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A Compulsory “License to All” World: A Counter-Factual Exercise

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In the highly contentious world of SEP licensing, one of the biggest debates in recent years has been between advocates of compulsory “access to all” and the existing “license to all” regimes. Framed as such, this is an oversimplification which obscures the most important aspect of the debate over who is entitled to receive a license for SEPs. In order to understand the nuances of this policy debate, it is important to first understand what is actually meant by the slogans “access to all” and “license to all.”

The proponents of “access to all” point to well established practices in key SEP markets such as cellular for smartphones and automotive and video for related devices where SEP owners have typically provided whole portfolio, fully exhaustive SEP licenses at a single point in the value chain, on the final product, with rights for all in the licensee’s supply chain to use the licensed technologies to create components for the licensee without needing to take separate licenses. This approach is based on enforcement efficiencies (reducing infringement), the value the SEPs bring to consumers and that net sales price of end-user devices are the most appropriate measure of this commercial value. It is not, as some commentators have claimed, “the most lucrative” place for SEP holders to grant licenses.

“Licensing to all” advocates the right of anyone in a product’s the value chain to receive a license to only those SEPs that are relevant to the manufacturer of the specific product (when did anyone ever volunteer to take a license without being tapped is another question). This approach is based on the logic that licensees have the pre-emptive right to demand a license to SEPs and that licensors cannot refuse SEP licenses to anyone who wants one.

The lead up to the European Commissions’ release of its 2017 FRAND Communication on SEP licensing was heavily lobbied on both sides of the issue and ultimately *did not impose a compulsory license to all regime*. (See <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC104068/jrc104068%20online.pdf>.) However, these issues were raised in multiple litigations around the world including in the FTC’s campaign against Qualcomm and in Damlier and Continental’s litigations with Nokia and Avanci. While there does seem to be finality emerging in the USA on this issue, there is now a renewed lobbying push by compulsory “license to all” proponents and the potential referral of disputes on this issue in the automotive context to the European Court of Justice. What has not really been discussed all that much is what a “license to all” world would be like for SEP in a concrete and practical way. Given the vast range of SDOs and IPRs policies, and the fact that it has the most patent declarations, for the purposes of concision this article will focus on the 3GPP ecosystem, with a brief IEEE Wi-Fi angle at the end.

Before looking at a potential licensing regime, it is important to return to first principles by reminding ourselves of a key element of what a patent is. Since most of the debate around SEP licensing is often couched in the aethereal world of economic models and obscure (at least to non-specialists) legal doctrines, it is important to be reminded that the primary basis for a patent’s worth in its *in terrorem* value, because patents are non-rivalrous and non-self-executing rights. (See https://kidonip.com/wp-content/uploads/2017/07/Cohen_Paper.pdf.) Consequently, when courts, regulators, and/or SDOs make the costs of enforcing an SEP—in terms of time, money, regulatory burden, etc.—exceed any value that the SEP owner stands to gain from enforcing that SEP, it undermines the entire incentive structure that undergirds the patent system—regardless of the historical and cultural reasons behind that structure.

We believe that it is the aim of at least some “license to all” advocates not merely to make SEP enforcement more costly. Rather, we believe that certain of its more ardent advocates aim to make the costs SEP enforcement so prohibitive that it will end

SEP licensing and SDO participation as we know it. They hope to accomplish this goal in five ways. First, requiring SEP owners to conduct an impossible level of diligence prior to assertion. Second, making the assertion process fraught with antitrust danger to the SEP owner, effectively making traditional and widespread SEP enforcement and licensing practices illegal. Third, eliminating the possibility of certainty in licensing agreements in favor of constantly fluctuating royalties. Fourth, requiring a level of transparency in SEP licenses that will be impossible to achieve as no sane licensee would ever agree to such terms. Finally, divorcing the royalty paid for a license from the value that SEPs provide to consumers of end-user devices, and replacing it with the value of a far less expensive upstream component. All in all, it seems to us, a system designed to fail.

Sketching It Out

What would SEP licensing governed by a “license to all” regime involve? To fully appreciate the dystopia, this article takes the foundational principals, as interpreted by the so-called Fair Standards Alliance as its basis, and extrapolates on these principles using the author’s deep experience in SEP licensing and the many arguments and tricks the author has personally witnessed to avoid SEP assertions. To be clear, not all implementers are bad actors (the vast majority are not) and many advocates of compulsory “license to all” advance less extreme versions of the arguments presented here. The goal of this reductive exercise is to point the absurdities and how its uncritical adoption could lead to rather unfortunate outcomes for innovators.

