

Standard Essential Patents and Innovation: Call for Views Response Form

After you have read the call for views document, please consider the questions below. There is no expectation or requirement that all questions are completed. You are welcome to only answer the questions that are relevant to you, your business or organisation.

In replying to this call for views you may find it helpful to refer to the IPO's [Guide to Evidence for Policy](#).

When you are ready to submit your response, please email this form and any other supporting documentation to SEPCallforViews@ipo.gov.uk.

This call for views will run for 12 weeks. It commences 10:00 on 7 December 2021 and will close at 23:45 on 1 March 2022.

After this call for views closes the government will assess the responses it has received and publish a summary of responses. The information obtained will inform the government's decision on any next steps on potential intervention that is required. Any impact assessments and policy decision announcements are generally published on GOV.UK.

Privacy notice for personal data processed for consultations

For information on how the IPO will process your data inline with General Data Protection Regulations (GDPR) please refer to IPO's [privacy notice for personal data processed for consultations](#).

Introductory questions:

Who are you?

A: *AIPPI JAPAN.*

In what capacity are you responding to this call for views?

A: *It is intended to deliver an opinion from one of our company members which is a SEP holder and an implementer.*

Relationship between Standard Essential Patents, innovation and competition

1. **How does the SEPs ecosystem work effectively in a balanced way to support competition and innovation?**

A: *Higher motivation for investment by contributors on SEP and reasonable license terms and conditions for implementers should lead to wider and faster SEP adoption.*

2. **What actions or interventions would make the greatest improvements for consumers in the UK?**

A: *No comments.*

Competition and market functioning

3. **In your view, are there issues in respect of market power in markets using SEPs? Examples are particularly sought on practices that create difficulties for industry or act as barriers to innovators.**

A: *Even only within a standard, multiple patent pools may be established, while some companies still choose to remain outside the pools. NPEs issue is also not negligible. (e.g, ISO/IEC 23008 HEVC video coding standard)*

4. **Are you aware of evidence of circumstances where an implementer of a SEP is required to buy licences to a wider patent portfolio that is not relevant to the standard or component to which the SEP relates? Are there effective ways of resolving such issues?**

A: *“Yes”.*
For example, in the video streaming applications, in addition to video / audio codec SEPs, following application-specific technologies should also be adopted in a product: Efficient and faster codec implementation methods, low latency streaming protocol, adaptive data caching systems and so on. On the other hand, patent pool for “de jure” standard usually covers SEP only; One-stop solution which supports both SEPs and related peripheral patents should contribute to ease the inconvenience.

5. **Does the competition law framework impact the provisions in agreements between SEP owners in practice? If so, how does it do this? Is there room for improvement in order to better benefit and encourage competition and innovation?**

A: *“Yes”. Competition law is applicable both for SEP holders and implementers as a basis of FRAND commitment. Patent pool is also not exceptional in this law. Then careful consideration is necessary while establishing new patent pool.*

6. **In your view, what actions or steps can be taken to encourage competition and innovation in the SEPs ecosystem?**

A: *No comments.*

Transparency in the system

- 7. Is there sufficient transparency around how patents are being declared as essential to the standard? What actions do industry, including SDOs undertake to ensure essentiality is understood?**

A: *SEP declaration is completely depending on “autonomy” of each organization / contributors without any prior 3rd party’s formal evaluation at any standard, at least within our recognition.*

- 8. Are you aware of instances of under-declaration or over-declaration and what issues does this create for markets using SEPs?**

A: *Yes, both under / over declared cases are observed.
 (“Under” case) It is very common that many undeclared patents are eventually approved as standard essential patents in patent pools.
 (“Over” case) Some patents with less possibility to be SEPs are also declared.
 This phenomenon seem simply depending on policy or strategy of each organization.*

(Just for a reference)

*A report by Japanese company Cyber Creative Institute is available describing relationship between estimated essentiality of 5G wireless patents and patent declaration to ETSI.
 (English version can also be reviewed with following URL)*

<https://www.cybersoken.com/en/topics/>

- 9. Would the introduction of an essentiality check service by an independent party improve licensing negotiations? Who would be the appropriate independent party to undertake essentiality checks?**

A: *Most of current patent pool(s) commits to hire 3rd party evaluation for the essentiality. Although they are all “private” companies, we believe fair evaluation seems to be secured to a reasonable degree. It is doubtful whether any governmental body work would yield better evaluation to secure “further credibility”.*

- 10. How should an essentiality check take place? Should there be a level of legal certainty given to essentiality checks and assertions of essentiality by IPR holders? If so, how?**

A: *Current evaluation is simply based on “claim to spec.” comparison, so criteria for essentiality is very clear. However on the other hand, sometimes it may not cover patents whose inventions are not described in the standard documents but which are necessarily infringed in implementing the standardized technology.*

- 11. As SEP portfolios are negotiated with individual implementers, in your view is there sufficient transparency around pricing available when entering into negotiation? Is there a justification under FRAND for different SEP implementers, using the SEP for the same purpose, to be charged different rates for market access?**

A: *It depends mostly on situation and relationship between two companies, such as total business volume, product category, price range and power-balance of IP portfolio. This kind of mutual agreement is usually not disclosed in any form, so it's almost impossible to verify difference among these private contracts, which may result in ambiguity of FRAND justification in some degree.*

12. Would some form of pricing transparency be appropriate for supporting implementers in FRAND pricing negotiations?

A: *Some kind of guideline would be helpful.*

Transparency on pricing should be more important.

