

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ **04** Line **51** # **1**

Stephens, Adrian Intel Corporation

Comment Type **S** Comment Status **D**

"A Working Group chair or his or her designee shall issue the call at every Working Group meeting."

There are two problems with this: 1) The different terminology used by differeng groups relating sessions to meetings. Some have a session consisting of multiple meetings and some vice versa.

2) FAQ 6 is an exception, which the cited text does not allow.

*SuggestedRemedy*

1. Add ", or sequence of adjacent meetings as described in FAQ 6."

Proposed Response Response Status **W**

PROPOSED ACCEPT IN PRINCIPLE.

This FAQ is consistent with the SASB Operations Manual clause 6.3.2. Further details are descibed in FAQ 6.

The following was added at the end of the answer to FAQ 4:

"For information about groups that meet for several days during a single week, see also FAQ 6."

FAQ **General** Line # **2**

Stephens, Adrian Intel Corporation

Comment Type **S** Comment Status **D**

The normative effect of the FAQ is not clear. It includes multiple "shall" statements. Does the FAQ create new requirements on volunteers, such as keeping specific records and making specific announcements, or is it merely summarising requirements established elsewhere?

We have had this debate in other SASB committees regarding "Guidelines" that included the word "shall", and the outcome in RevCom was that such guidelines should always cite the defining rule when "shall" is used to avoid creating the impression that the guideline was creating policy.

*SuggestedRemedy*

For every word shall either:

- 1) replace it with should, or
- 2) cite the policy that establishes the rule in the immediate vicinity of the shall

Proposed Response Response Status **W**

PROPOSED REJECT.

The uses of "shall" in the FAQs are based on "shall" statements in the policy. The following sentence has been added at the front of the FAQs to make this clear:

"The word 'shall' is used in these FAQs when it refers to corresponding language in the *IEEE-SA Standards Board Bylaws*, the *IEEE-SA Standards Board Operations Manual*, or the *Letter of Assurance* form."

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FAQ 11 Line # 3

Stephens, Adrian Intel Corporation

Comment Type S Comment Status D

The FAQ fails to address how to determine that the request for LoA has been received. Should the WG chair send out reminders if there is no acknowledgement of a request for LoA? How many times should this be done? I have a current example where a request has been sent multiple times to a known working email address and no acknowledgement has been received.

*SuggestedRemedy*

Indicate how the WG chair knows that they have reasonably discharged their duty to request an LoA, such as by determining that the email address is currently indicated by the recipient company as the place to send such requests, and not receiving email bounces, and repeating the request a couple of times over a period of 6 months.

Proposed Response Response Status W

PROPOSED REJECT.

The FAQ is consistent with the SASB Operations Manual clause 6.3.2. Neither the policy nor the Ops Man mandates any specific method for a working group chair or the chair's delegate to fulfill his or her duty to ask for an LOA. However, the cover letter for requesting an LOA has been updated to request acknowledgement of receipt of the request.

FAQ 66 Line 746 # 4

Stephens, Adrian Intel Corporation

Comment Type S Comment Status D

"How does a participant know if IEEE has requested a Letter of Assurance from a particular company?"

The answer given is: "A participant may ask the Working Group chair for this information. " Wrong. The WG chair knows what requests for LoAs they have sent, but they do not know what requests for LoAs the \*IEEE\* has sent, unless the IEEE keeps such a register and makes it available to the chairs.

*SuggestedRemedy*

Narrow the scope of the FAQ to whether the WG chair has sent a request for LoA, or create a mechanism and requirement on IEEE PatCom to maintain a register of requests for LoAs sent.

Proposed Response Response Status W

PROPOSED ACCEPT IN PRINCIPLE.

The question and answer have been changed to read:

66. How does a participant know if a Letter of Assurance has been requested from a particular company?

A participant may ask the Working Group chair whether he or she has requested an LOA from that company. Accepted Letters of Assurance are available on the IEEE's web site.

FAQ 19 Line 227 # 5

Stephens, Adrian Intel Corporation

Comment Type S Comment Status D

"A participant does not need to respond ... already covered by ... a request for a letter of assurance".

How does the participant know about requests for LoAs? It is unreasonable to expect all members of the WG to constantly poll the WG chair about which requests for LoAs have been sent.

*SuggestedRemedy*

at the end of line 230 add "of which they are personally aware"

Proposed Response Response Status W

PROPOSED REJECT.

A participant can learn about a request for an LOA either by asking the chair or (if the patent is held by the participant's employer or other affiliation) by asking the patent holder whether it has received a request. A chair is free to maintain a listing of LOA requests that have been sent and to make this listing available to working group members.

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FAQ 64 Line 736 # 6

Stephens, Adrian Intel Corporation

Comment Type S Comment Status D

"... does not read aloud ..."

IMHO, permitting one form of display while denying another is meaningless. Either the information is available, or it is not.

Further, permitting the display, but not the reading of such material disadvantages members who are blind, and may itself be an act that runs contrary to law in certain countries and IEEE-SA rules.

*SuggestedRemedy*

Research whether such an act - i.e. limiting the availability of such information only to sighted working group members meets the requirements of IEEE for equal participation, and meets the requirements of disability law for lack of discrimination.

Alternatively remove "read aloud, ".

Proposed Response Response Status W

PROPOSED REJECT.

Other accommodations for blind participants are possible such as a screen reader or a braille reader. Reading of the LOA could induce errors or too easily lead to discussion.

FAQ 69 Line 769 # 7

Stephens, Adrian Intel Corporation

Comment Type S Comment Status D

"Nothing." "Note, ", "In Addition", and FAQ 74 "Except that".

In my mind, simple engineer that I am, nothing has a well defined meaning, is is certainly not a movable feast.

You need to get the exceptions all in one place, not add them drip feed.

*SuggestedRemedy*

Replace with "Nothing except for" and exhaustively list the exceptions here.

Proposed Response Response Status W

PROPOSED REJECT.

The text is sufficiently clear as written and there are no exceptions to the prohibition on discussions of LOAs.

