

## Report Q 157

in the name of the Dutch Group  
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### **The Relationship between Technical Standards and Patent Rights**

#### **1. Basis for technical standards**

*1.1 What types of national and the international standards exist in your country? By whom are the standards set up? Are there de iure and/or de facto standards?*

The following types of standards can be recognized:

- a. Recommendations; neither de iure nor de facto binding
- b. Recommendations; not de iure but possibly de facto binding
- c. Technical solutions, which have become a de facto standard as a consequence of a very strong market position (possibly based on IP-rights); these technical solutions are de facto binding
- d. Standards; de iure binding

The last group is de iure binding in most cases on the basis of national or regional legislation

The most important institutes are

1. The Netherlands Normalization Institute (NNI) produces and co-ordinates standards in the Netherlands in nearly every field:

Labor environment, Construction, Chemicals and Materials, Consumer products, Electrical Power Supply, Electrical Installations, Gas and Water supply, Health, IT and Telecom, IT-applications, Quality Management, Logistics Transport and Packaging, Machine construction and Environment.

The standards are Dutch (NEN, NPR) or European or International and as such accepted in the Netherlands (NEN-EN, NEN ISO and NEN IEC).

The NNI represents the Netherlands as a member of the European Committee of Normalization (CEN) and on the world level as a member of the International Organization for Standardization (ISO).

New standards are developed by standardization committees, in which all (branch)parties are represented. Policy committees appoint these committees. The latter determine the subjects for standards and the priorities of handling too. The policy committees have a composition, representative for the branch of sector, with i.a. delegates of governmental ministries, branch organizations and companies.

Some Dutch (NEN) standards are de facto binding, others are also de iure binding.

Also de facto standards of different organizations are existing, like KEMA for electrical equipment.

2. Standardization organizations from e.g. Belgium (NBN), Germany (DIN), France (FN) and UK (BS) make standards that are recognized in the Netherlands.
3. EU authorities which set forth EU standards, applicable in the Netherlands and de iure binding. Directives of the EU, like the Public Procurement Directives create the de iure character of these standards.
4. International bodies, in most cases controlled by a group of industries and/ or service providers, in many cases indicated as Forum produce de facto binding standards, which are sometimes converted by standardization organizations into de iure standards.

**In this report the Dutch Group will only consider de facto and de iure binding standards because only these standards could result in a conflict between that standards and IP-Rights.**

*1.2 Who is the addressee of the standards and in which technical fields do standards apply? Are the Groups aware of any standards, which explicitly refer to patents?*

The addressee of the standards is the industry and the industrial users of the standard. Industrial user could be described as service provider using standardized equipment to provide services.

Sometimes the addressee might be importing firms, which are prohibited to import non-standardized equipment.

Such standards are mainly in the field of public interest services like electric power supply, water supply, gas supply and telecommunications.

The legal basis hereof can be found in the Public Procurement Directives of the European Community (Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC).

The Dutch Group is not aware of standards explicitly mentioning patents, however the last Directive mentioned has an article on patents.

*1.3 What is the legal effect of standards? Are they enforceable? If so, how are they enforced? The Groups are invited to distinguish between the types of standards involved according to question 1.1. above.*

a. De facto standards

The legal effect of a de facto standard is that manufacturers and service providers will in many cases be bound to apply the technology, which is used by the standard.

This is specifically true for a situation where standardized equipment has to cooperate with other equipment. So the enforcement is not de iure but de facto. Equipment not complying with the de facto standard can simply not be used in connection with standardized equipment and will for that reason not be of interest for the market.

b. De iure standards

Equipment not complying with de iure standards are in most cases not allowed to be sold or to be purchased (vide equipment according to the Public Procurement Directives). In most cases manufacturers are not prepared to supply other than such equipment. The use of such standardized equipment is enforced by national or regional governmental and/or legal authorities.