The concept of “license to all” means that owners of essential patents—or more properly patents declared as essential (SEP) to a standards development organization (SDO) would be compelled by the relevant IPR policy of the SDO (or perhaps more generally by the requirements of antitrust law—it is not entirely clear) to license their SEPs to all companies at any or all levels of the supply chain. The second principle prohibits injunctions regardless of the behavior of the infringer. The third requires enhanced transparency. The fourth requires that FRAND obligations transfer with the assets (although how that might work, when many advocates also argue that transfers of SEPs are per se illegal is not clear). The fifth requires that only patents “relevant” to the licensee be licensed (an unworkable and contentious proposition). The sixth prohibits royalties that “tax” (a) features “not covered” by the patent; (b) the fact that the patent

was accepted in the standard; and (c) fail to take into account aggregate royalty demands.

You Can’t Choose Your Licensee (or Licensing Model)

The first implication of these principles—and the one which has generated the most litigation—is the attempt to prevent SEP owners from licensing their SEPs to the infringer they choose. Rather they must be highly particular. They can only license exact matches for their SEPs. That is, the license offer must contain SEPs that are perfectly curated to match the putative licensee’s business—not encompassing claimed functionality that is larger than the licensee’s activities or encompassing components that are manufactured by others in the supply chain. Leaving aside the question of whether most SEPs strictly read on individual components or encompass functionality beyond chipsets for the time being, what is clear is that SEP owners would not have the choice of whom to license or to choose a licensing model. For if SEP owners had the right to choose who to license, then why would component manufacturers in the US and Europe try to sue them for supposed (creative) antitrust violations?

A logical consequence of this principle is that an SEP owner would need an in-depth understanding of their SEPs greater than any SEP owner currently has. Leaving aside the “commercial impracticality” (See <https://www.justice.gov/atr/page/file/1298626/> <https://www.justice.gov/atr/page/file/1298626/download> at p.15) of a patent-by-patent essentiality study of large portfolios, what is required here goes well beyond how well a patent maps to a standard. That is, if the SEP owner wished to continue what is “not [in] dispute” and a “matter of practice” and an “obvious consideration,” (See <https://www.bailii.org/uk/cases/UKSC/2020/37.html> at p. ¶15) i.e., global portfolio licensing, standard patent mapping would be woefully insufficient. That is because under a compulsory “license to all” regime, non-SEPs could not be “tied” to SEPs in the same license. Indeed, under some of the more extreme advocates’ theories it may be impermissible for an SEP license and non-SEP license to be entered in temporal proximity to each other, as it may be possible that the non-SEP license is what drove the implementer to enter, less than eagerly, into the SEP license and thus the two would be *de facto* tied. Thus, every single declared essential patent would have to be vetted as *in fact* essential before a licensing discussion can even begin. Moreover, to be true to this argument, the

exercise would not be completed if merely performed on a family-by-family basis. It would need to be done for all members of the family. This is so since it is not uncommon for related patents in different jurisdictions to have different claims sets—some of which may or may not be essential, and even if essential may read on different aspects of the standard.

This is no small task. For portfolio of even modest size thousands of hours of labor would be required just to ascertain if at least one claim in one patent in each family read on a standard. Reputable outfits spend, on average, at least an hour a patent on such exercises.

Having determined all members of a global portfolio that are reasonably believed to be truly essential, the SEP owner has only just begun its costly new diligence process. As anyone who has actually had to license complex technology knows, mapping a claim to a product is only the first step. Moreover, this ignores the fact that not every spot in the value chain is subject to full standardization. Although some patented solutions may be fully implemented within a 3G or 4G chipset, the chipsets themselves are not the subject of any 3G or 4G standard. 3GPP standards divide mobile systems into a User Equipment (UE) Domain and an Infrastructure Domain. (See 3GPP TS 23.101 § 5.1). The UE domain is further subdivided into a Mobile Equipment and SIM card basically the handset purchased by consumers and the SIM card sold separately. Indeed, one might plausibly wonder whether requiring SEP licenses on the chipset level would be illegal tying under the licensing to all regime.