FAQ Line 1 # 8

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

Those controlling the PatCom have consistently failed to meaningfully respond to questions and objections other than to support their discrete commercial interest as well as their specific positions and arguments in ongoing commercial litigation through the proposed changes to the IEEE-SA patent policy. IEEE-SA has not only allowed but actively supported this one-sided patent policy to be developed under a process that lacks any respect for the principles of consensus, openness, collaboration, due process and innovation (contrary to the Core Values of IEEE-SA that have been its guide during the process but were recently deleted from its website.) As we have repeatedly stated in written and oral comments in respect of the draft patent policy which this draft FAQ addresses, it is Qualcomm's view that, taken as a whole, the proposed amendments, including these proposed FAQ amendments, represent a substantial and radical set of changes to the current IEEE-SA patent policy. As such, the proposed amendments are fundamentally unbalanced and, if adopted, would damage prospects for continued standardization work at IEEE by discouraging participation, contribution of technology and the provision of licensing assurances. We once again ask PatCom and IEEE-SA to halt this damaging process and open the PatCom and its Ad Hoc Committee to all interested parties to meaningfully contribute to the debate and to consider whether any changes are necessary to the IEEE-SA patent policy supported by rationale and evidence, and if so to develop such changes in an open, collaborative and consensus-based manner that respects the IEEE-SA's Core Values.

*SuggestedRemedy*

Please delete this draft FAQ and the draft IEEE-SA patent policy, halt this damaging process and open the PatCom and its Ad Hoc Committee to all interested parties to meaningfully contribute to the debate and to consider whether any changes are necessary, supported by rationale and evidence, to the IEEE-SA patent policy, and if so to develop such changes in an open, collaborative and consensus-based manner that respects the IEEE-SA's Core Values.

Proposed Response Response Status W

PROPOSED REJECT.

The only justification offered for the suggested remedy is the commenter's disagreement with the draft policy. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

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FAQ 42 Line 480 # 9

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

As previously commented, typically, conformance testing for IEEE standards is conducted on end-products or reference designs for end-products and not on individual components or sub-assemblies such as individual chip components of such end-products. For example, the Wi-Fi Alliance permits use of the trademark "Wi-Fi Certified" only on commercial end-products that have passed conformance, interoperability and performance testing, such as Wi-Fi access points or client devices. It is not clear whether or not industry practices relating to conformance testing for IEEE standards are relevant to the interpretation of the scope of the patent licensing assurance for a compliant implementation of the standard in the IEEE patent policy. However, it seems that the practice of conformance testing for IEEE standards on end-products is consistent with current scope of the licensing assurance to "a compliant implementation of the standard" and the current industry practice of licensing at the level of the end-product that implements the standard and not to components or sub-assemblies of such end-products such as chip components. PatCom has rejected this comment but has also decided to delete any reference to conformity/compliance testing apparently in response to this comment. Is this because the PatCom agrees with the previous comments that the practice of conformance/compliance testing at the end-product does not appear to support its proposed changes to the IEEE patent policy to introduce the definition of Compliant Implementation? If not, please explain what the reason for removing this language.

SuggestedRemedy

Please explain the reason for removing the reference to conformance/compliance testing.

Proposed Response Response Status W

PROPOSED REJECT.

The changed was made in response to comment #41 from the prior commenting period. The policy does not rely on third party conformance testing to determine whether any product is a compliant implementation.

We do not comment on the comment's description of "current industry practice of licensing."

FAQ 43 Line 490 # 10

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

The answer to FAQ 43 has been changed to add "A Reasonable Rate does not include value arising from the cost or inability of implementers to switch from the Essential Patent Claim's technology included in the standard." This is very unclear and problematic. The technology protected by an Essential Patent Claim is part of the standard and the standard is meaningless without the technologies that it comprises. An implementer that has chosen to implement the standard has chosen to implement all the Essential Patent Claims included in the standard. It makes little sense when determining the value of the standardized technology to imagine that the implementer could nevertheless switch from a specific or indeed all technology covered by Essential Patent Claims and to discount the value arising from the cost or inability to do so. Does this mean that the implementer is able to discount the cost of licensing Essential Patent Claims from the value of Essential Patent Claims? This would be absurd. Is this intended to imply use of the ex ante incremental value rule? Please answer. This language should be deleted.

SuggestedRemedy

Please delete "A Reasonable Rate does not include value arising from the cost or inability of implementers to switch from the Essential Patent Claim's technology included in the standard."

Proposed Response Response Status W

PROPOSED REJECT.

The response to FAQ 43 was revised in response to several comments. The specific text referenced in this comment was added in response to comments from Sandy Block submitted to PP-Dialog on October 30, 2014:

*43. ... The last sentence of the FAQ is confusing that "Any incremental value imputed to the selected option because of its inclusion in the standard is excluded." I suggest deleting the last four sentences and insert what I think was intended:*

*"A value benchmark of a selected patented invention is the value it would have if there were no standardization effects. That is, reasonable royalty does not include value arising from the cost or inability of implementers, who have sizable sunk in costs, to change away from the selected patented invention."*

*Otherwise, explain how the royalty is affected by the second alternative.*

The proposed addition is a correct reading of the policy and provides useful guidance to readers.

This FAQ neither proposes nor rejects the "ex ante incremental value rule."

It is not correct that, "An implementer that has chosen to implement the standard has chosen to implement all the Essential Patent Claims included in the standard." An implementer that implements a portion of a standard only practices EPCs relating to that portion of the standard. This is consistent with how IEEE standards are written and how

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they are implemented in the marketplace.

FAQ 43	Line 490	# 11
Hermele, Daniel	Qualcomm Inc	
Comment Type S	Comment Status D	

The term "incremental value" has been changed to "additional value" in the answer to FAQ 43. Is there any difference between "incremental" and "additional"? If so, what is the difference? Does this change indicate that the relevant patent policy language is not supposed to imply use of the ex ante incremental value test? If so please state that in the FAQ answer.

*SuggestedRemedy*  
Please explain what additional value means and if it is any different to incremental value. If not, please add to the answer to FAQ 43 "The policy does not suggest use of the ex ante incremental value test for Essential Patent Claims"

*Proposed Response*      *Response Status* W  
PROPOSED REJECT.

The draft patent policy does not define, propose, or reject any "ex ante incremental value rule" or similar test or rule. Therefore it would be inappropriate for these FAQs to address such methodology.