## 2. Possible conflicts between technical standards and IPR

### 2.1 *What possible conflicts do the Groups see with regard to the relationship between patents and standards?*

As possible conflicts with regard to the relationship between patents and standards are seen:

1. The choice of existing patented technologies to be introduced in the standard.

By choosing a certain technology to be introduced in a standard there should from the outset be the certainty that the owner of a patent protecting such technology is prepared to grant licenses against certain conditions.

**Members** of standardization organizations are usually requested to undertake upfront that licenses under such patents will be available unless they have declared at the start of the standardization work that licenses under certain patents will not be available.

**Non-members** are usually not fully aware of the specific standardization project and cannot be bound to undertake to grant licenses.

The choice of the latest developed patented technologies to be introduced in the standard.

However the members of the standardization organization might be in a technically favored position because they are informed in a relatively early stage about the new technologies. Furthermore, by participating in the draft of the standard they are in the position to propose technologies, which they have or are about to protect by a patent application.

This means that the standardization body should make a permanent watch on patents and patent applications in the market to ensure that licenses will be available. Furthermore the people working on the draft of the standard have to carefully watch that newly developed technologies for the standard have to be protected by patent applications in order to avoid the collision with the rights of non-members.

This is, in practice an impossible task, especially since patent applications have in most countries usually a secret period of 18 months. For existing patent applications it is not always predictable what the scope of protection of the granted patent will be in every country where the standard will be used.

In order to avoid the above mentioned problems the Group could acknowledged a certain tendency to prefer the application of technologies for which patents have already be granted to one or more members of the standardization organization. In such case many problems are avoided, but at the same time the standard will not be based on the latest technologies.

*2.2 Which issues do the Groups find relevant with regard to confidentiality, concerning namely the relations between parties involved in setting up a specific standard or the preservation of confidentiality? Should there be rules for the handling of information obtained during the period of setting up a standard? Likewise should there be rules for filing of patent applications during the said period? If so, what should the rules be?*

The main issue is the difference in position between members and non-members of the organizations setting up standards. The members can influence the contents of the standard and the technology chosen. The non-members do not have such a possibility and are often in the position that other technology is introduced in the standard than they prefer.

In the ideal situation the setting up of a standard should be done in full openness with a goal to enable non-participants to anticipate on the new markets that will result from the standards.

However one should keep in mind that the work in standardization bodies heavily relies on expertise brought in by the participants. It is in the interest of the employers of these experts to protect the know-how of these experts by IPR and the contributions of these experts to the standards, in particular solutions that are about to be subject to patent applications. The creator of the information takes a considerable risk by making that information available since the European Patent Office has ruled, that contributions made to a standard are considered as a publication and can for that reason be used as material harmful for the novelty.

For these reasons there could be rules for the handling of information obtained during the period of setting up a standard. Such rules, comprising confidentiality during a limited period of documents clearly marked as confidential, could be given in order to enable the creator of the information to apply for a patent. The creator on the other hand should undertake to make available licenses under such patented information.

The Group is of the opinion that such rules do not work satisfactory in practice: the creator of the information should preferably apply for a patent before disclosing the information.

*2.3 Are there any issues with regard to the territorial aspect (scope of protection and application of the standard)? What differences do the Groups see with regard to patents of members of the standardization organization and of non-members?*

Patents can have a different scope of protection in different countries and not all countries apply the same standard, see e.g. GSM (Global System for Mobile communications) which is applied only scarcely in the US and not at all in Japan. Moreover, patent owners will be reluctant to grant licenses to manufacturers in countries where they cannot supply their products. It should be kept in mind that the European markets are relatively more open than a number of other markets.

For this reason members of standardization bodies will in choosing certain technologies for a new standard try to avoid to introduce technologies which are owned by companies from outside the standardization area. If such technologies would be chosen then suppliers from outside the standardization area would be able to compete with manufacturers within the standardization area, while at the same time manufacturers vested within the standardization area are not able to compete in that country outside that area.

These problems could only be solved in a situation in which the standard is applied worldwide and where the scope of protection of a patent is equal and also enforceable in all relevant countries.

