does not take a position on the "essentiality or relevance of the third party claims." *Id.*
16. *Id.* app. 6
17. *Id.* § 10.2.2
18. *Id.* §§ 10.3.1, 10.3.2 & app. 6.E.2
19. *Id.* § 10.2.3
20. *Id.* § 10.3.2. Under the proposed patent policy a licensor may do no more than: (1) require a licensee to grant a FRAND license for any of the licensees current or future patents claims needed to implement the VITA-VSO standard; (2) require a licensee to grant a reciprocal license to such patent claims; (3) require a licensee not to assert or bring suit to enforce any such patent claims against the licensor; and (4) suspend the license if the licensee sues the licensor for infringement of any such patent claims. *Id.*
21. *Id.* § 10.4
22. *Id.* § 10.5
23. The arbitration panel must consist of three people: one chosen by the complainant, one chosen by the patent holder, and a panel chair chosen by the first two. The arbitrators chosen by the parties cannot be affiliated with any VITA member represented on the working group in question, and the chair cannot be affiliated with any VITA member or VITA. The VITA Technical Director will act as a non-voting administrator to monitor the panel's progress. *Id.* § 10.5
24. 456 U.S. 556, 571 (1982), *aff'g*, 817 F.2d 938 (2d Cir. 1987); *see also Radiant Burners, Inc. v.*

Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961) (holding agreement by American Gas Association members to refuse to sell gas to customers using a non-Association certified product states a claim of a *per se* violation of section 1 of the Sherman Act).

25. 486 U.S. 492, 509-10 (1988)

26. The purpose of both these types of disclosure is to avoid inefficient outcomes and to foster competition between available substitute technologies. Requiring the disclosure of essential patents and patent applications is common among SDOs and raises no antitrust concern

27. If the proposed policy did allow such negotiations and discussions, the Division likely would evaluate any antitrust concerns about them under the rule of reason because such actions could be procompetitive

28. When it agrees to license on nondiscriminatory terms as is usually required by SDOs, a patent owner relinquishes its right to restrict the number of licenses it will grant, and its right to require more restrictive terms in exchange for an exclusive license. Requiring patent holders to disclose the most restrictive limits to their FRAND commitment should not further reduce competition between licensees for patent licenses needed to implement the standard.

6. Patents

6.1 Definitions

The following terms, when capitalized, have the following meanings:

“*Accepted Letter of Assurance*” and “*Accepted LOA*” shall mean a Letter of Assurance that the IEEE-SA has determined is complete in all material respects and has been posted to the IEEE-SA web site.

“*Affiliate*” shall mean an entity that directly or indirectly, through one or more intermediaries, controls the Submitter, is controlled by the Submitter, or is under common control with the Submitter. For the purposes of this definition, the term “control” and its derivatives, with respect to for-profit entities, means the legal, beneficial or equitable ownership, directly or indirectly, of more than fifty percent (50%) of the capital stock (or other ownership interest, if not a corporation) of an entity ordinarily having voting rights. “Control” and its derivatives, with respect to nonprofit entities, means the power to elect or appoint more than fifty percent (50%) of the Board of Directors of an entity.

“*Blanket Letter of Assurance*” shall mean a Letter of Assurance that applies to all Essential Patent Claims for which a Submitter may currently or in the future (except as otherwise provided for in these Bylaws and in the *IEEE-SA Standards Board Operations Manual*) have the ability to license.

“*Enabling Technology*” shall mean any technology that may be necessary to make or use any product or portion thereof that complies with the [Proposed] IEEE Standard but is neither explicitly required by nor expressly set forth in the [Proposed] IEEE Standard (e.g., semiconductor manufacturing technology, compiler technology, object-oriented technology, basic operating system technology, and the like).

“*Essential Patent Claim*” shall mean any Patent Claim the use of which was necessary to create a compliant implementation of either mandatory or optional portions of the normative clauses of the [Proposed] IEEE Standard when, at the time of the [Proposed] IEEE Standard’s approval, there was no commercially and technically feasible non-infringing alternative. An Essential Patent Claim does not include any Patent Claim that was essential only for Enabling Technology or any claim other than that set forth above even if contained in the same patent as the Essential Patent Claim.

“*Letter of Assurance*” and “*LOA*” shall mean a document, including any attachments, stating the Submitter’s position regarding ownership, enforcement, or licensing of Essential Patent Claims for a specifically referenced IEEE Standard, submitted in a form acceptable to the IEEE-SA.

“*Patent Claim(s)*” shall mean one or more claims in issued patent(s) or pending patent application(s).

“*Reasonable and Good Faith Inquiry*” includes, but is not limited to, a Submitter using reasonable efforts to identify and contact those individuals who are from, employed by, or otherwise represent the Submitter and who are known to the Submitter to be current or past participants in the development process of the [Proposed] IEEE Standard identified in a Letter of Assurance, including, but not limited to, participation in a Sponsor Ballot or Working Group. If the Submitter did not or does not have any participants, then a Reasonable and Good Faith Inquiry may include, but is not limited to, the Submitter using reasonable efforts to contact individuals who are from, employed by, or represent the Submitter and who the Submitter believes are most likely to have knowledge about the technology covered by the [Proposed] IEEE Standard.

“*Statement of Encumbrance*” shall mean a specific reference to an Accepted LOA or a general statement in the transfer or assignment agreement that the Patent Claim(s) being transferred or assigned are subject to any encumbrances that may exist as of the effective date of such agreement. An Accepted LOA is an encumbrance.

“*Submitter*” when used in reference to a Letter of Assurance shall mean an individual or an organization that provides a completed Letter of Assurance. A Submitter may or may not hold Essential Patent Claims.

6.2 Policy

IEEE standards may be drafted in terms that include the use of Essential Patent Claims. If the IEEE receives notice that a [Proposed] IEEE Standard may require the use of a potential Essential Patent Claim, the IEEE shall request licensing assurance, on the IEEE Standards Board approved Letter of Assurance form, from the patent holder or patent applicant. The IEEE shall request this assurance without coercion.

The Submitter of the Letter of Assurance may, after Reasonable and Good Faith Inquiry, indicate it is not aware of any Patent Claims that the Submitter may own, control, or have the ability to license that might be or become Essential Patent Claims. If the patent holder or patent applicant provides an assurance, it should do so as soon as reasonably feasible in the standards development process once the PAR is approved by the IEEE-SA Standards Board. This assurance shall be provided prior to the Standards Board’s approval of the standard. This assurance shall be provided prior to a reaffirmation/stabilization if the IEEE receives notice of a potential Essential Patent Claim after the standard’s approval

or a prior reaffirmation/stabilization. An asserted potential Essential Patent Claim for which an assurance cannot be obtained (e.g., a Letter of Assurance is not provided or the Letter of Assurance indicates that assurance is not being provided) shall be referred to the Patent Committee.

A Letter of Assurance shall be either:

- a) A general disclaimer to the effect that the Submitter without conditions will not enforce any present or future Essential Patent Claims against any person or entity making, using, selling, offering to sell, importing, distributing, or implementing a compliant implementation of the standard; or
- b) A statement that a license for a compliant implementation of the standard will be made available to an unrestricted number of applicants on a worldwide basis without compensation or under reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair discrimination. At its sole option, the Submitter may provide with its assurance any of the following: (i) a not-to-exceed license fee or rate commitment, (ii) a sample license agreement, or (iii) one or more material licensing terms.

Copies of an Accepted LOA may be provided to the working group, but shall not be discussed, at any standards working group meeting.

The Submitter and all Affiliates (other than those Affiliates excluded in a Letter of Assurance) shall not assign or otherwise transfer any rights in any Essential Patent Claims that are the subject of such Letter of Assurance that they hold, control, or have the ability to license with the intent of circumventing or negating any of the representations and commitments made in such Letter of Assurance.