FAQ 43	Line	# 12
Hermele, Daniel	Qualcomm Inc	
Comment Type S	Comment Status D	

The answer to FAQ 43 has been changed to add "The policy does not mean that an Essential Patent Claim covering an invention created solely to enhance an IEEE standard can never have value." What is the scope and meaning of "an invention created solely to enhance an IEEE standard"? Can it be said that there is any invention created solely to enhance an IEEE standard? Please give some examples. Is this intended to mean that an invention created at least in part for purposes other than to enhance an IEEE standard can never have value under the proposed reasonable royalty definition. This must surely be wrong. Please either delete this language or indicate that this interpretation is incorrect.

*SuggestedRemedy*  
Please delete "The policy does not mean that an Essential Patent Claim covering an invention created solely to enhance an IEEE standard can never have value."

Alternatively, please add "Neither does this policy mean that an Essential Patent Claim covering an invention created at least in part for purposes other than to enhance an IEEE standard can never have value."

*Proposed Response*      *Response Status* W  
PROPOSED REJECT.

This text in the FAQ was added in response to previous comments including comment #1 from the prior round of comments on the FAQ, and it provides helpful guidance for the special case where an invention was created solely to enhance a standard.

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FAQ 43 Line 490 # 13

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment on the answer to FAQ 43 stated some possible interpretations and asked several questions. The suggested remedy was rejected but the answer to the FAQ changed. **Please answer the questions posed in the previous comment (relevant parts reproduced below) in respect of the earlier and the newly changed FAQ answer.** This appears to be an illustration of the ex ante incremental value test that has been widely criticized and rejected by Judge Holderman in In Re Innovatio IP Ventures. We asked the Ad Hoc on three occasions to explain "whether it intends that the draft policy, and in particular any proposed amendments, might require or suggest the use of the ex ante incremental value test". We received no reply other than the statement "The draft policy neither proposes nor rejects the "incremental value test." However, now it appears that the FAQ gives an explanation of the newly added language that makes it clear that the language is intended to require use of the ex ante incremental value test. Why wasn't this intention made clear in response to our repeated questions to the Ad Hoc? Will the Ad Hoc now confirm that the newly added language is indented to require or suggest use of the ex ante incremental value test? Continued failure to respond to this question would be astonishing.

Addition of the language "excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard" is objectionable on its face as previously explained but also in the light of this FAQ. In the example given of two equal alternative technologies, only one will be selected for inclusion in the standard. The ex ante incremental value test is widely discredited because it suggests that both these technologies, however well they perform, will have zero value because the incremental value of one over the other is zero and because one is only potentially valuable as a result of its inclusion in the standard, the other being valueless as a result of not being included. This is an absurd result. **Would the Ad Hoc please confirm if it is correct interpretation of effect of the newly added language that the value of the two technologies posited in the example would be zero? If not, please can the Ad Hoc explain what the correct result would be in this example? In the absence of an explanation or response, it appears that the newly added text is neither clear on its face, nor explained by the answer to this FAQ and both should be deleted.**

SuggestedRemedy

Please answer the questions posed in the previous comment (relevant parts reproduced below) in respect of the earlier and the newly changed FAQ answer. Delete the language "excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard" from the draft patent policy and delete FAQ 43 and its answer.

Proposed Response Response Status W  
PROPOSED REJECT.

The only justification offered for the suggested remedy is the commenter's disagreement with the draft policy. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

This FAQ neither proposes nor rejects the "ex ante incremental value rule."

FAQ 45 Line 525 # 14

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

In a previous comment on this FAQ, we stated that it revealed the naked attempt by those controlling the Ad Hoc to change the IEEE patent policy to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of which is currently a requirement of the IEEE patent policy and both of which are contrary to industry licensing practice. The FAQ answer has now been changed. Thank you for that. However, this does not address the fundamental issue with the patent policy text and this FAQ that the inclusion of a definition of Complaint Implementation is a radical change to the IEEE patent policy.

SuggestedRemedy

Delete bullet 1 of the definition of Reasonable Rate in the patent policy and delete FAQ 44 and its answer.

Proposed Response Response Status W  
PROPOSED REJECT.

The only justification offered for the suggested remedy is the commenter's disagreement with the draft policy. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

We do not comment on the comment's description of "industry licensing practice."

FAQ 47 Line 561 # 15

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

The answer of this FAQ has been changed to indicate that "a reminder" that an injunction "might be available" is considered a threat. This is astonishing. Presumably use of the phrase "a reminder" indicates that the implementer was already aware that an injunction "might be available" but may have forgotten. So, does this FAQ answer mean that reminding the implementer of something it already knew is an implicit threat?

SuggestedRemedy

Delete FAQ 47.

Proposed Response Response Status W  
PROPOSED REJECT.

The comment does not offer a suggested remedy that would improve the answer to the FAQ in a manner consistent with the draft policy.

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FAQ 59 Line 685 # 16  
 Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

The answer to FAQ 59 has been changed but has further muddled the issue of whether a first-level appellate review is limited to a second instance court or adjudication or whether it can be a higher level. Now it reads "A first-level appellate review is a proceeding conducted by a court at the next-higher judicial level (e.g., a court of appeals or a court of second instance) to review the decision adjudication of the next-lower body (e.g., a trial court or a court of first instance)." Defining a first-level review as a next-higher level review is confusing and could mean that a review at the highest possible judicial level is what is meant which is not the ordinarily meaning of first-level appellate review. Please answer if this is what is meant and, if not, please change the FAQ answer accordingly. PatCom has not properly responded to a previous comment in relation to this FAQ. A useful question the FAQ could clarify is whether the "affirming first-level appellate review" applies to the "adjudication" as a whole or to each individual decision of "one or more courts" on issues of "patent validity, patent infringement, or any other claims or defenses against the Submitter" for all the patent holder's Essential Patent Claims subject to a licensing assurance. If the latter, "including an affirming first-level appellate review, if sought by any party within applicable deadlines" as part of the "adjudication" process further indicates that relevant section is intended is a blanket ban on injunctions for all Essential Patent Claims. The FAQ should address this important issue.

SuggestedRemedy

Amend FAQ 59 as to the instance that the phrase "first-level appellate review" is intended to apply and provide guidance as to whether the "affirming first-level appellate review" applies to the "adjudication" as a whole or to each individual decision of "one or more courts" on issues of "patent validity, patent infringement, or any other claims or defenses against the Submitter" for all the patent holder's Essential Patent Claims subject to a licensing assurance.

Proposed Response Response Status W

PROPOSED REJECT.

In a jurisdiction that has only a single level of appellate review, then the "next-higher" court will indeed also be the "highest" court in that jurisdiction.

The remainder of the comment is not relevant to this FAQs.

The draft patent policy does not propose a general ban on Prohibitive Orders. The draft policy does acknowledge limited situations where Prohibitive Orders may be appropriate.

FAQ 60 Line 692 # 17  
 Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment and question on this FAQ asked the following questions. In the case of a patent holder with multiple Essential Patent Claims in multiple jurisdictions, is it a "failure to participate in ... an adjudication" if the "prospective licensee is not subject to the jurisdiction" and "does not voluntarily submit to such jurisdiction" of ALL the courts or ANY one of the courts "with the power to determine and award reasonable compensation to the Patent Holder" for those Essential Patent Claims? Similarly, in the case of a patent holder with multiple Essential Patent Claims in multiple jurisdictions, is a prospective licensee "failing to comply with the outcome of an adjudication" if "a trial court has made a decision" in respect of ONLY one or ONLY a subset of such Essential Patent Claims or essential patents and "that decision has been affirmed in whole or in relevant part through a first-level appellate review (or the time for seeking such a review has passed without review being sought), and the prospective licensee refuses to pay past or future royalties as so determined."? PatCom has accepted the suggested remedy in principle and has stated that it has clarified the FAQ answer, but has not answered the questions or provided a clear explanation of the answers to the questions raised in the FAQ answer as requested. As such, it totally unclear under what a failure "to participate in, or to comply with the outcome of, an adjudication" means and thus the circumstances under which an injunction for an IEEE standards essential patent might be available. These fundamental issues remain as unclear as ever and must be addressed in this FAQ. We suggest a particular remedy to this defect. PatCom should respond substantively and directly to these questions and this suggestion giving an explanation of why it is incorrect if they choose to reject this suggestion.

SuggestedRemedy

Please amend the answer to FAQ 60 to add the following: "In the case of a patent holder with multiple Essential Patent Claims possibly in multiple jurisdictions, it is a "failure to participate in ... an adjudication" if the "prospective licensee is not subject to the jurisdiction" and "does not voluntarily submit to such jurisdiction" of any one of the courts - and not all of the courts - "with the power to determine and award reasonable compensation to the Patent Holder" for those Essential Patent Claims. Similarly, a prospective licensee is "failing to comply with the outcome of an adjudication" if "a trial court has made a decision" in respect of only one or only a subset - and not all - of such Essential Patent Claims or essential patents and "that decision has been affirmed in whole or in relevant part through a first-level appellate review (or the time for seeking such a review has passed without review being sought), and the prospective licensee refuses to pay past or future royalties as so determined."

Proposed Response Response Status W

PROPOSED REJECT.

In general, the outcome and enforcement of an adjudication including an affirming first-level appellate review regarding one EPC in a jurisdiction is not affected by the lack of an outcome of an adjudication, regarding another EPC, in the same or another jurisdiction.

FAQ 60 provides one example and does not attempt to cover all possible scenarios and cases.

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FAQ 61 Line # 18  
 Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

The answer to FAQ 61 has been amended to state that: *"Whether a party is willing or unwilling is a matter of perspective, and the IEEE does not make any determinations of "willing" or "unwilling".*" What the IEEE does or does not do is irrelevant. What is relevant however, is whether the IEEE patent policy permits a patent holder to seek and or seek to enforce an injunction against an unwilling licensee. Numerous courts around the world have similarly opined that injunctions for SEPs must be available at least against unwilling licensees. Despite repeated requests through various rounds of this commenting process, no clear answer has been given. We ask once again. Does the draft IEEE-SA patent policy permit seeking or seeking to enforce an injunction for an Essential Patent Claim against a party found by a court to be an unwilling licensee? This is a fundamental question that needs to be answered in this FAQ.

*SuggestedRemedy*

Please provide an answer to the fundamental question of whether the draft IEEE-SA patent policy permits seeking or seeking to enforce an injunction for an Essential Patent Claim against a party found by a court to be an unwilling licensee?

Proposed Response Response Status W

PROPOSED REJECT.

The draft policy does not use the terms "willing licensee" or "unwilling licensee." Rather, the policy uses "participation" and "compliance," and the policy describes conditions where the Submitter of an Accepted LOA agrees it shall neither seek nor seek to enforce a Prohibitive Order. Therefore the FAQ does not define the term "unwilling licensee" and does not discuss whether a Prohibitive Order may be sought against a party whom some may view as an "unwilling licensee."

FAQ 40 Line 460 # 19  
 Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 40 stated as follows: As Qualcomm has previously demonstrated in Comments to the draft patent policy, the definition of Compliant Implementation fundamentally changes the scope of licensing assurances and is not reflective of current industry licensing practice for IEEE standards. The current patent policy states that the licensing commitment applies to *"implementations of the standard"*. Industry practice is to license IEEE Essential Patent Claims at the level of the end product that implements the whole IEEE standard and not to components that implement only portions of the IEEE standard. In contrast, the definition of *"Compliant Implementation"* would for the first time, include *"any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard."* This would constitute a major expansion of the scope of the licensing assurances currently requested, and a disruptive change to existing industry licensing practices. Such a change would be over-inclusive and would result in uncertainty, in the context of the complex products that implement IEEE standards, as to which of the myriad of components, sub- assemblies or products conforming to *"any portion of an IEEE standard"* used in those complex products would be included in the scope of a licensing assurance. It appears that this proposed change is principally an attempt by certain implementer companies to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of which is currently a requirement of the IEEE patent policy. To claim that the change from *"implementations of the standard"* to *"any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard"* is merely *"for clarity"* is simply false. PatCom rejected the proposed remedy to delete FAQ 40 stating *"The FAQ is consistent with the draft patent policy."* This is not responsive. We believe we have demonstrated that the draft patent policy changes the scope of the licensing assurance. To claim that the definition of Compliant Implementation it is provided *"for clarity"* would therefore be false. Please explain whether PatCom believes we are wrong and why. If not please delete the answer to FAQ 40.