Frameworks (patents, licensing, and litigation)

Patent infringement and remedies

13. Views are sought from respondents on the role that the patent system plays in the development of SEPs and FRAND licensing and whether there are issues within current practice (including law and court judgments) that create issues for innovators. Please include case studies or worked examples, if possible.

A: *No comments*

14. As patents are territorial in nature, does the current patent regime create a fair global market? Do SEP licensing costs vary by region?

A: *Most patent pools base unified price (without any territorial adjustment) and statement for number of annually sold products is to be reported in each district basis. On the other hand, pricing as a result of private negotiation can't be verified as described in Q.11.*

15. Are legal actions and injunctive actions taken equally against infringers of SEPs, regardless of their territorial presence?

A: *Plaintiffs often go out for "forum shopping". Plaintiff-side-favoured and easier-injunctive forums tend to be chosen. Moreover, while choosing jurisdiction, total sales of defendant, place for manufacturing, and even address of operating office are also considered. As a result, some kind of uneven distribution of jurisdiction can be observed.*

16. Does the current framework work for you in enforcing your rights conferred by holding the patent? For example, are injunctions an effective tool? What is the impact of anti-suit injunctions by implementers?

A: *Injunction will be a final weapon after mutual negotiation has done in vain. However, ASI is problematic because it allows a court to have stronger juridical power beyond its jurisdiction, and will be a heavy burden for plaintiff because it causes unproductive and endless dispute followed by successive AASI, AAASI...*

Licensing of SEPs

17. In your view, how should the SEPs and FRAND licensing ecosystem adapt to new standard development for emerging technologies

A: SEP is a good compromising point both for IP owners (contributors for international standards) and implementers for adopting new technologies. Otherwise (i.e., without the SEP ecosystem), each licensors may demand each "favourable" rate and implementers must hesitate to adopt it.

18. What if any, flexibilities exist within the IP framework that could improve the efficiency of obtaining a license for implementers?

A: Patent pools are effectively working in some areas, but they are run by "private" companies. Then they tend only to be established for "beneficial" standards. So, it may not be expected for more niche standards.

19. Do you have any views on any other ways of improving efficiency within the licensing landscape of SEPs?

A: No comments.

20. Would better use and access to patent pools offer improved efficiency around SEPs licensing? Or would greater use/access create barriers for innovators if there were limitations introduced i.e. cross-licensing?

A: No comments.

21. How are patent pools best created? To what extent should States, SDOs or other appropriate entities be involved (or excluded) from setting up patent pools?

A: As already answered in Q18, patent pools are NOT voluntarily established but just as new business opportunities for private companies seeking profits. So, pools run by some kind of NPO would cover wider selections of standards including very niche ones.

22. Are there alternative ways to address disputes on pricing mechanisms? For example, what point in the value chain provides an economic basis to calculate rates payable?

*A: It is extremely difficult to define a single and common royalty calculation base covering all the different types of products.
That is because number of patent owners and number of products sold are different in each countries and regions, and impact or value of SEP itself would differ depending on the products.*

23. How could schemes where there are specific definitions of what costs are allowable (percentage limits etc.) best be utilised?

A: The issue "charging royalty based on entire market value or SSPPU?" is highlighted on the current dispute. However it looks like rather supplemental issue. Then, most important aspect will be making much of "technological value or impact of SEPs" in each industry and product.

24. In your view, what are the benefits or drawbacks of national courts setting global licensing rates?

A:

Benefit: Convenient to calculate payment / income for worldwide market, which also enables easier compensation and audit for both licensors and licensees.

Drawback: Setting "global" rate by any national court goes beyond jurisdiction of each country. It may cause ASI just as a countermeasure by defendant side.

Even within the same market genre, major price range is quite different in each region, so cost share of SEPs should also vary depending on the region where a product is sold. So, totally, setting "global" rate by any national court looks inappropriate.

25. Is reliance on courts to determine on a case by case basis whether a licence is FRAND efficient?

A: *No comments*

26. How should industry led approaches for specific areas of SEPs arbitration be explored further? Do you also have views on alternatives to industry led solutions, for example government providing alternative ways of determining and resolving FRAND licensing disputes?

A: *No comments*

27. Are there already effective alternative means of arbitration and dispute resolution away from courts in respect of FRAND licensing?

A: *International SEP disputes already go beyond local governmental issues of each country.*

They (including ASI, AASI, AAASI...) might rather be dealt with any international arbitral organization (WIPO, WTO, ICJ or whatever..)

However, if any resolution by these organizations do not have legal cross-border enforcement authority, these disputes may not reach the goal. Then final resolution of the SEP disputes should ultimately depend on the smaller headroom of mutually-comprisable landing spot as a result of direct negotiation between patent owner and implementer.

Other questions:

Please add any other comments or evidence the government should be made aware of here: