Advocating for openness and interoperability

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Topics

- About ECIS
- ECIS interoperability policy concerns
- Open standards
  - FRAND or royalty free
  - *Ex-ante* disclosure of licensing terms
- Licence of Right
- Open standards-setting
- Open source software
- Patents, standards and competition

ECIS

- An international non-profit association founded in 1989 that endeavours to promote a favourable environment for interoperable ICT solutions

- Actively represents its members regarding issues related to interoperability and competition before European, international and national fora

ECIS interoperability policy concerns

- **Key issues ECIS is actively involved with include the promotion of:**
  - Open standards
    - Case: Open Document Format ("ODF")
  - Open standard-setting
    - Ensuring that standard-setting processes are not misused
  - Open source
    - Encouraging the growth of European open source development
  - Competitive ICT environments
    - Identifying and working with regulators to remedy market failure and barriers to competition

What is an open standard?

- To be open, a standard should meet the following principles:
    - Adopted through an open, transparent and democratic process
    - It enables all implementations of the standard to interoperate
    - It is platform-independent and vendor-neutral, and can be implemented in competing ways
    - Its specifications are fully/properly documented and documentation is available at minimal cost to all
    - Essential patents are available under royalty-free or FRAND licensing terms that do not discriminate against open source

The benefits of open standards

- Open standards should be the basis for ensuring interoperability in the ICT industry
  - Standards-based development allows focus to be put on developing innovative new features *on top of the standard*, and not in reverse-engineering for the purpose of enabling interoperability
  - Open standards based interoperability permits
    - new players to enter the market
    - competition on the merits
    - consumer choice
- Experience demonstrates the damage which can result when vendors fail to support or abuse open standards
- Open standards based interoperability prevents the anti-competitive exploitation of *ex-post* market power

Essential patents under royalty-free or FRAND terms?

- **In the *software* sector:**
  - Any IPRs related to a software standard should be available royalty-free or at minimal cost
  - Other terms and conditions such as on field of use and defensive suspension should be FRAND-compliant
  - Licensing of essential patents should not discriminate against open source model
- **In the *telecommunications* sector:**
  - The FRAND model should prevail

Ex-ante disclosure as a guarantee to competition

- *Ex-ante* disclosure of licensing terms and conditions is pro-competitive, especially in areas such as the software sector
- In the more complex area of telecommunications, *ex-ante* disclosure of licensing terms is viewed with more caution and needs to be complemented by other measures
  - The most practical method may be an *ex-ante* commitment to a reasonable cumulative royalty, with appropriate limits on individual license demands

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A Licence of Right: an additional guarantee for a pro-competitive environment

- Any person wishing to use the essential patent to manufacture and market interoperable software is able to obtain a licence to use it for that purpose

- Ensure wider access to technology essential to achieving software interoperability, without fear of patent holders trying to assert their exclusive rights to block development of new products

- Voluntary Licences of Right ("LoR") system (Article 20 of the Draft Regulation on EU patent)

- Need to provide patent holders with adequate financial incentive to opt for LoR

Open standards-setting processes

- Need for clearly defined standardisation policies that allow for platform-independent and vendor-neutral standards that can be implemented in competing ways rather than competing standards
- Require full and proper documentation of the standard's specifications and availability of documentation to all at minimal cost
- The *ODF v OOXML* example

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Open standards and open source software

- Open standards and open source are not the same
- Open source software however implements open standards
  - *e.g.*, Open Office/ODF, Mozilla Firefox/HTML
- Nonetheless, for an open standard to be compatible with open source it should be made available royalty-free
- Patent holders should not engage in vague allegations against open source software (spreading FUD)

Patents, standards and competition

- The SSO rules/processes may not yield FRAND result and a patent holder can impose higher royalties or other unreasonable licensing terms and conditions in light of the absence of alternative technology

- *Ex-post* enforcement of competition law can play the role of a "*safety valve*"

- Need for governments to remain vigilant about abusive practices of dominant market players in the ICT sector that prevent competition on the merits

- Vigorous *ex post* deployment of competition law given that software markets are susceptible to distortion of competition