*SuggestedRemedy*

Delete FAQ 40 and its answer.

Proposed Response Response Status W

PROPOSED REJECT.

This question has been asked a number of times, and therefore having an FAQ is appropriate.

We do not comment on the comment's description of "existing industry licensing practices."



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FAQ 41 Line 469 # 20

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 41 stated as follows: The answer to FAQ 41 reflects the changes proposed to the licensing assurance and confirms that "A Submitter may limit its license to cover only implementations that are created for use in conforming with the IEEE Standard." This further demonstrates that the introduction of the proposed definition of "Compliant Implementation" changes the scope and meaning of the current licensing assurance. If "implementations that are created for use in conforming with the IEEE Standard" is to have any meaning here it must be different to "any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard" which is the language of the new definition of Compliant Implementation. If so, then the scope and meaning of the current licensing assurance to "a compliant implementation of the standard" must likewise be different to the scope and meaning of the new definition of Compliant implementation to "any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard." Thus, to claim that the change from "implementations of the standard" to "any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard" is merely "for clarity" is simply false. PatCom rejected the proposed remedy to delete FAQ 41 stating "The FAQ is consistent with the draft patent policy." This is not responsive. We believe we have demonstrated that the draft patent policy changes the scope of the licensing assurance. To claim that the definition of Compliant Implementation it is provided "for clarity" would therefore be false. Please explain whether PatCom believes we are wrong and why. If not please delete the answer to FAQ 41.

SuggestedRemedy

Delete FAQ 41 and its answer.

Proposed Response Response Status W

PROPOSED REJECT.

The only justification offered for the suggested remedy is the commenter's disagreement with the draft policy. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

FAQ 45 Line 525 # 21

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 45 requested deletion of FAQ 45 and stated as follows: In ICT and telecoms related patents, Essential Patent Claims are most often directed to end-products, systems and methods that implement the claimed invention. It is extremely rare to see a claim directed to an integrated circuit. In the example given, Essential Patent Claims would most often be applicable to the entertainment system as an end-product or to the system of the entertainment system in combination with another end-product such as an IEEE 802.11 client device, and not to the integrated circuit in the entertainment system. In the example given, industry licensing practice would typically be to license a portfolio of IEEE 802.11 essential patents (containing multiple Essential Patent Claims) to the entertainment system, not to the integrated circuit in the entertainment system, nor to the airplane.

While those controlling the Ad Hoc are clearly attempting to change the IEEE patent policy to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of those is currently a requirement of the IEEE patent policy and both are contrary to industry licensing practice. PatCom rejected the proposed remedy to delete FAQ 45 stating "The FAQ is consistent with the draft patent policy." This is not responsive. Please delete FAQ 45 and its answer.

SuggestedRemedy

Delete FAQ 45 and its answer.

Proposed Response Response Status W

PROPOSED REJECT.

The comment does not comment on the changed text or directly affected text as requested by PatCom chair Law's email of November 11, 2014 neither does the comment offer any new justification for the suggested remedy.

As to the comment that the draft policy reflects a substantive change from the current policy, the IEEE expresses no view as to whether any specific provision in the IEEE policy does or does not represent a substantive change from the previous policy.

We do not comment on the comment's description of "industry licensing practice."

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 46 Line 537 # 22

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 46 requested deletion of FAQ 46 and stated as follows: FAQ 46 asks the question "In discussing Reasonable Rates, what is an example of considering "...in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation?"  
 The answer given is "Many IEEE Standards require the use of multiple Essential Patent Claims to create a Compliant Implementation. If the value of any given Essential Patent Claim is viewed in isolation from other Essential Patent Claims, then the resulting determination of value for that single patent may be inappropriate. For example, suppose a standard requires implementation of 100 Essential Patent Claims of equal value held by 100 Submitters. If each Submitter were to be entitled to a royalty of 2% of the implementation's selling price, then the implementation would never be produced because the total royalties (200% of the implementation's selling price) would exceed any possible selling price. Therefore, when determining a Reasonable Rate, the value of all the Essential Patent Claims should be considered. In practice, the number and value of the Essential Patent Claims and the structure of requested royalties won't be as simple as in the example; however, at some point, the parties (or court) can agree that they have sufficient information to make a determination."  
 The example set out in this answer is confused and confusing for many reasons and demonstrates the danger of simplistic theories of "reasonableness" over a case by case consideration. Firstly, even according to the admittedly oversimplified example, the court or parties would need to determine the value of all 100 Essential Patent Claims, which would first need to be identified (this would be no easy task particular in IEEE where there is no requirement to disclose individual patents believed to be essential), then analyzed to determine which claims are in fact Essential Patent Claims, and then the "contribution" of each of those Essential Patent Claims to the Compliant Implementation would need to be "valued". How this process would be done in the real world is a mystery.  
 Moreover, the example then skips over the step of how the "the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation" would be determined. How would these individual values be aggregated into a total value? The example suggests that royalty demands of 2% from all 100 Essential Patent Claims would prevent production of the Compliant Implementation because the total royalty demand would be 200% of the Compliant Implementation's selling price. This is both circular and not necessarily true for a number of reasons including that it fails to take cross-licensing into account. It is circular because the result of simplistically adding the 100 royalty rate demands results in 200% by design. This suggests that the selling price of the Compliant Implementation is fixed according to some exogenous constraint and that the royalty demands (all presumed to be at the level of that Compliant Implementation) must be crammed into that fixed price. It does not permit that the selling price of the Compliant Implementation may reflect the price/value of all its component physical and technology inputs. If the example were to posit a fixed royalty fee or a royalty rate with a maximum fee for each Essential Patent Claim rather than a rate, the supposed problem immediately disappears. The selling price of the Compliant implementation would take into account and accommodate the component and technology inputs.  
 In fact, in the simplistic example given, every one of the 100 Submitters would be able to produce the Compliant Implementation because each would be able to cross-license its one Essential Patent Claim with each of the other 99 Submitters one Essential Patent Claim.