The Submitter of a Letter of Assurance shall agree (a) to provide notice of a Letter of Assurance either through a Statement of Encumbrance or by binding any assignee or transferee to the terms of such Letter of Assurance; and (b) to require its assignee or transferee to (i) agree to similarly provide such notice and (ii) to bind its assignees or transferees to agree to provide such notice as described in (a) and (b).

This assurance shall apply to the Submitter and its Affiliates except those Affiliates the Submitter specifically excludes on the relevant Letter of Assurance.

If, after providing a Letter of Assurance to the IEEE, the Submitter becomes aware of additional Patent Claim(s) not already covered by an existing Letter of Assurance that are owned, controlled, or licensable by the Submitter that may be or become Essential Patent Claim(s) for the same IEEE Standard but are not the subject of an existing Letter of Assurance, then such Submitter shall submit a Letter of Assurance stating its position regarding enforcement or licensing of such Patent Claims. For the purposes of this commitment, the Submitter is deemed to be aware if any of the following individuals who are from, employed by, or otherwise represent the Submitter have personal knowledge of additional potential Essential Patent Claims, owned or controlled by the Submitter, related to a [Proposed] IEEE Standard and not already the subject of a previously submitted Letter of Assurance: (a) past or present participants in the development of the [Proposed] IEEE Standard, or (b) the individual executing the previously submitted Letter of Assurance.

The assurance is irrevocable once submitted and accepted and shall apply, at a minimum, from the date of the standard's approval to the date of the standard's withdrawal.

The IEEE is not responsible for identifying Essential Patent Claims for which a license may be required, for conducting inquiries into the legal validity or scope of those Patent Claims, or for determining whether any licensing terms or conditions provided in connection with submission of a Letter of Assurance, if any, or in any licensing agreements are reasonable or non-discriminatory.

Nothing in this policy shall be interpreted as giving rise to a duty to conduct a patent search. No license is implied by the submission of a Letter of Assurance.

In order for IEEE's patent policy to function efficiently, individuals participating in the standards development process: (a) shall inform the IEEE (or cause the IEEE to be informed) of the holder of any potential Essential Patent Claims of which they are personally aware and that are not already the subject of an existing Letter of Assurance, owned or controlled by the participant or the entity the participant is from, employed by, or otherwise represents; and (b) should inform the IEEE (or cause the IEEE to be informed) of any other holders of such potential Essential Patent Claims that are not already the subject of an existing Letter of Assurance.

LETTER OF ASSURANCE FOR ESSENTIAL PATENT CLAIMS

Please return via mail,
e-mail (as a PDF), or fax:

PatCom Administrator, IEEE-SA Standards Board Patent Committee
Institute of Electrical and Electronics Engineers, Inc.
445 Hoes Lane
Piscataway, NJ 08854 USA
FAX (+1 732-875-0524) e-mail: patcom@ieee.org

No license is implied by submission of this Letter of Assurance

A. SUBMITTER:

Legal Name: _____ (“Submitter”)

B. SUBMITTER'S CONTACT INFORMATION (for the purpose of licensing information):

Contact Name/Title: _____

Department: _____

Address: _____

Telephone: _____

Fax: _____

E-mail: _____

URL: _____

Note: The IEEE does not endorse the content, or confirm the accuracy or consistency of any contact information or web site listed above.

C. IEEE STANDARD OR PROJECT (e.g., AMENDMENT, CORRIGENDA, OR REVISION):

In accordance with Clause 6.3.5 of the *IEEE-SA Standards Board Operations Manual*, this licensing position is limited to the following:

Standard/Project Number: _____

Title: _____

D. SUBMITTER'S POSITION REGARDING LICENSING OF ESSENTIAL PATENT CLAIMS:

In accordance with Clause 6 of the *IEEE-SA Standards Board Bylaws*, the Submitter hereby declares the following (*Check box 1 or box 2 below*):

Note: Nothing in this Letter of Assurance shall be interpreted as giving rise to a duty to conduct a patent search. The IEEE takes no position with respect to the validity or essentiality of Patent Claims or the reasonableness of rates, terms, and conditions provided in connection with submission of a Letter of Assurance, if any, or in any license agreements offered by the Submitter. To the extent there are inconsistencies between the Letter of Assurance Form and any sample licenses, material licensing terms, or not to exceed rates provided in connection with 1.a. or 1.b. below, the terms of the Letter of Assurance Form shall control.

- ☐ 1. The Submitter may own, control, or have the ability to license Patent Claims that might be or become Essential Patent Claims. With respect to such Essential Patent Claims, the Submitter's licensing position is as follows (*must check a, b, c, or d and any applicable subordinate boxes*):

- ☐ a. The Submitter will grant a license without compensation to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.

- ☐ (Optional) A sample of such a license (or material licensing terms) that is substantially similar to what the Submitter would offer is attached.

- ☐ b. The Submitter will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.

☐ (Optional) These reasonable rates will not exceed _____ (e.g., percent of product price, flat fee, per unit).

☐ (Optional) A sample of such a license (or material licensing terms) that is substantially similar to what the Submitter would offer is attached.

- ☐ c. The Submitter without conditions will not enforce any present or future Essential Patent Claims against any person or entity making, using, selling, offering to sell, importing, distributing, or implementing such a compliant implementation.

- ☐ d. The Submitter is unwilling or unable to grant licenses according to the provisions of either a or b above or to agree that it will not enforce its Essential Patent Claims as described in c above.

- ☐ 2. After a Reasonable and Good Faith Inquiry, the Submitter is not aware of any Patent Claims that the Submitter may own, control, or have the ability to license that might be or become Essential Patent Claims.

E. SCOPE OF ASSURANCE:

Note: The Submitter must complete this section if box 1 in part D above is checked.

The Submitter may, but is not required to, identify one or more of its Patent Claims that it believes might be or become Essential Patent Claims. *(Submitter must check box 1 or box 2 below)*

- ☐ 1. When checked, this Letter of Assurance only applies to the Patent Claims identified below that are or become Essential Patent Claims. (If no Patent Claim is identified below, then this Letter of Assurance applies to all Essential Patent Claims supported by the disclosure in the patent or patent applications listed below.)

Patent/Application/Docket Number: _____

Description/Title (optional): _____

Claim (optional): _____

Patent/Application/Docket Number: _____

Description/Title (optional): _____

Claim (optional): _____

Patent/Application/Docket Number: _____

Description/Title (optional): _____

Claim (optional): _____

For additional patents, use additional pages as necessary.

- ☐ 2. When checked, this Letter of Assurance is a Blanket Letter of Assurance. As such, all Essential Patent Claims that the Submitter may currently or in the future have the ability to license shall be available under the terms as indicated above in part D.1; however, a Blanket Assurance shall not supersede any pre-existing or simultaneously submitted specific assurance identifying potential Essential Patent Claims.

F. APPLICATION TO AFFILIATES:

With respect to any Essential Patent Claims that an Affiliate has the ability to license, the Submitter agrees that (i) the licensing positions described in parts C and D above apply to any Essential Patent Claims within the scope of the assurance described in part E; and (ii) the terms of this assurance are binding on each such Affiliate; provided, however, that such representations and commitments shall not apply to Affiliates identified below:

<input type="text"/> Organization's Name	<input type="text"/> Organization's Name
<input type="text"/> Address	<input type="text"/> Address
<input type="text"/> Contact person	<input type="text"/> Contact person

For additional Affiliates, use additional pages as necessary.

G. SIGNATURE:

By signing this Letter of Assurance, you represent that you have the authority to bind the Submitter and all Affiliates (other than those Affiliates excluded above) to the representations and commitments provided in this LOA and acknowledge that users and implementers of the [Proposed] IEEE Standard identified in part C above are relying or will rely upon and may seek enforcement of the terms of this LOA. The Submitter and all Affiliates (other than those Affiliates excluded above) agree not to sell or otherwise transfer any rights in any Essential Patent Claims that they hold, control, or have the ability to license with the intent of circumventing or negating any of the representations and commitments made in this LOA.