Million Dollar Diligence

After the essentiality work, the patent owner, under the traditional regime, would still need to figure out quite a bit of information about the product manufacturer/distributor, including manufacturing and sales locations, as well sale volumes and associated revenues. With the revenue, sales and essentiality information in hand, under the current regime an SEP owner should be able to craft a license proposal along with evidence of use and confidently approach the putative licensee.

Under “license to all”, by contrast, the SEP owner, in addition to the foregoing, would have to—for each declared SEP that it believed was actually essential:

- (i) determine whether the products included components manufactured by third parties (presumably through teardowns, reverse engineering,

or searching for trade secrets misappropriated by third parties and posted on the web) the end product manufacturer’s bills of materials or other, typically highly confidential product information;

- (ii) determine whether the claims read solely on the components or read on more than just the components;
- (iii) if the claim reads on more than the components, determine whether under the relevant jurisdictions’ laws, a claim can be made on the component maker, the end manufacturer, or both
- (iv) If the claim can read on both, get legal counsel on which would be the more appropriate target in view of exhaustion, apportionment and other concerns and ascertain the correct value to be assigned to the chosen assertion target;
- (v) Understand the physical and legal locations of each of these parties in the value chain and the relevant laws related to approaching potential licensees in those jurisdictions—a prudent SEP owner would also try to understand whether a jurisdiction’s enforcement and collection mechanisms (e.g., courts, agencies) effectively render any of the parties judgment proof; and
- (vi) Understand the prices charged by each participant in the value chain including how to calculate the appropriate royalty base and any corresponding maximum royalty rate.

Indeed, this analysis appear to be far more like an expert damages report created after extensive litigation discovery, than a traditional infringement claims chart. Given that patent damages expert reports typically cost in the mid five figures (if not higher), for a single patent, and are based on hundreds of thousands of dollars of litigation discovery (at least in the US), the diligence required pre-assertion under license to all, would likely run in the millions of dollars for even a moderately sized portfolio. These devastating costs are exactly what “license to all” proponents are after. Furthermore, this would lead to highly contentious license negotiations. It is a complete fantasy to imagine that a SEP holder and any particular licensee would ever agree that certain SEPs in a large portfolio were “component” SEPs and thus must be licensed to the component manufacturers, and which were not and thus could be licensed to the OEMs.

To the extent that the license would apply to future activities, then the SEP owner would need to know precisely the future life of each of the relevant patents in the portfolio and need to devise a method to adjust the royalties of the license should any one of those patents expire or be invalidated—by the

licensee or some other third party. Moreover, given the absolute terms of license for all, the mechanism should be immediate and perhaps function like a daily price with rebates for patents that expire or are invalidated. We note that such an arrangement was proposed to my client with utmost seriousness by a reputable antitrust authority.

Speak Softly and Carry a Wet Noodle

Assuming that after the SEP owner presented the results of its hard and very expensive work to a putative licensee and the implementer refused to take a license on the SEP owner's term, "license to all" limits the SEP owner's options. SEP owners could never threaten injunction or even ask a court to impose an injunction against a licensee should the court determine the implementer acted in bad faith, because it would distort good faith negotiations. The argument that even requesting a court to determine if an SEP owner were entitled to injunctive relief due to alleged hold out is a *per se* violation of antitrust, was also proffered to me as a legitimate argument by a major antitrust authority.

Thus, to avoid antitrust risk, a SEP owner likely could not even ask for specific performance of an FRAND obligation (or for a licensee to perform under an existing license) because such relief is injunctive in nature. The only kind of relief an SEP owner could request would be damages for patent infringement. Moreover, it is not even clear in what situations an SEP owner would be justified in filing suit against an infringer—as faking good faith negotiation is always possible, at any time, even after years of (even admittedly) bad faith negotiation. If the only penalty for not taking a license offered on FRAND terms is for a court to impose penalties no greater than FRAND terms, the only rational behavior would be for every implementer to throw the dice in the courts and every single FRAND negotiation would end up being decided in court. Today, on the other hand, it is only the downside of ending up in court and risking penalties imposed by the court on infringers that compels implementers to negotiate on a commercial basis.

Perhaps one approach to litigation that may be permitted under "license to all" where an SEP owner is unsatisfied with the state of negotiations with a potential licensee, would be to seek declaratory relief that the putative licensee is not negotiating in good faith and put in escrow the estimated litigation costs of the licensee to defend themselves—which would be payable to the licensee should the SEP owner lose

and a court determine that the putative licensee was in fact negotiating in good faith.