There is no real world problem that this simplistic example and the changes to the IEEE patent policy are designed to fix.  
 IEEE standards are extremely successful under the existing patent policy and there is no evidence that royalties for essential patents have caused any problems. See Ericsson Inc. v. D Link Systems, Inc., No. 10-cv-473, 2013 WL 4046225, at \*18 (E.D. Tex. Aug. 6, 2013) "The best word to describe Defendants' royalty stacking argument is theoretical." Rather, the changes to the patent policy and this FAQ appear to be a naked attempt by certain commercial interests to reduce the value of Essential Patent Claims of others based on unrealistic theory. PatCom rejected the proposed remedy to delete FAQ 46 stating "The FAQ is consistent with the draft patent policy." This is not responsive. Please delete FAQ 46 and its answer.

SuggestedRemedy

Please delete FAQ 46 and its answer.

Proposed Response Response Status W

PROPOSED REJECT.

The only justification offered for the suggested remedy is the commenter's disagreement with the draft policy. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

The comment does not offer a suggested remedy that would improve the answer to the FAQ in a manner consistent with the draft policy.

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 57 Line 669 # 23

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 57 requested deletion of FAQ 57 and stated as follows: FAQ 57 asks "Does the IEEE-SA Patent Policy prevent an implementer from raising issues of patent validity, patent infringement, or any other claims or defenses against the Submitter or change the requirements for that litigation?" It gives the answer: "No. The policy does not prevent the parties from litigating those issues, and it does not change any jurisdiction's rules on allocating burdens of proof or production of evidence." This might potentially suggest that the "adjudication" referred to in the section of the draft patent policy prohibiting seeking or seeking to enforce injunctions is intended to require an exhaustive consideration of claims and defences for all the "one or more Essential Patent Claims" for which the "Submitter of an Accepted LOA has committed to make available a license." In other words, potentially, seeking an injunction for one Essential Patent Claim would require an exhaustive analysis of "patent validity, patent infringement, or any other claims or defenses against the Submitter" for all the patent holder's Essential Patent Claims subject to a licensing assurance. This would be to confuse an adjudication of whether a patent holder has offered a portfolio license consistent with its RAND licensing assurance with an exhaustive analysis of all the Submitter's Essential Patent Claims subject to its licensing assurance. Would the Ad Hoc kindly confirm whether or not this is the correct interpretation or intention? If not, we suggest the FAQ and its answer be deleted or amended to indicate that it is not intended to apply to the "adjudication" process contemplated by the relevant section of the draft patent policy. If yes, this FAQ and its answer suggests the "adjudication" process is intended to place impossible constraints on the availability of injunctions for owners of even modestly sized portfolios of essential patents and to damage the ability of such patent holders to obtain portfolio licenses on reasonable terms. PatCom rejected the proposed remedy to delete FAQ 57 stating "The FAQ is consistent with the draft patent policy." This is not responsive. Please delete FAQ 57 and its answer.

*SuggestedRemedy*

Please delete FAQ 57 and its answer.

*Proposed Response* Response Status W

PROPOSED REJECT.

The policy states that, "Nothing in this policy shall preclude a licensor and licensee from voluntarily negotiating any license under terms mutually agreeable to both parties." This would include, for example, a portfolio license.

The comment, however, is based on the mistaken premise that a patent holder can satisfy its obligations by offering only a complete portfolio license rather than offering licenses for individual Essential Patent Claims.

Adjudication of "patent validity, patent infringement, or any other claims or defenses against the Submitter" varies from one jurisdiction to another. The draft patent policy does not change those adjudications.

The comment does not offer a suggested remedy that would improve the answer to the FAQ in a manner consistent with the draft policy.

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 58 Line 677 # 24

Hermele, Daniel Qualcomm Inc

Comment Type S Comment Status D

A previous comment to FAQ 58 requested deletion of FAQ 58 and stated as follows: FAQ 58 asks "Why does the IEEE-SA Patent Policy text on Prohibitive Orders use the phrase "... by one or more courts...?" It gives the answer: "In some jurisdictions, a single court does not have the authority to decide all issues. For example, a jurisdiction may empower one court to determine patent validity but another court to determine infringement or compensation. The policy was drafted so that it could apply in such a jurisdiction." This could potentially mean that even for one Essential Patent Claim in one jurisdiction, at least two courts may be required to decide issues of patent infringement, compensation and patent validity as part of the "adjudication" process referred to in the section of the draft patent policy prohibiting seeking or seeking to enforce injunctions. If this is the case for one Essential Patent Claim in one jurisdiction, it potentially might indicate that for a portfolio of multiple Essential Patent Claims in multiple jurisdictions, one or more determinations of "patent validity, patent infringement, or any other claims or defenses against the Submitter" would be required for all the "one or more Essential Patent Claims" for which the "Submitter of an Accepted LOA has committed to make available a license." In other words, potentially, seeking an injunction for one Essential Patent Claim would require an exhaustive analysis of "patent validity, patent infringement, or any other claims or defenses against the Submitter" for all the patent holder's Essential Patent Claims subject to a licensing assurance. This would be to confuse an adjudication of whether a patent holder has offered a portfolio license consistent with its RAND licensing assurance with an exhaustive analysis of all the Submitter's Essential Patent Claims subject to its licensing assurance. Would the Ad Hoc kindly confirm whether or not this is the correct interpretation or intention? If not, we suggest the FAQ and its answer be deleted or amended to indicate that it is not intended to apply to the "adjudication" process contemplated by the relevant section of the draft patent policy. If yes, this FAQ and its answer suggests the "adjudication" process is intended to place impossible constraints on the availability of injunctions for owners of even modestly sized portfolios of essential patents and to damage the ability of such patent holders to obtain portfolio licenses on reasonable terms. PatCom rejected the proposed remedy to delete FAQ 58 stating "The FAQ is consistent with the draft patent policy." This is not responsive. Please delete FAQ 58 and its answer.

*SuggestedRemedy*

Please delete FAQ 58 and its answer.

Proposed Response Response Status W

PROPOSED REJECT.

The policy states that, "Nothing in this policy shall preclude a licensor and licensee from voluntarily negotiating any license under terms mutually agreeable to both parties." This would include, for example, a portfolio license.

The comment is based on the mistaken premise that a patent holder can satisfy its obligations by offering only a complete portfolio license rather than offering licenses for individual Essential Patent Claims.