The Submitter agrees (a) to provide notice of a Letter of Assurance either through a Statement of Encumbrance or by binding any assignee or transferee to the terms of such Letter of Assurance; and (b) to require its assignee or transferee to (i) agree to similarly provide such notice and (ii) to bind its assignees or transferees to agree to provide such notice as described in (a) and (b).

If, as described in Clause 6 of the *IEEE-SA Standards Board Bylaws*, the Submitter becomes aware of additional Patent Claims not already covered by an existing Letter of Assurance that are owned, controlled, or licensable by the Submitter that may be or become Essential Patent Claims with respect to the standard identified in C above, the Submitter agrees to submit a Letter of Assurance stating its position regarding enforcement or licensing of such Patent Claims.

Print name of authorized person:

Title of authorized person:

Signature of authorized person: Date:

Address:

Phone: E-mail:

Note: This assurance applies from the date of the standard's approval to the date of the standard's withdrawal and is irrevocable upon acceptance by the IEEE-SA.

The IEEE Patent Policy and the procedures used to execute that policy are documented in the IEEE-SA Standards Board Bylaws and the IEEE-SA Standards Board Operations Manual, available at <http://standards.ieee.org/resources/index.html#guides>. The terms and definitions set forth in the IEEE Patent Policy, IEEE-SA Standards Board Bylaws, and IEEE-SA Standards Board Operations Manual in effect as of the date of this Letter of Assurance are incorporated herein.

DEFINITIONS

The following terms, when capitalized, have the following meanings:

“Accepted Letter of Assurance” and *“Accepted LOA”* shall mean a Letter of Assurance that the IEEE-SA has determined is complete in all material respects and has been posted to the IEEE-SA web site.

“Affiliate” shall mean an entity that directly or indirectly, through one or more intermediaries, controls the Submitter, is controlled by the Submitter, or is under common control with the Submitter. For the purposes of this definition, the term “control” and its derivatives, with respect to for-profit entities, means the legal, beneficial or equitable ownership, directly or indirectly, of more than fifty percent (50%) of the capital stock (or other ownership interest, if not a corporation) of an entity ordinarily having voting rights. “Control” and its derivatives, with respect to nonprofit entities, means the power to elect or appoint more than fifty percent (50%) of the Board of Directors of an entity.

“Blanket Letter of Assurance” shall mean a Letter of Assurance that applies to all Essential Patent Claims for which a Submitter may currently or in the future (except as otherwise provided for in these Bylaws and in the *IEEE-SA Standards Board Operations Manual*) have the ability to license.

“Enabling Technology” shall mean any technology that may be necessary to make or use any product or portion thereof that complies with the [Proposed] IEEE Standard but is neither explicitly required by nor expressly set forth in the [Proposed] IEEE Standard (e.g., semiconductor manufacturing technology, compiler technology, object-oriented technology, basic operating system technology, and the like).

“Essential Patent Claim” shall mean any Patent Claim the use of which was necessary to create a compliant implementation of either mandatory or optional portions of the normative clauses of the [Proposed] IEEE Standard when, at the time of the [Proposed] IEEE Standard’s approval, there was no commercially and technically feasible non-infringing alternative. An Essential Patent Claim does not include any Patent Claim that was essential only for Enabling Technology or any claim other than that set forth above even if contained in the same patent as the Essential Patent Claim.

“Letter of Assurance” and *“LOA”* shall mean a document, including any attachments, stating the Submitter’s position regarding ownership, enforcement, or licensing of Essential Patent Claims for a specifically referenced IEEE Standard, submitted in a form acceptable to the IEEE-SA.

“Patent Claim(s)” shall mean one or more claims in issued patent(s) or pending patent application(s).

“Reasonable and Good Faith Inquiry” includes, but is not limited to, a Submitter using reasonable efforts to identify and contact those individuals who are from, employed by, or otherwise represent the Submitter and who are known to the Submitter to be current or past participants in the development process of the [Proposed] IEEE Standard identified in a Letter of Assurance, including, but not limited to, participation in a Sponsor Ballot or Working Group. If the Submitter did not or does not have any participants, then a Reasonable and Good Faith Inquiry may include, but is not limited to, the Submitter using reasonable efforts to contact individuals who are from, employed by, or represent the Submitter and who the Submitter believes are most likely to have knowledge about the technology covered by the [Proposed] IEEE Standard.

“Statement of Encumbrance” shall mean a specific reference to an Accepted LOA or a general statement in the transfer or assignment agreement that the Patent Claim(s) being transferred or assigned are subject to any encumbrances that may exist as of the effective date of such agreement. An Accepted LOA is an encumbrance.

“Submitter” when used in reference to a Letter of Assurance shall mean an individual or an organization that provides a completed Letter of Assurance. A Submitter may or may not hold Essential Patent Claims.

<p><i>Should any discrepancy exist between the definitions above and the definitions in the IEEE-SA Standards Board Bylaws clause 6.1, the definitions contained in the Bylaws shall control.</i></p>

附属書K — IEEEのIPRポリシーに対する司法省の見解



DEPARTMENT OF JUSTICE
Antitrust Division

THOMAS O. BARNETT
Assistant Attorney General

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(202) 514-2401 / (202) 616-2645 (fax)
E-mail: antitrust@usdoj.gov
Web site: <http://www.usdoj.gov/atr>

April 30, 2007

FACSIMILE TRANSMITTAL

Michael A. Lindsay, Esq.
Dorsey & Whitney LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402-1498

Dear Mr. Lindsay:

This letter responds to your request on behalf of the Institute of Electrical and Electronics Engineers, Inc. ("IEEE") and its Standards Association ("IEEE-SA") for a business review letter from the Department of Justice pursuant to our Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's antitrust enforcement intentions with respect to a proposed patent information policy that will allow patent holders to publicly commit to specific restrictions on their future licensing terms and conditions for the use of patents that are essential to IEEE standards. This proposed change in IEEE's patent information policy is designed to better ensure that any willing licensee can implement IEEE standards and that IEEE standards will become widely adopted.

I. IEEE and IEEE-SA

IEEE is a non-profit professional association with over 385,000 members whose technical interests cover the fields of aerospace systems, computers, telecommunications, biomedical engineering, electric power, and consumer electronics.⁽¹⁾ IEEE has long been involved with technological collaborative standard-setting activities in the United States. IEEE was formed in 1963 as a result of a merger between the American Institute of Electrical Engineers, formed in 1884, and the Institute of Radio Engineers, formed in 1912. Standards development was a major part of both of IEEE's predecessor institutions, and IEEE-SA has continued that tradition by establishing more than 900 standards, with more than 400 standards currently in development. The standards issued by IEEE-SA are used in fields and industries including information technology, power and energy, instrumentation and measurement, mobile and stationary batteries, nanotechnology, organic electronics, telecommunications, and transportation safety.⁽²⁾ Many IEEE standards have been developed to enhance the interoperability of communications products. One important example is the 802[®] series of standards for local and metropolitan area wireless and wired networks. Ethernets, token rings, wireless local area networks ("LANs"), and bridging and virtual bridged LANs, for example, are widely used today because they allow users to reliably access and share information over communications systems by interconnecting many compatible products manufactured by different producers.

Two processes for developing standards are used within IEEE-SA. The first involves all interested qualified individuals who each may vote on the decisions made in the standard-setting process. More recently,

IEEE-SA has set some standards using a corporate-based program in which each materially interested participating corporation, educational institution, or government agency has one vote on the decisions made in the standard-setting process.