*2.4 Are there rules for patent pools and discrimination against non-members, which might constitute a conflict?*

Each patent pool can, in principle, make its own rules. As far as the Group is aware, it is common practice that a patent owner-non-member which is prepared to undertake to make licenses available could have the same rights to receive licenses as a member of the standardization organization, taking into account the observations made under 2.3.

However, it should be recognized that patent-pools could have an anti-competitive effect and may for that reason be subject to approval by the anti-trust authorities.

Although the word discrimination is not fully applicable in this sense, it should be recognized that major patent owners solve their problems in most cases by the use of cross-licenses, because they need licenses under each other's patents.

The position of a small or medium sized enterprise (SME), owning no or few patents, which are essential for the implementation of the standard, is completely different. They might be forced to grant licenses under patents in a field different from the standard. Such (mal) practice may bring the SME in a weaker position, because those patents might be their most important commercial asset, in particular when these SME owned patents are not in the field of the standardized technology. However, the IPR statements applied in a number of standardization bodies, which require licenses on fair and non-discriminating conditions, may prevent such disadvantage for SME's.

### 3. IPR policies, conflict resolution means

#### General remarks to Chapter 3 made by the Group

Before answering the questions of Chapter 3 in more detail, the Group would like to make the following remarks:

In the original IPR policy of ETSI an essential patent was defined as a patent that is for technical reasons necessarily infringed while implementing the standard. This is the so-called technical criterion. In practice, IPR that cannot be avoided for commercial reasons very soon became more important and should be classified as essential as well.

Manufacturers or third parties in a market of standardized products should be entitled to licenses under essential patents. On the other hand they should not be bound to obtain licenses under patents which are only said to be essential but are not so in practice.

This creates the necessity to determine if a patent is essential or not. Such determination is strongly coupled to the question of the scope of protection of a patent. The determination of the scope of protection of a patent is, according to the Dutch law, of public order and can only be done by a competent court. Any determination of the scope of protection made by a standardization body or organization is only valid inter partes. A solution for this problem has not been found yet but is urgently required to ensure that the right licenses are available for every manufacturer of standardized equipment or for a user of standardized methods.

An interesting exercise is going on in the 3G patent platform for the next generation of mobile telephone equipment. Members to this platform intend to leave the determination of essentiality to third party experts. An appeal procedure is foreseen. Furthermore the members to that platform have agreed to accept the judgement of the external experts and have accepted a certain capping on the maximum royalty to be paid for certain parts of the system.

It should further be remarked that in today's practice standards are not longer developed by formal standardization organizations, but much more by small groups (Forums) of interested selected parties. These groups make their own rules for the licensing issue. Such rules can hardly be controlled anymore by legislation.

*3.1 How and by whom should the relevant or "essential" IP-rights be determined? Should the members of the respective organization be required to reveal their relevant IP-rights? What should be the consequences if a member does not reveal an IP-right? How does this affect the disclosure of new inventions or technologies?*

The organization producing standards should determine which IP-rights are essential, for reasons that that organization chooses the technologies underlying the standard.

That organization should require from its members to reveal their relevant IP-rights ' for which they are not prepared to grant licenses.

Not revealing an IP right by a member could happen because in particular the big patent owners are not always able to guarantee that they did not overlook the essentiality of a

particular patent. However the risk for such overlooking should be for the member. The consequence is that the member cannot withhold licenses under the said IP-right, because he has given the required IPR statement.

A member notifying the standardization organization that he has a patent application protecting essential technology, for which he is not prepared to grant licenses, could be asked to make such notification to the director of the standardization organization requesting that such notification will not be published before the date of publication of the patent application. In such case the director of the standardization organization should give guidance to the persons involved in drafting the standard that the introduction of certain technologies in the standard should be avoided. This could indeed affect partly the disclosure of new technologies.

*3.2 Can the owner of an IP-right which has been detected as relevant be forced to let it be used for standardization? If so, should this be done by way of licensing? Can the owner deny the use of the IP right?*

If the owner is a member of the standardization organization, the rules of that organization will certainly provide rules for these situations.