The comment does not offer a suggested remedy that would improve the answer to the

FAQ in a manner consistent with the draft policy.

The answer to FAQ 58 did not change. As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

FAQ 01-81 Line 1 # 25

Kallay, Dina Ericsson

Comment Type S Comment Status D

(Lines 1-989)

Regretfully, most of the 33 comments Ericsson submitted on the proposed revised FAQs on October 25, 2014 were rejected.

For the record, Ericsson hereby repeats and resubmits these multiple dismissed comments where applicable.

*SuggestedRemedy*

See Ericsson multiple comments submitted on October 25, 2014, available at:

[http://grouper.ieee.org/groups/pp-dialog/drafts\\_comments/PatCom\\_sort\\_by\\_CommentID\\_111114.pdf](http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_CommentID_111114.pdf)

Proposed Response Response Status W

PROPOSED REJECT.

These comments have already been addressed.

As stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 25 Line 285 # 26

Kallay, Dina Ericsson

Comment Type S Comment Status D  
(Lines 285-290)

There is nothing new or changed in the newly proposed IEEE IP policy that supports this change. The process of revising the FAQs is based on the premise of accommodating the new policy.

*SuggestedRemedy*

Reject the proposed revisions to lines 285-290

Proposed Response Response Status W  
PROPOSED REJECT.

Since "disclosure policy" is not a defined term, we have deleted the FAQ and its answer.

FAQ 29 Line 341 # 27

Kallay, Dina Ericsson

Comment Type S Comment Status D  
(Lines 341-342)

The newly suggested text is impractical, because persons or entities who do not actively participate in the development of a specific standard are unlikely to be aware that they hold a potential Essential Patent.

Furthermore, the IEEE has no jurisdiction to "encourage" (or otherwise regulate) the behavior of persons who do not participate in its standard-development.

Finally, although the language appears optional ("encouraged"), maintaining it in the text may send a dangerous message to jurisdictions outside that U.S. that suggests that IP-related obligations in standard-development context apply to parties who do not participate in the standard-setting activity.

*SuggestedRemedy*

Revise the text as follows (red text is new):

Any party or entity **participating in the work of a Working Group** that believes that it holds a potential Essential Patent Claim is encouraged to submit a Letter of Assurance.

Proposed Response Response Status W  
PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

"Any person or entity that believes that it holds a potential Essential Patent Claim may submit a Letter of Assurance."

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 43 Line 497 # 28

Kallay, Dina Ericsson

Comment Type S Comment Status D  
(Lines 497-499)

The new text proposed in these lines is not found anywhere in the new policy, and presents yet another attempt to improperly use the FAQs as an instrument that goes beyond the new policy.

Furthermore, this new and original text relates to data that is only known to the implementer, and therefore opens the door to ex-post opportunism (reverse hold-up or refusal to negotiate) on behalf of the implementer to inflate this alleged value.

*SuggestedRemedy*

Delete the text as follows:

~~A Reasonable Rate does not include value arising from the cost or inability of implementers to switch from the Essential Patent Claim's technology included in the standard.~~

Proposed Response Response Status W  
PROPOSED REJECT.

The response to FAQ 43 was revised in response to several comments. The specific text referenced in this comment was added in response to comments from Sandy Block submitted to PP-Dialog on October 30, 2014:

*43. ... The last sentence of the FAQ is confusing that "Any incremental value imputed to the selected option because of its inclusion in the standard is excluded." I suggest deleting the last four sentences and insert what I think was intended:*

*"A value benchmark of a selected patented invention is the value it would have if there were no standardization effects. That is, reasonable royalty does not include value arising from the cost or inability of implementers, who have sizable sunk in costs, to change away from the selected patented invention."*

*Otherwise, explain how the royalty is affected by the second alternative.*

The proposed addition is a correct reading of the policy and provides useful guidance to readers.

FAQ 44-46 Line 512 # 29

Kallay, Dina Ericsson

Comment Type S Comment Status D  
(Lines 512-559)

The creative hypotheticals developed here are nowhere to be found in the newly-proposed policy.

Furthermore, these new FAQ text appear to create a new method of patent damages, an attempt that goes way beyond the mandate of IEEE-SA. The attempt to determine what a court may or may not do is equally inappropriate.

*SuggestedRemedy*

Delete these three FAQs

Proposed Response Response Status W  
PROPOSED REJECT.

These examples provide useful guidance to the readers of the patent policy. Please note, however, that the answers were previously revised based on the prior round of commenting.

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 61 Line 705 # 30

Kallay, Dina Ericsson

Comment Type S Comment Status D

(Lines 705-711)

While the FAQs go to great length to discuss what a “threat of an injunction” may be (see FAQ # 47), they fail in FAQ 61 to spell out what is the behavior of an unwilling licensee or a licensee that engages in a constructive refusal to deal.

This asymmetry suggests a substantial bias in the drafting committee in favor of infringers/technology users and against standardized technology contributors.

*SuggestedRemedy*

Flesh out the definition for “unwilling licensees”. E.g. add a 2nd sentence after “willing” or “unwilling” that would read:

Recent court cases have suggested certain criteria for “unwillingness”, such as the refusal to be bound by a RAND adjudication offered by a court.

Proposed Response Response Status W

PROPOSED REJECT.

The draft policy does not use the terms “willing licensee” or “unwilling licensee.” Rather, the policy uses “participation” and “compliance,” and the policy describes conditions where the Submitter of an Accepted LOA agrees it shall neither seek nor seek to enforce a Prohibitive Order. Therefore the FAQ does not define the term “unwilling licensee” and does not discuss whether a Prohibitive Order may be sought against a party whom some may view as an “unwilling licensee.”

FAQ 01-81 Line 1 # 31

Kallay, Dina Ericsson

Comment Type E Comment Status D

(Lines 1-989)

Although this is only the 2nd draft released for comments, the heading of this document reads “Draft 11”.

As an organization that prides itself on “openness”, the IEEE-SA PatCom ad-hoc should circulate the missing nine (9) drafts

*SuggestedRemedy*

Publicly circulate the nine (9) secret drafts of the FAQs

Proposed Response Response Status W

PROPOSED REJECT.