SEP Ripple Effects

Having been lucky enough to secure an SEP license, in this vision of "license to all", the SEP owner's costly work would not be complete. SEP owners would need to keep track all of their licensee's customers for their licensed products and understand how they are used by those customers to avoid double-dipping for the same patent or attempting to license a company that incorporates a licensed product. Double licensing (double-dipping) of patents for different steps of the value chain and field of use licenses would be prohibited.

Practically speaking, it would be virtually impossible for SEP owners to know into what end-user products components were installed. Any attempt at a tiered licensing rates based on end-use would incentivize component manufactures to obscure the secondary market through sales to intermediaries in which the only solution would be for SEP holders to impose a uniform tariff regardless of end-use. This would lead to commodity pricing and horizontal distortions whereby implementers receiving high value from SEP licenses would underpay and those receiving low value from SEP licenses would overpay.

Additionally, SEP owners would need to insist that all aspects of their licenses be public and available for inspection by potential, future, third party licensees. This would include all the calculations noted above relating the putative licensee's (highly confidential?) manufacturing processes, value creation activities, and geographic activities. Under this vision, lump sum royalties may also be prohibited as it may obscure the true royalty load. This level of exposure is necessary since only with this information could a putative 3d party licensee truly figure out whether the SEP owners' licensing proposal to that 3d party is non-discriminatory. Indeed, an economist at a well-known antitrust authority once floated the idea (in a quasi-public forum) that SEP owners should not enter into business relationships with their licensee because it would obscure the true value of any SEP license—an absurd level of market intervention more appropriate to totalitarian regimes.

To ensure further compliance under the non-discrimination prong of FRAND, under "license to all", SEP owners wishing to avoid antitrust risk would be required to include a most favored nation clause in each of their licenses that automatically lowered the royalty rate in a license to match the best rate

negotiated by similar parties for similar patents, as well as a process to allow for the comparison of the royalty calculation processes that led to each bespoke SEP license that is even remotely related to the license at hand. In other words, every time an SEP owner would enter into an SEP license, it would have to recalibrate each of its existing SEP licenses to ensure that none of them discriminate against the licensees. Again, this was proposed to my client by a reputable antitrust authority.

As an SEP owner's portfolio aged or as potential licensee sales declined—assuming new patents were not added in their stead—few SEP owners would likely take the risk of entering into new licenses, since such licenses would likely trigger an automatic ratcheting down of the owner licensing revenue from its existing licensees. Again, all of this would lead to discriminatory commodity pricing with the value provided by patented technology completely divorced from the cost of SEP licenses.

A Zero-Sum World for Licensors

Under this extreme “license for all vision”, SEP owners would need to be fully aware of all royalties charged (through actual licenses) and being asked (through program rates of major licensors) for every product that the SEP owner attempts to license. This is because SEP owners would be prohibited from requesting adequate royalties in light of their SEP alone, they would need to modify their royalty demands to take in account all other SEP royalty demands that the licensee may face lest the SEP owner breach some magical aggregate royalty that makes their licensing requests an antitrust violation.

An Infringers' Charter

It should be clear by now that taking “license for all” seriously and thinking through the implications of its more ardent advocate's argument, creates insurmountable obstacles to SEP owners before they even begin to approach potential licensees. Forgetting for a moment the amount of costly diligence that the SEP owner would need to perform on their own portfolio, the sheer amount of carefully guarded information about potential licensees' infringing activities that the SEP owner would need to know to even commence drafting a FRAND license offer may be impossible to obtain, or, at the least, extremely expensive to reverse engineer. Additionally, no manufacturer in

their right mind would agree to share with the SEP owner—let alone with other potential licensees of the SEP owner—all of the confidential information necessary for the SEP owner to craft a FRAND license under license for all. Thus, it is almost inevitable that an SEP owner would fail to offer an objectively FRAND license. Thus, a potential licensee could very confidently refuse to deal and sue an SEP owner for antitrust violations because, under license to all an SEP owner would invariably be in violation of some aspect of FRAND.