Whether the member can be forced by the organization to make licenses available is determined by the type of standard (de iure or de facto) and by the character of the declaration the member has made. In case such declaration is in the form of an undertaking, the member that refuses to make available licenses is in breach of his undertaking and could be sued for breach of contract. If the relation between the standardization organization and its members is governed by law (in case of a de iure standard), the member may be forced on the basis of certain provisions in such law.

In some legal systems, like the Dutch, a possibility exists for a compulsory license if the Ministry of Economic Affairs deems such a license necessary in the public interest. (Article 57 ROW, based on the Paris Treaty, Article 5A and TRIPS, article 31). The Group is not aware of any relevant application in the Netherlands of these articles for purposes of standardization.

*3.3 What should be the consequences of such denial for the standardization process? Can the membership or the participation in the standardization process be made subject to an undertaking to grant licenses or to make the technology protected by IP rights available?*

The consequences of said denial are that either the standard will have to be modified or a certain pressure will have to be exercised by the members. The membership or the participation in the standardization process should be made subject to an undertaking to grant licenses or to make the technology protected by IP-rights otherwise available. The reasoning for this position is that participants in standardization should be able to work in good faith and in certain openness. This can only be achieved if each member can trust in the licensing behavior of the other participants. It cannot reasonably be requested from a participant to make available licenses under his patents to a participant who refuses to do so in a reciprocal way.

3.4 *In which way and by whom should conflicts between a member and the organization or between members be resolved? The Groups are invited to give their comments on the pros and cons of internal arbitration proceedings on the one hand and of national court proceedings on the other hand, as far as particular conflicts with regard to standards and patents are concerned.*

How the conflicts between a member and the organization are solved will be subject to the rules of the organization. The Group is of the opinion, that such conflicts should be solved either by arbitration or by ADR (Alternative Dispute Resolution). The same is true for conflicts between members.

The advantages of such procedures are that the arbitrators or mediators can be chosen by the parties for their specific know-how in the field of standards and IPR. Such know-how is in general scarcely available in most courts.

Although parties may agree to submit their dispute on the scope of protection or the validity of a patent to arbitration or ADR, such decision will only be binding inter partes.

However experience teaches that most participants in standardization are prepared to accept an inter partes ruling from arbitration.

Third parties, which are not bound to the rules of the standardization organization, could always bring the said issues to a competent court.

#### **4. License policies, royalties**

4.1 *Who determines the conditions of a license agreement? What are reasonable royalties? How and by whom can the non-discriminatory character of the conditions be defined? Is there any impact, and if yes, which impact does Art. 31 TRIPS have on this type of licenses?*

The conditions of a license agreement will be determined by the licensor and the licensee. A problem arising with these conditions is the use of negotiation pressure of major patent owners against small patent owners. The major patent owners will solve their licensing problems by cross licensing.

The small patent owner could use the services of an experienced licensing executive, but the difference in negotiating power remains.

A majority of the Group is of the opinion that it is advisable that the standardization organization creates a standard license agreement, which becomes mandatory to the parties, if they cannot agree amicably on individual licensing conditions. Furthermore a license should be available as of right. This means that the licensee will not have to wait with the application of the standardized equipment and methods until final agreement has been reached.

As a general rule of thumb a royalty should give the licensor a reasonable reward for his investment in R&D and IPR-protection of which the patent is a result and the royalty and conditions should not have the effect that the licensee is prohibited to enter into the

market. At the same time the licensor should be able to operate in the same geographical markets as the licensee.

Furthermore a majority of the Group is of the opinion that a maximum royalty should be determined. For GSM royalties now differ roughly between 8 and 28% (source: ITSUG, the International Telecommunications Standardization Users Group). A reasonable cumulative royalty should be determined on a case by case basis and on the basis of the general rule of thumb given here above.

The non-discriminatory character of conditions can only be determined if only monetary conditions would apply. This is however not realistic in a world where cross licensing amongst major patent owners often occurs. A standard license agreement could avoid excessive conditions for those parties, which have few or no patents.