The IEEE-SA standards-setting process begins when a member of an IEEE Technical Society or Council sponsors a new standardization project.⁽³⁾ After determining that there is sufficient interest among IEEE members for such a standard, the sponsor appoints a study group chair who submits a project authorization request ("PAR") to the IEEE-SA Standards Board.⁽⁴⁾ If the project is approved, an official working group is formed and is given four years to draft a standard.⁽⁵⁾ When the draft standard is complete, it must be approved by a balloting group made up of interested IEEE members.⁽⁶⁾ At least seventy-five percent of the balloting group must vote on the draft standard and seventy-five percent of these votes must be affirmative.⁽⁷⁾ A failed ballot may be recirculated after addressing negative comments in order to gain the required approval. Even after the 75/75 requirement has been met, the working group must respond to all negative comments.⁽⁸⁾ A ballot-approved draft standard is then submitted to the IEEE-SA Standards Board⁽⁹⁾ which approves the standard after confirming that the draft standard is within the scope of the PAR and that the working group has followed the procedural rules designed to achieve consensus.⁽¹⁰⁾

In order to "produce standards that any willing implementer can use and that will become widely adopted," IEEE seeks to ensure that licenses for patent claims that are essential to implement an IEEE standard are broadly available on reasonable terms.⁽¹¹⁾ IEEE-SA's current patent policy is found in the IEEE-SA Standards Board Bylaws and its Standards Board Operations Manual. This policy requires working group chairs to begin every working group meeting to develop IEEE standards by informing participants that they should disclose any patent claims or patent applications that might be essential to implement the standard they are drafting.⁽¹²⁾ The working group chair asks those who may hold potentially essential patents to state, in writing, either (1) that they will not enforce their essential patent claims used to implement the standard, or (2) that they will license the essential patent claims to implement the standard on reasonable and nondiscriminatory ("RAND") terms.⁽¹³⁾ The IEEE-SA Standards Board will consider these commitments, or lack thereof, when deciding whether to approve a draft standard.⁽¹⁴⁾

IEEE-SA represents that it has encountered two difficulties in relying on patent holders' commitments to license on RAND terms. First, commitments to license essential patent claims on RAND terms are inherently vague. Such ambiguities in RAND commitments can lead to litigation that can delay the introduction of standardized products. Patent holders may also demand higher licensing fees than they could have profitably demanded before the standard was set, and such higher royalty payments could result in higher prices for consumers.⁽¹⁵⁾ Second, IEEE-SA is concerned that its current prohibition of any discussion related to licensing terms within working groups prevents its members from making "sensible cost-benefit comparisons" when voting on competing technological proposals.⁽¹⁶⁾ IEEE-SA believes that the uncertainty about future licensing terms impedes the ability of IEEE-SA working group members to make decisions on a consensus basis, as is required by IEEE-SA procedures.⁽¹⁷⁾

II. The Proposed IEEE-SA Patent Information Policy

IEEE-SA has decided to change its policy to give patent holders the option to publicly disclose and commit to the most restrictive licensing terms (which may include the maximum royalty rate) they would offer for patent claims⁽¹⁸⁾ that are found to be essential to the standard.⁽¹⁹⁾ In addition, IEEE working group members will be allowed to discuss within certain limits the relative costs and benefits of alternative technologies within technical standard-setting meetings.

Commitments to licensing terms for potentially essential patent claims will be made using an IEEE-SA Letter of Assurance ("LOA") form. The proposed policy specifies that the licensing commitments made in an LOA will bind future holders of the patent as well as affiliates of the patent holder, unless they are specifically excluded from the LOA. Each LOA will also apply to amendments, corrigenda (corrections to printing errors), editions, or revisions of the existing standard. IEEE-SA anticipates that the proposed policy changes will have positive effects. Creating greater clarity about a patent holder's future licensing requirements may decrease the chances that litigation will delay the implementation of an IEEE standard and improve the ability of working groups to reach consensus, thus allowing standardized products to reach consumers more quickly. IEEE-SA states that these changes also may result in lower prices for consumers of standardized products.⁽²⁰⁾

A. Patent Licensing Commitments

If the working group chair learns that access to a patent claim might be necessary to implement a proposed standard, it must request a licensing assurance from the patent holder or the patent applicant.⁽²¹⁾ A patent holder can choose to respond to a request from IEEE in one of five ways.⁽²²⁾ First, it may either choose not to provide any licensing information, by not submitting an LOA or submitting a letter stating that it is unwilling or unable to make any commitment about its future licensing intentions. Choosing this option, however, results

in a referral to the Patent Committee.⁽²³⁾ At the time the draft standard is published, IEEE will announce that essential patent claims may exist for which no LOA has been received.⁽²⁴⁾

Second, after a reasonable and good faith inquiry, a putative patent holder may submit an LOA stating that it is not aware that it owns, controls, or otherwise has the ability to grant a license to any patent claims that might become essential to the IEEE standard.⁽²⁵⁾ Such a reasonable and good faith inquiry does not require a patent holder to search its patent portfolio. Rather, it involves contacting individuals associated with the company who have been involved with the development of the standard.⁽²⁶⁾

Third, a patent holder may submit an LOA stating that it will not assert any claims against anyone who uses its essential patented technology to implement the standard. Such a nonassertion LOA may not include any conditions.⁽²⁷⁾

Fourth, a patent holder may submit an LOA stating that it has patents that might be essential to the IEEE standard and that it is willing to license the essential claims of those patents to those seeking to implement the standard either "without compensation" or under "reasonable rates" with all other terms and conditions on a RAND basis.⁽²⁸⁾

Fifth, if a patent holder commits to license its essential patent claims under RAND terms, it may voluntarily augment its LOA by including details about those terms for each essential claim. Such details may include a not-to-exceed license fee or rate commitment, other material licensing terms, or a sample licensing agreement.⁽²⁹⁾

The patent holder may choose to provide a blanket LOA that covers all patent claims that are potentially essential to the proposed standard. Or, the patent holder may provide different LOAs for each potentially essential patent claim.⁽³⁰⁾ A patent holder may also submit multiple LOAs for each potentially essential patent claim, each of which will be binding. Thus, a patent holder may offer alternative assurances to potential licensees and each potential licensee may choose to invoke whichever LOA it finds most advantageous during subsequent bilateral licensing negotiations.⁽³¹⁾ Having submitted one LOA, a submitter is obliged to submit additional LOAs if it learns during the standard-setting process that it owns, controls, or has the ability to license any other patent claims that might be essential to the same IEEE standard.⁽³²⁾

B. Timing

If an individual or organization chooses to submit an LOA, it must do so before the proposed standard is approved by the Standards Board, although the Standards Board requests that LOAs be submitted as soon as it is "reasonably feasible" to do so.⁽³³⁾

C. Submission and Acceptance

To submit an LOA, a patent holder simply mails the completed LOA form to the IEEE-SA's Patent Committee Administrator, who then records the date the LOA is received and ensures that the LOA is materially completed on the appropriate IEEE form. The Patent Committee Administrator also determines whether the signatory to an LOA has authority to bind the patent holder. Once the Patent Committee Administrator has approved an LOA, it is posted on the IEEE-SA website.⁽³⁴⁾

D. Duration of the LOA Commitment

After an LOA is accepted by IEEE-SA, it is irrevocable and applies from the date the standard is approved by the IEEE-SA Standards Board to the date the standard is withdrawn. The commitments in an LOA are binding on the patent holder and all of its affiliates, except those that have been specifically excluded, and on any assignees or transferees of the underlying patent claims.⁽³⁵⁾ If the application of the technology remains the same and the patent claims remain essential, the LOA will also apply to amendments, corrigenda, editions, or revisions of the existing standard.⁽³⁶⁾

E. Use of the Licensing Information in the LOA During the Standard-Setting Process

IEEE-SA working group members will have access to all accepted LOAs, but working group members will not discuss specific licensing terms at standards-development meetings.⁽³⁷⁾ Working group members may, however, discuss the relative costs of the proposed technological alternatives, and these costs may include the relative costs of licensing the essential patent claims needed to implement the technologies under consideration.⁽³⁸⁾

F. Enforcement of an LOA

By signing an LOA, the submitter "acknowledge[s] that users and implementers" of the proposed standard "are relying or will rely upon and may seek enforcement of the terms of th[e] LOA."⁽³⁹⁾ The IEEE-SA's policy does not provide for any enforcement role for IEEE-SA or IEEE.⁽⁴⁰⁾

III. Agency Analysis

The Department analyzes the competitive effects of standard-setting activities under the rule of reason unless the standard-setting process is being "used as a sham to cloak naked price fixing or bid rigging."⁽⁴¹⁾ We examine both the expected competitive benefits of IEEE's proposed patent policy and its potential to restrain competition.

