What Are Standard Essential Patents and Why Do I Need to Know About Them?

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When you woke up this morning, you probably unplugged your cell phone from its charger, looked at it, and saw a Wi-Fi icon at the top. Maybe over breakfast, you watched a couple of clips from the news. Just like that, without even thinking about it, you have used multiple technologies covered by standards, and those everyday actions implicated hundreds of standard essential patents, or SEPs.

Broadly speaking, a standard is a document or a technology that is defined by a standards body in a standard-setting process. Standards are often the result of many meetings over many years by industry representatives who work together to come to a consensus on a new technology. Of course, these companies also work separately to develop their own technologies, but the goal of working on a standard together is interoperability. Some commonly-known standards are USB, LTE, Wi-Fi, and others. Standards are developed to make sure that, for example, when you buy a USB cable from any manufacturer, it works with the USB port on your computer without issue. In addition to the commonly-known standards, there are many more standards that work in the background as part of our everyday lives, like video compression standards.

A standard essential patent starts out as a typical patent and becomes essential to a given standard usually when it is declared to be essential by one of the contributing participants of the standard. As part of the standard-setting process, and sometimes as part of the process of declaring a patent to be essential to the standard, the contributors of a technology who own patents on the technology agree to license the patent on fair, reasonable, and non-discriminatory terms, sometimes abbreviated as FRAND. This is not always the case – many standard essential patents (or patents that are alleged to be essential to a standard) are owned by companies that did not participate in the standard-setting process, and these companies are usually not obligated to declare that their patents are essential to the standard and not obligated to license on FRAND terms.

As mentioned above, video compression standards are commonly used, but largely go unnoticed by consumers. When a consumer clicks to stream a movie online, it just works – that's in part enabled by video compression standards. Video compression standards allow digital video to be compressed into a size that is more manageable for transmission and storage. Companies use video compression standards to take, for example, a 30-minute television show and compress it into a size that allows it to be streamed or downloaded efficiently. Various standards bodies have developed these technologies so that anybody can compress a video into a format that is understandable and can be interpreted by a wide variety of devices.

Video compression standards often involve hundreds or even thousands of standard essential patents contributed by multiple companies. And, as one might expect with that many interested parties and patents, legal issues abound. As mentioned above, owners of SEPs are frequently obligated to license their SEPs on fair, reasonable, and non-discriminatory terms. While that is a laudable goal, there's no standard for what a FRAND rate is. Companies can negotiate the rates

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they pay for licensing SEPs, and sometimes (though not often), litigation happens, and a court sets the rates that an implementer will pay. Sometimes, however, even a FRAND rate can be too high, which can lead to companies shelving development of product that implement standards, because the potential for profit evaporates with high licensing fees.

Another legal issue in the SEP arena is overdeclaration. Overdeclaration happens when a patent owner asserts that patents are essential to a standard, but the standard can be implemented without implicating the patents. This can result in companies negotiating and paying for licenses for which they don't need to pay, and can have the effect of causing companies to overpay. These costs are ultimately passed on to the consumer – if the manufacturer of a mobile phone pays more to license the patents needed to play videos on the phone, the consumer ultimately pays more for the phone.

Relatedly, in an attempt to efficiently license SEPs, patent pools have formed to provide a more comprehensive licensing solution for companies seeking to implement a standard. Patent pools are formed by multiple SEP holders so that, when a potential implementer wants to implement a standard, the implementer can negotiate with the pool instead of engaging in multiple time-consuming negotiations with individual SEP owners. However, in some cases, patents can be licensed through a pool without any validation of their essentiality to the standard, and without any validation of the validity of the patents that make up the pool. As with the overdeclaration problem, this can lead to increased licensing costs passed on to the consumer.

Although complicated, standards and standard essential patents are an everyday part of life, especially in the media and entertainment industry. Appreciating the growing importance of these topics can help companies better understand the technological and legal benefits and concerns of implementing standards.

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