The Group is not aware of any impact of Art. 31 TRIPS at this moment.

*4.2 Do the Groups see general principles for license conditions? The Groups are invited to submit factual comments on the licensing policy involved in standards, i.e. in comparison to the policies for amicable license agreements.*

The general principles for license conditions should meet the rule of thumb as set out under 4.1.

The Group is of the opinion that in case of de iure standards the smaller patent owner should have a reasonable chance to enter into the market of equipment and methods of such standard. This means that a certain protection should be given to the smaller patent owners.

Such protection should be created by the standardization organization in the form of a standardized license agreement referred to above. The factual contents of such a license agreement may be dependent of the specific market of the standardized equipment and methods and should therefore be determined on a case by case basis, taking into account the above mentioned general rule of thumb. Amicable license agreements are of course always possible between parties, which can reach agreement on this basis.

*4.3 What are the consequences if an agreement cannot be reached between the patent holder and the licensee? How should royalties be determined?*

The answer to these questions has been set out in the answers to questions 4.1 and 4.2.

The Group is of the opinion that the different interests and relations between the parties in the market cannot, as a general rule, be introduced in a rigid framework.

As a general principle the Group is of the opinion that in case of a de iure standard a maximum royalty should be set by the national or regional governmental and /or legal authorities, responsible for the enforcement of the standards.

For de facto standards the parties can bring their disputes to arbitration, ADR or the competent court.

4.4 *What is the legal quality of an undertaking to grant licenses (e.g. third party beneficiary)? Are the rights of a member or of a third party to challenge the validity of the patent affected in any way by this undertaking? Does the patent holder retain the right to enforce the patent against third parties or the member and, if so, under which conditions?*

The legal quality of an undertaking to grant licenses is subject to Dutch law and the rules of the of the standardization organization. The standardization organization should ensure that third party beneficiaries (non-members) should be able to receive licenses.

A separate organization comprising licensors and licensees could be created to implement this situation (vide e.g. the 3G3P platform). Such an organization could issue a standard license agreement for the cases wherein parties cannot reach agreement amicably.

In most cases the relation between licensor and licensee will be harmed by the challenge of the IP-right. The Group is of the opinion that such challenge should however be possible in case of de iure standards. This seems necessary to ensure that owners of IP-rights do not pretend that IP-rights, which are not essential, are considered to be essential and thus resulting in unnecessary payment of royalties.

The patent holder should be able to retain the right to enforce its IP-rights against parties, which do not respect the IP-rights by infringing it, or by breach of the license agreement.

## **5. Conclusion**

Patents on technology included in de iure or de facto standards can create a dominant market position. Clear case law on the abuse of such dominant position (vide article 30 in conjunction with article 82 of the Rome Treaty of March 25 1957 and the Dutch Competition Law) could not be found.

Nevertheless the discrepancy between the use of IP-rights and de iure standards could create problems especially in the present developments where the need for both IP-rights and standards is generally felt as unavoidable.

The Group does not pretend to find a final solution for the totality of problems but is of the opinion that the suggestions made herein above could help to solve a number of problems.

## **Summary**

During the Montreal Congress of AIPPI in 1995 the question has been raised to which extent the interest of standardisation of product collides with the interest of Intellectual Property Rights (IPR's). At that Congress a decision has been made to further study this question during the Melbourne Congress in 2001.

The national groups of AIPPI have been requested to answer a number of questions as a preparation for this study, in particular concerning the situation in their country.

Both standards and IPR's have in most cases effects on competition issues in a greater economical area than a country. Competition law in the Netherlands is mainly determined

by rules issued by the European Community. As a consequence the Dutch group has taken into account this situation while answering the questions.

A further limitation of the work of the group is to standards which are de jure or de facto binding for the parties having an interest in the specific industrial area of the industry in which the standardized technology is used. In a number of cases reference has been made to telecommunications because in that industrial area the problems concerning the relation between standards and IPR have become significant.

