

Fostering Patent Pools During the Standardization Process

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April 20, 2021

Patent Pool Fostering

- ❑ The success of a patent pool depends on a large number of factors independent of “fostering”
 - ❑ A key factor is the experience and skill of the administrator in finding, conferring with, and bringing together the right mix of SEP holders: both those with implementation-driven business models as well as those with licensing-driven business models
- ❑ Pools formation is driven by market forces, “organically”
 - ❑ Fostering is the exception rather than the rule
- ❑ Fostering may be helpful if pool formation is not happening organically
 - ❑ For example in industries where pools have never succeeded
 - ❑ But may be unlikely to succeed for the same reason that pools have not succeeded in those industries previously
- ❑ But fostering may interfere with and delay pool formation where a market-driven effort is in progress or likely would occur

Patent Pool Fostering

- ❑ Linking pool fostering to the standards development process may create downsides
 - ❑ Participation in pool formation is a voluntary activity, as is standards setting
 - ❑ Public policy and competition law/policy recognize benefits from broad participation, therefore risk if participation seen as not fully voluntary
 - ❑ Not all “voluntary” activities feel “voluntary” to participants
 - ❑ will patent holders and implementers see pool participation as a mandatory feature of the standard?
 - ❑ for example, some SDOs require work-around of a contribution from a company that does not provide a positive Letter of Authorization (“LOA”)
 - ❑ would SDOs mandate or recommend work-around of contributions from company that does not indicate willingness to participate in pool?
 - ❑ valuable contributions to standards have come from companies that do not participate in patent pools, license only bilaterally
 - ❑ How will this affect participation in standards development
 - ❑ After IEEE IPR policy change in 2015, have seen drop off in positive LOAs and increase in negative LOAs

Patent Pool Fostering

- ❑ Pool fostering should not begin before standard is finalized
 - ❑ Any earlier efforts could be a signal to the standards organizer to consider working around the contribution of an entity not willing to participate
 - ❑ Not clear how “fostering” can begin before the standard is final because before that, there is no way of knowing:
 - ❑ the value of the technology to implementations, which is crucial to determining royalty rates and terms
 - ❑ which patents will be essential, which is crucial to determining who are appropriate participants
- ❑ What are the appropriate bounds of fostering?
 - ❑ Experts Group Report recommends fostering will not include discussion of rates and terms, which are at heart of pool formation
 - ❑ Is it appropriate for implementers who are not also SEP holders to jointly negotiate for the rates they will pay?
 - ❑ Does “buyer-side” collective action raise legal issues, such as whether a joint decision to not accept terms is illegal (likely yes, in US law)?

Patent Pool Fostering

- ❑ Pool fostering may be desirable when no pool is being developed within a reasonable time after standard is final
 - ❑ But the important issue is why no pool is being developed “yet”
 - ❑ There is no predictable answer to the question of what is a “reasonable” time
 - ❑ Decision of when time is right to begin forming a pool depends on a number of factors specific to the technology and the industry, and identifying it is another core skill of experienced pool administrators
- ❑ Pool fostering may be necessary in industries where SEP holders resist such joint licensing
 - ❑ May bring together likely participants, both implementers and essential patent owners
 - ❑ May help educate implementers and patent owners who are not familiar with pools and what participation in a pool means
 - ❑ But may be unlikely to succeed for the same reason that pools have not succeeded in those industries

Patent Pool Fostering

- ❑ Market-driven pool formation has occurred for decades in US
 - ❑ First pool “approval” by US Department of Justice in 1997
 - ❑ Since then dozens of patent pools have been formed that follow EU, US, and others’ competition guidance
 - ❑ For example, in compact discs, video, audio, Wi-Fi, RFID, and many other technologies
- ❑ A number of experienced, independent third party administrators continue to curate market-driven pool formations in new technologies and new standards
 - ❑ Via Licensing
 - ❑ Access Advance (formerly, HEVC Advance)
 - ❑ Sisvel
 - ❑ MPEG LA
 - ❑ OneBlue

Patent Pool Fostering

- ❑ In industries where market-driven pool formation has occurred organically, it will continue to happen without fostering
 - ❑ Pool administrators and likely participants will be attracted by business opportunity
 - ❑ Not clear what fostering would add, and may interfere
- ❑ Pool fostering activities may have downside effects in industries in which successful pool formation has been market driven
 - ❑ May interfere with and delay market-driven pool formation efforts
 - ❑ May increase, rather than decrease, the likelihood of more than one pool forming for a particular technology or standard
 - ❑ Facilitation during standards formation may be too early to begin pool formation activities and may lead to results that do not address market effectively once technology is adopted

Patent Pool Fostering

- ❑ Proper pool formation optimizes outcomes for both licensors and implementers as required by FRAND
 - ❑ Curating discussions to ensure reaching those outcomes is a core skill of pool administrators in forming patent pools
 - ❑ Bringing together significant SEP holders, including those with licensing-driven business models and those with implementation-driven business models in a process curated by an experienced pool administrator
 - ❑ Discussions of rates and terms are market negotiations, ensuring balance of interests in results
 - ❑ Rates and terms that incent SEP holders to be licensors and that also incent implementers to be licensees
 - ❑ Both interests optimized by broad/deep patent coverage (therefore significant SEP holders) plus reasonable rates/terms
 - ❑ Goal is combination of patent coverage, rates, and terms that minimize friction so large numbers of licensors and licensees join

Patent Pool Fostering

- ❑ Leadership in ongoing administration of pools is another core skill of experienced pool administrators
 - ❑ Licensing should be primarily a sales process
 - ❑ Licensors and licensees depend on sophisticated systems for reporting, paying, tax payments (for licensees), as well as for collection and distribution of royalties (for licensors)
- ❑ Leadership in achieving those goals through give-and-take among participants is a core skill of pool administrators and takes years of experience to acquire



 Thank You.

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