

Dear PatCom members, PP-Dialogue members,

The opportunity to provide feedback on Dave Ringle's proposed amendment of IEEE's LOA discussed at the 12 June Patcom meeting ("Proposal") is welcomed.

As of today, the Proposal leaves several questions unanswered.

1. The rationale for the proposal is not clear. Fraunhofer has consistently highlighted the need for transparency of licensing terms, which is considered to be pro-competitive and certainly more conducive for IEEE standards to be implemented in the market. Rather than addressing transparency, the proposal appears to artificially divide projects commenced pre- and post- 15 March 2015 – now permitting, after a significant lag period, the identification of where licensing terms can be found for patents relating to some IEEE standards. The result of this is unknown – for example, would it appear that there is fragmentation in IEEE standards?
2. A query is whether the proposal seeks to correct an unforeseen consequence from the latest IEEE policy, and predictions which formed the basis of the latest policy that have not come to fruition. Further, is this proposed customisation of the LoA an event that triggers a re-accreditation process for IEEE?
3. As to why the same approach is not being adopted in relation to negative LOAs associated with projects/standards initiated after 15 March 2015, there are no clear reasons. The impact of such a change gives rise to significant implementation questions: are already filed LoAs able to be amended to include a link to licensing terms? Should LoAs previously rejected by IEEE because of inclusion of a hyperlink to licensing terms and conditions now be accepted as a re-filing, to include the link to licensing terms?
4. The proposal is inconsistent with FAQ 85 within IEEE's document "Understanding Patent Issues During IEEE Standards Development":  
*"85. Will the updated IEEE-SA Patent Policy apply to existing standards development projects currently underway as well as new standards development projects? The updated policy will apply to any LOAs (for any project or standard) submitted on or after the effective date"* (emphasis added).

Relying on FAQ 85, some IP owners may have submitted positive LOAs so that the inclusion of their technology in technical standards was not endangered. Indeed, a negative LOA is usually referred to the Patent Committee and can result in the exclusion of the related technology from the standard.

If the proposed amendments to the LOA are approved, IP owners are placed in a position whereby the business decision regarding an LoA would have been different should the option to include licensing terms have been available. This is considered to be intrinsically unfair.

Conversely, allowing patent owners which submitted negative LOAs to use the new option would be unfair and possibly discriminatory towards those who have perhaps reluctantly submitted positive LOAs under the latest policy.

5. On its face, The proposed amendment would revive the old IP policy for projects initiated prior to March 2015 and would then amount to a change of IP policy, which should undergo ANSI's reaccreditation process.

The principle that an SSO should re-apply for accreditation after significant modification of its standards development procedures emerges from Section 4.1 of the ANSI Essential Requirements ("Accreditation of American National Standard Developers"). Under this provision, any revision to an accredited standards developer's procedure needs to be submitted to the ExSC for its consideration. It is then for the ExSC to assess whether the change is substantive or not. If the change is considered substantive, the ExSC publishes it and calls for public comments. Eventually, at the end of the review process, the ExSC will decide whether to maintain the accreditation of the SSO and whether a reaccreditation process needs to be activated.

In the case at issue today, in light of the significant differences between the IP policies in place at IEEE after and before 15 March 2015 (which would be reintroduced by the new LOA for the projects initiated before that date), there seems to be little doubt that the proposed amendments to the LOA, if approved, would bring about a substantive change to IEEE's IP policy.

6. Further to the above-mentioned substantial issues arising from the Proposal, it is suggested that, irrespective of whether IEEE's members want to pursue the proposed amendment, the proposed text should be amended to reflect the following observations:

- (i) it should be stated that the proposed amendment does not affect the patentee's right to submit a negative LOA;
  - (ii) reference should be made to the two optional sub-boxes indicated in the old version of box D.1.b (see box below);

b. The Submitter will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.

(Optional) These reasonable rates will not exceed \_\_\_\_\_ (e.g., percent of product price, flat fee, per unit).

(Optional) A sample of such a license (or material licensing terms) that is substantially similar to what the Submitter would offer is attached.

- (iii) a specific optional sub-box including a reciprocal licensing requirement should be added to the text;
- (iv) since the LOA adopted in 2015 has language definitions that were not in the old policy, reference should be made to definitions contained in the old IP policy. To this end, the proposed text should be amended as follows (see below text in red):

*"Notwithstanding its having checked box D.1.d, the Submitter declares that as to the IEEE Standard or IEEE standards project identified in part C and for the Essential Patent Claims covered by part E Scope of Assurance of this LOA, the Submitter's licensing position is the same as it would have been if the Submitter had submitted an LOA with box D.1.b selected using the version of*

*the IEEE LOA form that was in use immediately prior to the 15 March 2015 implementation of the updates to the IEEE-SA patent policy, under the terms of the IEEE-SA Standards Board Bylaws that were in effect at that time, **INCLUDING THE DEFINITIONS PROVIDED THEREIN AND EXCLUDING ANY DEFINITION PROVIDED IN THIS FORM**”.*

In light of the above-mentioned issues arising from the Proposal, Fraunhofer is not likely to support it as of today. Fraunhofer would prefer to have a more comprehensive discussion on how to correct the macroscopic underlying assumptions made by IEEE in 2015 with the reform of its IP policy. This would be done in the best interest of IEEE, with the idea of being supportive of IEEE's standardization activities.

Should the proposal of Gaelle Martin-Cocher (Blackberry, posting of 11 June 2018 to the PP-Dialogue) be distributed as a new proposal by IEEE, it is considered that there should be an opportunity to respond to this in that context. Similar questions and issues to those raised above would arise, and require a fuller discussion.

There does not appear to be relevance of categorizing any proposal as a 'one-time' or general; a change will impact the policy and those submitting LoAs in some way.

I hope that these observations and suggestions are helpful to the deliberation of the proposal, and would be happy to discuss any element in further detail.

Sincerely,

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Fraunhofer-Gesellschaft