The Department recently announced through a business review letter that it did not intend to take enforcement action against the proposed patent policy of another standards-development organization ("SDO")--VMEbus International Trade Association ("VITA"). In that letter the Department recognized the potential competitive benefits of collaborative standard setting:

Interoperability standards can enable consumers to share information with each other and to interconnect compatible products from different producers. In addition, the collaborative standard-setting process can enable industry participants to share knowledge and develop a "best-of-breed" product or process. Especially in industries with network effects, the collaborative standard-setting process can enlarge markets by overcoming coordination failures among those interested in developing and using the standard so that the products are available to, and used, by more consumers.⁽⁴²⁾

The Department noted that working group members may be able to choose among various technological options during the standard-setting process, but once the technological choice is made, and particularly once the standard has been commercially adopted, it can be time consuming and expensive to adopt a different technology. As a result, the owner of a technology incorporated in a final standard may be able to negotiate licensing terms more favorable to itself than it could have negotiated before the standard was set when competitive alternatives may have been available without "the expense and delay of developing a new standard around a different technology."⁽⁴³⁾

The Department concluded that a policy that requires patent holders to disclose and commit to their most restrictive licensing terms would permit SDO members to make more informed decisions when setting a standard because they would be able to compare alternative technologies based on differences in cost in addition to technical merit. The Department stated:

Requiring patent holders to disclose their most restrictive licensing terms in advance could help . . . preserv[e] the benefits of competition between alternative technologies that exist during the standard-setting process. Currently, VITA working group members choose between alternative technologies primarily based on technical merit. They generally have little information about how eventual licensing terms for alternative technologies are likely to differ. Under the proposed policy, each working group member also will be able to compare the most restrictive licensing terms associated with each alternative technology, including freely-available public domain technologies, when deciding which technology to support for inclusion in the draft VSO specification. Disclosure of this information, enforced by the requirement that nondisclosed patents be licensed royalty-free, permits the working group members to make more informed decisions when setting a standard. . . .

The disclosure of each patent holder's most restrictive licensing terms would allow working group members to evaluate substitute technologies on both technical merit and licensing terms. Working group members are likely to use this information when deciding which technologies to include in the standard. This use likely will create incentives for each patent holder to compete by submitting declarations that will increase the chances that its patented technology will be selected.⁽⁴⁴⁾

Although the proposed IEEE-SA policy does not require patent holders to publicly commit to their most restrictive licensing terms during the standard-setting process, the ability to make such commitments could generate similar benefits as patent holders may compete to offer the most attractive combination of technology and licensing terms.

In addition, IEEE-SA working group members may make better informed decisions by considering potential licensing fees when weighing the relative costs of technological alternatives in addition to their technical merits. Moreover, the increased predictability of licensing terms, created by LOA commitments and the knowledge that such commitments bind the patent holder's affiliates and any future patent assignees, could lead to faster development, implementation, and adoption of a standard as well as fewer litigated disputes after a standard is set.

The proposed patent information policy permits voluntary commitments to most restrictive licensing terms, but prohibits discussion of specific licensing terms within IEEE-SA standards development meetings.⁽⁴⁵⁾ Based on your statements, we understand that this prohibition extends to joint negotiations of licensing terms within standards development meetings.⁽⁴⁶⁾ The Department observes in this regard that IEEE's current policies permit limited discussions of costs related to proposed standards. Such discussion, could, in

certain circumstances, rise to the level of joint negotiation of licensing terms. You have not requested, and we are not providing, the Department's views on joint negotiations that might take place inside or outside such standards development meetings or IEEE sponsored meetings.⁽⁴⁷⁾

The proposed IEEE-SA policy will prohibit standard setters from discussing the prices at which standardized products would be sold.⁽⁴⁸⁾ The Department likely would challenge under section 1 of the Sherman Act any activities that reduced competition by using IEEE-SA's proposed patent policy as a cover to fix the prices of downstream standardized products. The Department would also be likely to challenge efforts by patent holders to rig their LOAs by agreeing on the licensing terms they will disclose to IEEE-SA. IEEE-SA should continue its efforts to educate those who set standards under its auspices about the consequences of such activities.⁽⁴⁹⁾

IV. Conclusion

IEEE-SA has an important role in setting many standards in a vast array of technical fields. These standards promote and enable competition in the products and services that conform to IEEE-SA standards. IEEE-SA's proposed patent information policy is a sensible effort to preserve competition between technological alternatives before the standard is set in order to alleviate concern that commitments by patent holders to license on RAND terms are not sufficient to avoid disputes over licensing terms or litigation that may delay the implementation of IEEE-SA's future standards.

Practical consideration may lead some SDOs to prefer not to implement patent policies like those proposed by IEEE-SA or by VITA. Some SDOs, for example, may conclude that required or voluntary disclosure of and commitments to most restrictive licensing terms before a standard is set would decrease participation in standard-setting activities by patent holders. Experimentation and competition among SDOs regarding the breadth and depth of member licensing commitment obligations or options should help SDOs and their members determine which methods ultimately provide the best platforms for collaborative standard setting.⁽⁵⁰⁾

The Department has no present intention to take antitrust enforcement action against the conduct you have described. This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you submitted will be made publicly available within thirty days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Yours sincerely,

/S/

Thomas O. Barnett

FOOTNOTES

1. IEEE, About the IEEE, <http://www.ieee.org/web/aboutus/home/index.html> (last visited Feb. 21, 2007).

2. *Id.*

3. Inst. of Elec. & Elecs. Eng'rs, Inc., IEEE-SA Standards Board Bylaws 5.2.2(a)(e) (2007), *available at* <http://standards.ieee.org/guides/bylaws/sb-bylaws.pdf> [hereinafter IEEE-SA Standards Board Bylaws]; IEEE Standards Association, IEEE Standards Companion, <http://standards.ieee.org/guides/companion/part1.html#sponsor> (last visited Feb. 21, 2007).

4. IEEE Standards Companion, *supra* note 3; see IEEE-SA Standards Board Bylaws, *supra* note 3, 5.2.3.

5. IEEE Standards Companion, *supra* note 3; see IEEE-SA Standards Board Bylaws, *supra* note 3, 5.2.3.

6. Inst. of Elec. & Elecs. Eng'rs, Inc., IEEE-SA Standards Board Operations Manual § 5.4.3.1 (2007), *available at* <http://standards.ieee.org/guides/opman/sb-om.pdf> [hereinafter IEEE-SA Standards Board Operations Manual]; IEEE Standards Companion, *supra* note 3. The sponsor sends out an invitation to join a balloting group to those IEEE members or participants it thinks may be interested in voting on the draft standard. Those that respond affirmatively to this request comprise the balloting group. IEEE-SA Standards Board Operations Manual, *supra*, § 5.4.2.