The comment does not offer a suggested remedy that would improve the answer to the FAQ in a manner consistent with the draft policy.

FAQ 64 Line 729 # 32

Koepfing, Joe None entered

Comment Type S Comment Status D

In reviewing the draft Patent Policy FAQ 11114 I think that follow excerpt from this material may need to take into consideration a statement that is found in the IEEE-SA Standard Bylaws.

The following is a copy of the statement contained in the draft Patent Policy FAQ 11114:

*Can the actual Accepted Letter of Assurance be displayed on a screen?  
Yes, but it is not recommended. The Letter of Assurance consists of multiple pages of often very small type. Therefore, the display is not going to be legible except in the smallest of rooms. The lack of legibility may lead to impermissible questions or discussion.  
Nevertheless, displaying the Accepted Letter of Assurance as it resides on the IEEE web site is not a violation of the IEEE-SA Patent Policy provided a participant does not read aloud, present, or answer questions about the displayed Letter of Assurance.*

The IEEE-SA Bylaw states the following with is taken from IEEE-SA Standards Board Bylaws, SubClause 6.2 Policy, Subclause b), 2nd paragraph:

*Copies of an Accepted LOA may be provided to the working group, but shall not be discussed, at any standards working group meeting*

If there has been no change in the IEEE-SA Bylaws, the I believe that starting with the new sentence in line 700 to line 704 should be deleted and replaced with:

*“There shall be no discussion of the material in the LOA at any IEEE standard development meeting of a Sponsor, Technical Committee, Technical Subcommittee or Working Group”.*

Rational:

It seems that the By-Laws were trying to limit discussion and interpretation of the LOAs, since this is a legal document between the IEEE-SA PatCom, IEEE-SA Standards Board and IEEE-SA BOG and the entity submitting the LOA.

*SuggestedRemedy*

See comment.

Proposed Response Response Status W

PROPOSED ACCEPT IN PRINCIPLE.

The answer to FAQ 64 has been changed to:

*“Yes, but displaying the LOA is not recommended because doing so may lead to impermissible questions or discussion. Nevertheless, displaying the Accepted Letter of Assurance as it resides on the IEEE web site is not a violation of the IEEE-SA Patent Policy provided a participant does not read aloud, present, or answer questions about the displayed Letter of Assurance. See also FAQ 69.”*

Note that FAQ 69 tells the reader that discussions are prohibited.

IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ **All** Line # **33**  
 Kolakowski, John Nokia Solutions and Networks

Comment Type **S** Comment Status **D**

"Overall Objection to New IPR Policy and Process Under Which It Was Created": NSN wishes it to be known at the outset of these comments that NSN continues to object to the new IEEE IPR Policy that occasioned and is underlying the changes to this FAQ document. NSN previously voiced objections to the new IPR Policy on substantive grounds, and detailed those substantive objections in written submitted comments on the various draft iterations of the new policy, as well as via in-person oral statements at various IEEE PatCom meetings and the IEEE SASB meeting in Beijing in August 2014. NSN also previously voiced objections to the new IPR Policy on procedural grounds. Explanation of those procedural objections may be found in appeals submitted to the IEEE SASB on August 11, 2014 and September 18, 2014 by NSN and others. NSN continues to maintain all of its objections and believes that the new IPR Policy was improperly derived in violation of IEEE governing principles and rules. As such, any objections made herein to the FAQ or FAQ changes should not be taken as tacit agreement or implied acquiescence to the underlying new policy itself. Moreover, in light of NSN's continuing objections to the new policy on which these FAQs are based, NSN objects to the presentation of the FAQs in their entirety. More specific objections in addition to these general objections are presented below.

*SuggestedRemedy*

*Proposed Response* Response Status **W**  
 PROPOSED REJECT.

The comment does not propose a specific and actionable revision to the FAQ text. Moreover, as stated in PatCom chair Law's email of November 11, 2014:

"Comments on the draft policy or on unchanged parts of the FAQs are out of scope."

FAQ **40** Line **448-55** # **34**  
 Kolakowski, John Nokia Solutions and Networks

Comment Type **S** Comment Status **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here reiterates its comment provided in regards to the first draft of these FAQs, which was rejected. NSN again notes that the proposed new FAQ and its answer respectfully provide almost no guidance and information. The question itself seems unnecessary and the main thrust of the answer ("how IEEE standards are written and how they are implemented in the marketplace") is vague and actually begs further questions. The drafters' rationale for rejection ("The FAQ is consistent with the draft patent policy") does not provide a justification for the FAQ's inclusion, nor does it respond to the grounds for objection that NSN previously raised.

*SuggestedRemedy*

Remove FAQ 40 and its answer.

*Proposed Response* Response Status **W**  
 PROPOSED REJECT.

Although mere consistency with the draft policy may not justify an FAQ, in this case the question has been asked a number of times, and therefore having an FAQ is appropriate.



IEEE-SA PatCom FAQ -- Round 2 Responses to comments

FAQ 43

Line 486-92

# 35

Kolakowski, John

Nokia Solutions and Networks

Comment Type **S** Comment Status **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here reiterates its comment provided in regards to the first draft of these FAQs, which was rejected. NSN again comments that the proposed hypothetical cannot be correct. In the circumstances described, the two alternatives cannot have the same "value" because, if so, there would be no basis on which to choose one over the other. Rather, the choice of one necessary dictates that it has a higher value than the alternative. Accordingly, the answer is based on a fallacy and does not serve to clarify the subject requirement in the Reasonable Rate definition. The drafters' rationale for rejection of the comment and proposed change is that "[t]he choice of one alternative over another indicates the necessity for a choice (even an arbitrary choice), but not necessarily a difference in value." While this might theoretically be true in the abstract, the reality is that this "arbitrary choice" scenario simply never occurs, so including it in the FAQs for guidance is a disservice.

*Suggested Remedy*

Remove FAQ 43 and its answer.

Proposed Response Response Status **W**

PROPOSED REJECT.

As stated previously, "The FAQ is consistent with the draft patent policy. The choice of one alternative over another indicates the necessity for a choice (even an arbitrary choice), but not necessarily a difference in value."

We do not comment on the comment's two statements that, "...the proposed hypothetical cannot be correct" and that "While this might theoretically be true in the abstract..."