Even if, by some miracle, an SEP licensor crafted an objectively FRAND license offer, no license under this regime would ever lead to legal certainty—as the terms and royalties would always be changing to accommodate new licensees of the owner and changes to the SEP owner's portfolio. In fact, a license wouldn't become a settlement of a negotiation between the SEP owner and the licensee, rather it become a methodology for the licensee and SEP owner to continue to negotiate all throughout the term of the license. If this were not bad enough, the SEP owner would be subject to constant supervision of the courts and competition regulators *in every country where it had SEPs* for each mis-step that the SEP owner took would be actionable as a FRAND violation. Given the high transaction costs in every step of this process, most smaller SEP owners would likely give up on licensing—and perhaps even getting SEPs in the first place—and most large SEP owners would likely give up on licensing or at best engage in royalty free cross-licensing. Which makes total sense as it is what the ardent license for all advocates have been pushing for over the past 15 years.

An Annex below compares the licensing process of the two regimes.

Conclusion and IEEE's Natural Experiment in “License to All”

The compulsory “license to all” model was crafted as a way to kill FRAND licensing and allow infringers to use valuable technology for free. I would be remiss without noting that IEEE's failed experiment with instilling a compulsory “license to all” regime. In 2015 IEEE, the SDO that develops Wi-Fi among other standards, revised its patent policy into a “license to all”/no-injunction-regardless-of-infringers-behavior regime. I have reviewed the extensive negative consequences of that experiment (*see [---

JANUARY 2021](https://www.kidonip.com/news/the-ieee-2015-patent-policy-a-natural-exper-</i></p></div><div data-bbox=)*

iment-in-devaluing-technology/) and was honored when the U.S. Department of Justice cited to my work in its September 2020 supplemental Business Review

Letter to IEEE (see <https://www.justice.gov/atr/page/file/1315291/download> at p.9). These stark empirical results support the analysis developed in this paper.

Annex: The SEP Licensing Process Compared

Licensing under “Access to All”	Licensing under “License to All”
<ol style="list-style-type: none"> 1) Review declared SEP portfolio to ascertain truly essential patents (valid/infringed) 2) Review SEP portfolio to determine relevant technical domains and categories of infringing products 3) Identify manufacturers of likely infringing products 4) Develop royalty rate structure and global licensing proposal that includes a license for infringement and freedom to operate under entire portfolio for putative licensees 5) Approach putative licensees with what SEP owner reasonably believes is a FRAND compliant offer based on a blended global rate. <ol style="list-style-type: none"> a. Failure to offer the putative licensee what the licensor subjectively considers a FRAND offer could be an actionable violation of the FRAND regime. 6) Licensee to respond in reasonable time frame with acceptance, negotiation or what it reasonably believes is a FRAND compliant counteroffer. <ol style="list-style-type: none"> a. Failure to respond to SEP owners offer—even if not objectively FRAND—with good faith negotiation or with what putative licensee reasonably considers a subjective FRAND counteroffer, could lead to loss of any FRAND related defenses. 7) After further negotiation, parties either <ol style="list-style-type: none"> a. Enter into license b. Enter into dispute mechanism to resolve dispute on a global basis. 8) Resolution and/or settlement. 	<ol style="list-style-type: none"> a) Review declared SEP portfolio to ascertain truly essential patents (valid/infringed) b) Review SEP portfolio to determine relevant technical domains and categories of infringing products c) Identify manufacturers of likely infringing products d) Reverse engineer likely infringing products to ascertain their relevant components and the business model for how those components are manufactured; by whom they are manufactured; where they are manufactured; and where they are transported. e) Correlate portfolio with each participant in infringing value chain to ensure that each putative licensee is only approach with those SEPs in those countries that are relevant to their business model. f) Develop a royalty model that accounts for the properly apportioned value for each SEP for each participant in the value chain that correctly discounts the specific value factors for each jurisdiction where the relevant SEP is in force—including, any royalty caps in force in that jurisdiction for specific products and/or sectors, and the value add that the claimed functionality provides to the specific putative licensee in the specific jurisdiction based on the activities of the putative licensee (which the SEP owner has managed to uncover) in that jurisdiction. g) Approach putative licensee with objectively FRAND offer based on the above—not providing such an offer will render portfolio unenforceable. h) If putative licensee fails enter into a license, recourse to litigation may be permitted, but the merest hint of a request for injunctive relief could lead to the portfolio being found unenforceable. i) Upon entry into a license the SEP owner would need to adjust all its other licenses to ensure no violation of the non-discrimination principle and failure to do so would be actionable under anti-trust law.

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