7. IEEE-SA Standards Board Operations Manual, *supra* note 6, 5.4.3.1.
8. IEEE Standards Companion, *supra* note 3; see IEEE-SA Standards Board Operations Manual, *supra* note 6, 5.4.3.12.
9. See IEEE-SA Standards Board Operations Manual, *supra* note 6, 5.6.2.4.
10. There are several opportunities for appeal. Working group members may appeal to the sponsoring committee if they believe the process has been unfair and members of the balloting group may appeal to the Standards Board. IEEE-SA Standards Board Bylaws, *supra* note 3, § 5.4.
11. Letter from Michael A. Lindsay, Dorsey & Whitney LLP, to Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice 2 (Nov. 29, 2006) [hereinafter IEEE-SA Business Review Request].
12. IEEE-SA Standards Board Operations Manual, *supra* note 6, § 6.3.2.
13. IEEE-SA Standards Board Bylaws, *supra* note 3, § 6.
14. IEEE-SA Business Review Request, *supra* note 11, at 2. Based on conversations with you, it is our understanding that the Standards Board will defer approval of a draft standard until some response has been received from the patent holder.
15. IEEE-SA Business Review Request, *supra* note 11, at 23.
16. *Id.* at 5.
17. *Id.*; IEEE-SA Standards Board Operations Manual, *supra* note 6, § 5.3.3; IEEE-SA Standards Board Bylaws, *supra* note 3, § 2.1 ("The approval and publication of an IEEE standard implies that the document represents a consensus of the parties who have participated in its development and review. Since every attempt is made to involve all interests in the activity, it can be presumed that the document represents a consensus of interests concerned with the scope of the standard. Consensus is established when, in the judgment of the IEEE-SA Standards Board, substantial agreement has been reached by directly and materially affected interest categories. Substantial agreement means much more than a simple majority, but not necessarily unanimity. Consensus requires that all views and objections be considered, and that a concerted effort be made toward their resolution."); IEEE, Imperative Principles of the Standards Process (n.d.), <http://standards.ieee.org/faqs/ImperativePrinciples.ppt>.
18. Patent claims are defined as "one or more claims in issued patent(s) or pending patent application(s)." Inst. of Elec. & Elecs. Eng'rs, Inc., IEEE-SA Standards Board Bylaws § 6.1 (rev. 2006), *in* Letter from Michael A. Lindsay, Dorsey & Whitney LLP, to Frances Marshall, Special Counsel for Intellectual Prop., U.S. Dep't of Justice (Feb. 21, 2007) [hereinafter IEEE-SA Proposed Standards Board Bylaws].
19. A patent claim is essential if its use is "necessary to create a compliant implementation" of the proposed standard when "there was no commercially or technically feasible non-infringing alternative." IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, 6.1.
20. See IEEE-SA Business Review Request, *supra* note 11, at 5.
21. IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2; Inst. of Elec. & Elecs. Eng'rs, Inc., IEEE-SA Standards Board Operations Manual § 6.3.2 (rev. 2006), *in* Letter from Michael Lindsay to Frances Marshall, *supra* note 18 [hereinafter IEEE-SA Proposed Standards Board Operations Manual I]. It is our understanding that a patent holder also may submit an LOA on its own accord. The term "patent holder" as used in this letter refers to an individual or organization that has, or will have, the legal right to license a patent claim that is potentially essential to an IEEE standard.
22. See IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2.
23. Inst. of Elec. & Elecs. Eng'rs, Inc., Letter of Assurance for Essential Patent Claims D.1.d (2006), *in* IEEE-SA Business Review Request, *supra* note 11, at exhibit B [hereinafter Letter of Assurance]; IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2.
24. IEEE-SA Standards Board Operations Manual, *supra* note 6, § 6.3.2.
25. IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2 ("The Submitter of the Letter of Assurance may, after Reasonable and Good Faith Inquiry, indicate it is not aware of any Patent Claims that the Submitter may own, control, or have the ability to license that might be or become Essential Patent Claims.").
26. *Id.* § 6.1.
27. *Id.* § 6.2(a).

28. *Id.* § 6.2(b).
29. *Id.* § 6.2(b)(i)(iii).
30. IEEE-SA Proposed Standards Board Operations Manual I, *supra* note 21, § 6.3.4. A potential licensee may not invoke a blanket LOA if an LOA specific to that claim was filed on the same date. Blanket LOAs will apply to after-acquired essential patent claims unless the prior patent holder had already submitted an LOA for those claims. *Id.*
31. *Id.*
32. IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2.
33. *Id.*
34. IEEE-SA Proposed Standards Board Operations Manual I, *supra* note 21, § 6.3.
35. IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2. IEEE may request an LOA from excluded affiliates. IEEE-SA Proposed Standards Board Operations Manual I, *supra* note 21, § 6.3.
36. IEEE-SA Proposed Standards Board Operations Manual I, *supra* note 21, § 6.3.5. A new LOA must be requested when technologies are used in different proposed standards. *Id.*
37. IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2 ("Copies of an Accepted LOA may be provided to the working group, but shall not be discussed, at any standards working group meeting."); Inst. of Elec. & Elecs. Eng'rs, Inc., IEEE-SA Standards Board Operations Manual § 5.3.8.2 (rev. 2006), *in* Letter from Michael A. Lindsay, Dorsey & Whitney LLP, to Frances Marshall, Esq., U.S. Dep't of Justice (Dec. 12, 2006) [hereinafter IEEE-SA Proposed Standards Board Operations Manual II] ("No discussions or other communications regarding the following topics shall occur during IEEE-SA working group standards-development meetings or other duly authorized IEEE-SA standards-development technical activities: The status or substance of ongoing litigation[, t]he essentiality, interpretation, or validity of patent claims[, s]pecific patent license terms or other intellectual property rights, other than distribution of accepted letter of assurance as permitted under the IEEE-SA patent policy (see section 6.2 of *IEEE-SA Standards Board Bylaws*)."). Although section 5.3.8 of the Proposed IEEE Standards Board Operations Manual is not officially part of the revised patent policy, it informs our understanding of how the proposed policy will be implemented. Section 5.3.8 was revised by the IEEE-SA Procedures Committee to be consistent with the changes to the patent policy. These changes were adopted in December 2006 and will take effect on April 30, 2007. In that document, section 5.3.8 will be renumbered as section 5.3.10.
38. IEEE-SA Proposed Standards Board Operations Manual II, *supra* note 37, § 5.3.8.3.
39. Letter of Assurance, *supra* note 23, at § F.
40. *See id.*
41. Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq., Drinker, Biddle & Reath, LLP 8 (Oct. 30, 2006), *available at* <http://www.usdoj.gov/atr/public/busreview/219380.pdf>.
42. *Id.* at 7.
43. *Id.* at 8.
44. *Id.* at 9.
45. *See* IEEE-SA Proposed Standards Board Bylaws, *supra* note 18, § 6.2; *supra* note 37 and accompanying text; *see also* IEEE-SA Proposed Standards Operations Manual II, *supra* note 37, § 5.3.8.2.
46. IEEE-SA Business Review Request, *supra* note 11, at 6, 8.
47. The Department has indicated that it would typically apply a rule-of-reason analysis to joint negotiations of licensing terms in the standard-setting context. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 54 (2007), *available at* <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>.
48. IEEE-SA Business Review Request, *supra* note 11, at 6; IEEE-SA Proposed Standards Board Operations Manual II, *supra* note 37, §§ 5.3.8.2, 5.3.8.3.
49. *See* IEEE, Instructions for the WG Chair (Feb. 2006), <http://standards.ieee.org/board/pat/pat-slideset.ppt>.
50. *See* Gerald F. Masoudi, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Efficiency in Analysis of

Antitrust, Standard Setting, and Intellectual Property, Remarks at the High-Level Workshop on Standardization, IP Licensing, and Antitrust 15 (Jan. 18, 2007), *available at* <http://www.usdoj.gov/atr/public/speeches/220972.pdf> ("There certainly is no affirmative requirement in antitrust law that businesses *must* create a RAND, disclosure, or *ex ante* licensing system. Doing nothing remains an option, and may be a viable option in view of the fact that there are many self-correcting mechanisms within traditional standard setting approaches. It may be reasonable to conclude that reputational constraints are enough to prevent hold-up strategies in some industries, or that simple economic incentives—those who hold up a standard too much could delay or kill the standard, which would deprive them of royalties—would suffice. Or perhaps an SDO may recognize the benefits of a policy like VITA's, yet conclude that those benefits are not enough to compensate for the additional personnel, costs, and delays that such a policy may require.").

附属書 L — ETSI IPR Policy

ETSI Rules of Procedure, 26 November 2008 Annex 6: ETSI Intellectual Property Rights Policy

1 Introduction

The General Assembly of ETSI has established the following Intellectual Property Rights POLICY.

2 Definitions

Terms in the POLICY which are written in capital letters shall have the meaning set forth in Clause 15 entitled DEFINITIONS.

3 Policy Objectives

3.1 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, as defined by the General Assembly. In order to further this objective the 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. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.

3.2 IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.

3.3 ETSI shall take reasonable measures to ensure, as far as possible, that its activities which relate to the preparation, adoption and application of STANDARDS and TECHNICAL SPECIFICATIONS, enable STANDARDS and TECHNICAL SPECIFICATIONS to be available to potential users in accordance with the general principles of standardization.

4 Disclosure of IPRs

4.1 Subject to Clause 4.2 below, 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. 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.

4.2 The obligations pursuant to Clause 4.1 above do however not imply any obligation on MEMBERS to conduct IPR searches.

4.3 The obligations pursuant to Clause 4.1 above 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.

5 Procedures for Committees

ETSI shall establish guidelines for the chairmen of COMMITTEES with respect to ESSENTIAL IPRs.

6 Availability of Licences

6.1 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 to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and

- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.

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.

6.2 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.

6.3 As long as the requested undertaking of the IPR owner is not granted, the COMMITTEE Chairmen should, if appropriate, in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should suspend work on the relevant parts of the STANDARD or TECHNICAL SPECIFICATION until the matter has been resolved and/or submit for approval any relevant STANDARD or TECHNICAL SPECIFICATION.

6.4 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.

6bis Use of the IPR Licensing Declaration Forms

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.

7 Information on IPR by ETSI

7.1 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.

7.2 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.

8 Non-availability of Licences

8.1 Non-availability of licences prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION

8.1.1 Existence of a viable alternative technology

Where prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION an IPR owner informs ETSI that it is not prepared to license an IPR in respect of a STANDARD or TECHNICAL SPECIFICATION in accordance with Clause 6.1 above, the General Assembly shall review the requirement for that STANDARD or TECHNICAL SPECIFICATION and satisfy itself that a viable alternative technology is available for the STANDARD or TECHNICAL SPECIFICATION which:

- is not blocked by that IPR; and
- satisfies ETSI's requirements.

8.1.2 Non-existence of a viable alternative technology

Where, in the opinion of the General Assembly, no such viable alternative technology exists, work on the STANDARD or TECHNICAL SPECIFICATION shall cease, and the Director-General of ETSI shall observe the following procedure:

- a) If the IPR owner is a MEMBER,
 - i) the Director-General of ETSI shall request that MEMBER to reconsider its position.
 - ii) If that MEMBER however decides not to withdraw its refusal to license the IPR, it shall then inform the

Director-General of ETSI of its decision and provide a written explanation of its reasons for refusing to license that IPR, within three months of its receipt of the Director-General's request.

iii) The Director-General of ETSI shall then send the MEMBER's explanation together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

b) If the IPR owner is a third party,

i) the Director-General of ETSI shall, wherever appropriate, request full supporting details from any MEMBER who has complained that licences are not available in accordance with Clause 6.1 above and/or request appropriate MEMBERS to use their good offices to find a solution to the problem.

ii) Where this does not lead to a solution the Director-General of ETSI shall write to the IPR owner concerned for an explanation and request ultimately that licences be granted according to Clause 6.1 above.

iii) Where the IPR owner refuses the Director-General's request and decides not to withdraw its refusal to license the IPR or does not answer the letter within three months after the receipt of the Director-General's request, the Director-General shall then send the IPR owner's explanation, if any, together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

8.1.3 Prior to any decision by the General Assembly, the COMMITTEE should in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should pursue development of the concerned parts of the STANDARD or a TECHNICAL SPECIFICATION based on the non-available technology and should look for alternative solutions.

8.2 Non-availability of licences after the publication of a STANDARD or a TECHNICAL SPECIFICATION

Where, in respect of a published STANDARD or TECHNICAL SPECIFICATION, ETSI becomes aware that licences are not available from an IPR owner in accordance with Clause 6.1 above, that STANDARD or TECHNICAL SPECIFICATION shall be referred to the Director-General of ETSI for further consideration in accordance with the following procedure:

i) The Director-General shall request full supporting details from any MEMBER or third party who has complained that licences are not available in accordance with Clause 6.1 above.

ii) The Director-General shall write to the IPR owner concerned for an explanation and request that licences be granted according to Clause 6.1 above. Where the concerned IPR owner is a MEMBER, it shall inform the Director-General of ETSI of its decision and provide a written explanation of its reasons in case of continuing refusal to license that IPR.

iii) Where the IPR owner refuses the Director-General's request or does not answer the letter within three months, the Director-General shall inform the General Assembly and, if available, provide the General Assembly with the IPR owner's explanation for consideration. A vote shall be taken in the General Assembly on an individual weighted basis to immediately refer the STANDARD or TECHNICAL SPECIFICATION to the relevant COMMITTEE to modify it so that the IPR is no longer ESSENTIAL.

iv) Where the vote in the General Assembly does not succeed, then the General Assembly shall, where appropriate, consult the ETSI Counsellors with a view to finding a solution to the problem. In parallel, the General Assembly may request appropriate MEMBERS to use their good offices to find a solution to the problem.

v) Where (iv) does not lead to a solution, then the General Assembly shall request the European Commission to see what further action may be appropriate, including non-recognition of the STANDARD or TECHNICAL SPECIFICATION in question.

In carrying out the foregoing procedure due account shall be taken of the interest of the enterprises that have invested in the implementation of the STANDARD or TECHNICAL SPECIFICATION in question.

9 ETSI ownership of IPRs

9.1 The ownership of the copyright in STANDARDS and TECHNICAL SPECIFICATIONS documentation and reports created by ETSI or any of its COMMITTEES shall vest in ETSI but due acknowledgement shall be given to copyrights owned by third parties that are identifiable in ETSI copyrighted works.

9.2 In respect of IPRs other than copyright in STANDARDS and TECHNICAL SPECIFICATIONS documentation and reports, ETSI shall only seek ownership of IPRs generated either by its employees or by secondees to ETSI from organizations who are not MEMBERS.

9.3 ETSI shall, on request by a non-member, grant licences to that non-member on fair and reasonable terms and conditions in respect of any IPRs, other than those referred to in Clause 9.1 above, owned by ETSI. MEMBERS shall be allowed to use IPRs owned by ETSI free of charge.

10 Confidentiality

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.

CONFIDENTIAL INFORMATION incorporated in a STANDARD or TECHNICAL SPECIFICATION shall be regarded as non-confidential by ETSI and its MEMBERS, from the date on which the STANDARD or TECHNICAL SPECIFICATION is published.

11 Reproduction of Standards Documentation

MEMBERS may make copies of STANDARDS and TECHNICAL SPECIFICATIONS documentation produced by ETSI for their own use free of charge but may not distribute such copies to others.

12 Law and Regulation

The POLICY shall be governed by the laws of France. However, no MEMBER shall be obliged by the POLICY to commit a breach of the laws or regulations of its country or to act against supranational laws or regulations applicable to its country insofar as derogation by agreement between parties is not permitted by such laws.

Any right granted to, and any obligation imposed on, a MEMBER which derives from French law and which are not already contained in the national or supranational law applicable to that MEMBER is to be understood as being of solely a contractual nature.

13 Policy Decisions

Without prejudice to ETSI's Statutes and Rules of Procedure, no decisions shall be taken by ETSI in relation to implementation of the POLICY unless supported by a 71 % majority of the weighted individual votes cast by MEMBERS.

14 Violation of Policy

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.

15 Definitions

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

- 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.

2 "COMMITTEE" shall mean any Technical Body of ETSI and shall include ETSI Projects, Technical Committees, ETSI Partnership Projects, and their Working Groups.

3 "CONFIDENTIAL INFORMATION" shall mean all information deemed to be confidential pursuant to Clause 10 of the POLICY disclosed directly or indirectly to the MEMBER.

4 "EQUIPMENT" shall mean any system, or device fully conforming to a STANDARD.

5 "METHODS" shall mean any method or operation fully conforming to a STANDARD.

6 "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.

7 "IPR" shall mean any intellectual property right conferred by statute law including applications therefor other than trademarks. For the avoidance of doubt rights relating to get-up, confidential information, trade secrets or the like are excluded from the definition of IPR.

8 "MANUFACTURE", shall mean production of EQUIPMENT.

9 "MEMBER" shall mean a member or associate member of ETSI. References to a MEMBER shall wherever the context permits be interpreted as references to that MEMBER and its AFFILIATES.

10 "POLICY" shall mean ETSI's Intellectual Property Rights Policy.

11 "STANDARD" shall mean any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs) (telecommunications series), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs (telecommunications series) and including drafts of any of the foregoing, and documents made under the previous nomenclature, including ETSS, I-ETSS, 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.

12 "TECHNICAL SPECIFICATION" shall mean any Technical Specification (TS) adopted by ETSI including options therein or amended version including drafts, the Technical Specifications of which are available to all MEMBERS, but not including any technical specifications, or parts thereof, not made by ETSI.

The date on which a TECHNICAL SPECIFICATION is considered to be adopted by ETSI for the purposes of this POLICY shall be the date on which the technical content of that TECHNICAL SPECIFICATION was available to all MEMBERS.

13 "PATENT FAMILY" shall mean all the documents having at least one priority in common, including the priority document(s) themselves. For the avoidance of doubt, "documents" refers to patents, utility models, and applications therefor.

ETSI Rules of Procedure, 26 November 2008
Annex 6 - Appendix A: IPR Licensing Declaration forms

GENERAL IPR LICENSING DECLARATION

IPR HOLDER / ORGANISATION ("Declarant")

Legal Name: _____

CONTACT DETAILS FOR LICENSING INFORMATION:

Name and Title: _____

Department: _____

Address: _____

Telephone: _____

Fax: _____

Email: _____

URL: _____

GENERAL IPR LICENSING DECLARATION

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.:

_____, or

☐

with reference to ETSI Project(s): _____

_____, or

☐

with reference to all ETSI STANDARDS AND TECHNICAL SPECIFICATIONS

and with reference to **(check one box only)**:

☐

IPR(s) contained within technical contributions made by the Declarant and/or its AFFILIATES, or

☐

any IPRs

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.

☐

This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate **(check box if applicable)**.

The construction, validity and performance of this General IPR licensing declaration shall be governed by the laws of France.

Terms in ALL CAPS on this form have the meaning provided in Clause 15 of the ETSI IPR Policy.

SIGNATURE

By signing this General IPR Licensing Declaration form, you represent that you have the authority to bind the Declarant and/or its AFFILIATES to the representations and commitments provided in this form.

Name of authorized person: _____

Title of authorized person: _____

Place, Date: _____

Signature: _____

Please return this form duly signed to: ETSI Director-General

ETSI - 650, route des Lucioles - F-06921 Sophia Antipolis Cedex – France / Fax. +33 (0) 4 93 65 47 16

IPR INFORMATION STATEMENT AND LICENSING DECLARATION

IPR HOLDER / ORGANISATION ("Declarant")

Legal Name: _____

CONTACT DETAILS FOR LICENSING INFORMATION:

Name and Title: _____

Department: _____

Address: _____

Telephone: _____ Fax: _____

Email: _____ URL: _____

IPR INFORMATION STATEMENT

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*.

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*.

IPR LICENSING DECLARATION

In accordance with Clause 6.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby irrevocably declares the following (***check one box only, and subordinate box, where applicable***):

☐ 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.

☐ This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate (***check box if applicable***).

☐ The Declarant and/or its AFFILIATES are not prepared to make the above IPR Licensing Declaration (reasons may be explained in writing in the attached *IPR Licensing Declaration Annex*).

The construction, validity and performance of this IPR information statement and licensing declaration shall be governed by the laws of France.

Terms in ALL CAPS on this form have the meaning provided in Clause 15 of the ETSI IPR Policy.

SIGNATURE

By signing this IPR Information Statement and Licensing Declaration form, you represent that you have the authority to bind the Declarant and/or its AFFILIATES to the representations and commitments provided in this form.

Name of authorized person: _____

Title of authorized person: _____

Place, Date: _____

Signature: _____

Please return this form duly signed to: ETSI Director-General

ETSI - 650, route des Lucioles - F-06921 Sophia Antipolis Cedex – France / Fax. +33 (0) 4 93 65 47 16

IPR Licensing Declaration Annex

Optional written explanation of reasons for not making the IPR Licensing Declaration

☐ The Declarant and/or its AFFILIATES are unwilling to grant irrevocable licences under the IPR(s) disclosed in the attached *IPR Information Statement Annex* on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy.

☐ The Declarant and/or its AFFILIATES are unable to grant irrevocable licences under the IPR(s) disclosed in the attached *IPR Information Statement Annex* on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy, because

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

☐ the Declarant and/or its AFFILIATES do not have the ability to licence the IPR(s) disclosed in the attached *IPR Information Statement Annex* on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy. In this case, please provide Contact information of those who may have this ability:

Legal Name:

Name and Title:

Department:

Address:

Telephone:

Fax:

Email:

☐ Other reasons (please specify):

Please return this form together with the “IPR Information Statement and Licensing Declaration form” to:

ETSI Director-General

ETSI - 650, route des Lucioles - F-06921 Sophia Antipolis Cedex – France / Fax. +33 (0) 4 93 65 47 16

ETSI - Ex-Ante Disclosures of Licensing Terms

EX ANTE DISCLOSURES OF LICENSING TERMS

Where can I find ex ante disclosures of licensing terms?

You can find the collection of links to URLs of IPR owners, which contains the details of licensing terms from ex ante disclosures at the following link: [List of Ex ante disclosures of licensing terms](#).

What is ex ante disclosures of licensing terms?

Ex ante disclosure of licensing terms is a mechanism about committing to licensing terms before the protected technology will be selected as part of a standard or in other words a mechanism about submitting anticipated licensing terms for a given standard draft before the contribution is locked-in as a standard. Ex ante disclosure of licensing terms should not be confused with:

- the disclosure of IPRs, which is the notification to ETSI of essential or potentially essential IPRs, nor with
- 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.

Both are independent from the ex ante disclosures of licensing terms and are not replaced by the latter.

It is considered that licensing terms from such disclosures may, in some circumstances, improve transparency for individual Members in considering technologies for inclusion in standards.

How is ex ante working in ETSI?

Any public and unilateral ex ante disclosure of licensing terms by licensors of essential IPRs in ETSI is fully voluntary and for the sole purpose of assisting members in making informed (unilateral and independent) decisions in relation to whether solutions best meet the technical objectives.


There is no obligation for any ETSI Member to disclose any licensing terms related to any of its IPRs. The lack of disclosure by a Member of its licensing terms is not creating 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.

Also and in order to avoid a misleading impression no detailed licensing terms are available from ETSI. ETSI is simply acting 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.

ETSI – List of Ex-Ante Disclosures

List of Ex ante disclosures of licensing terms

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List of Ex Ante Disclosures of Licensing Terms

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[Bookmark page](#)
[Email to colleague](#)

Ex ante disclosures by Company

Company Name	Link to disclosed licensing terms
Company Name	Link to disclosed licensing terms
Company Name	Link to disclosed licensing terms

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