The group has, as a starting point, taken the view that the licensor of the protected technology which has been introduced in a standard should receive a reasonable reward for his investments in R&D and protection of which the IPR is a result, but on the other hand side this reward should not have the effect that the licensee is prohibited to enter into the market of the standardized technology. At the same time the licensor should be able to operate in the same geographical markets as the licensee. It should be kept in mind that the introduction of a technology in a standard should not as general rule lead to expropriation of the owner of that technology. Further consideration should be given to the fact that the owner could have a lead in the market of standardized technology.

Although it is desirable, that the most important owners of the technology are involved in the creation of a standard and as consequence are in the position to influence the choice of technology, this position at the same time creates obligations to that parties to ensure that licenses under IPR protecting that technology are available for other parties in the same market against fair and reasonable conditions.

The number of owners of technology involved in the creation and the use of a standard is in most cases limited. The consequence is that these parties will exchange licenses on the basis of cross-licensing.

This creates the need to give special attention to the position of those enterprises that have none or few IPR and nevertheless desire to enter into the market of standardized products and services. The majority of the group takes the position that for these enterprises special rules for licensing should be designed to avoid that their market entrance is unnecessary blocked. Such rules could comprise a maximum cumulative royalty and a set of standard license conditions. At the same time the standardization body should make clear which licenses under what patents are really necessary to be obtained by the licensee implementing the standard.

## **Résumé**

Lors du congrès à Montréal en 1995 on a soulevé la question de savoir à quel point l'intérêt de la standardisation de produits se heurte à l'intérêt des brevets. On a décidé alors d'étudier ce problème plus en détail pendant le congrès de Melbourne de 2001.

Pour préparer cette étude, on a demandé aux groupes nationaux de l'AIPPI de répondre à quelques questions, en particulier à celles concernant la situation dans leurs pays respectifs.

Dans la plupart des cas, tant les standards que les brevets ont trait à une unité économique plus grande que celle d'un seul pays, notamment pour ce qui est du droit de concurrence. Le droit de concurrence néerlandais est largement déterminé par les règles de l'Union Européenne, de sorte que, pour répondre aux questions, le groupe de travail a tenu compte de ces règles.

En outre, le groupe de travail s'est borné à étudier les standards qui, de jure ou de facto, sont contraignants pour les parties ayant des intérêts dans le domaine spécifique de l'industrie auquel la technologie standardisée a trait.

On s'est souvent référé à la situation dans le domaine des télécommunications, du fait que c'est justement dans ce domaine que de nombreux standards et brevets sont nés ces dernières années.

Le groupe de travail est parti de l'idée que, d'un côté, le breveté dont la technologie brevetée est devenue partie d'un standard, doit recevoir une indemnité raisonnable pour les investissements qu'il a faits dans les recherches et les développements de la technologie brevetée, alors que, de l'autre côté, des licences de brevets pour protéger cette technologie doivent être disponibles pour autres participants dans le marché aux conditions qui ne rendent pas au fond impossible l'accès au marché.

A cela s'ajoute qu'il faut prendre en considération que si une technologie est admise dans un standard, cela ne peut entraîner en général l'expropriation du breveté de cette technologie. On ne nie pas que ce breveté puisse avoir un avantage dans le marché.

Il est souhaitable que les brevetés les plus importants d'une certaine technologie soient engagés dans la création d'un standard, mais cela entraîne également des obligations pour ces brevetés à concéder des licences de leurs brevets à d'autres parties dans le marché contre des redevances raisonnables.

Dans beaucoup de cas, le nombre de parties qui est actif dans le marché de la technologie standardisée et qui est titulaire de brevets sur cette technologie, sera limité, de sorte que des licences seront souvent échangées entre les parties sous forme de licences réciproques.

Il faut prêter une attention particulière à la position des entreprises qui ne possèdent pas ou pas beaucoup de brevets dans le domaine de la technologie standardisée.

Le groupe de travail est en majeure partie d'avis qu'il faut prendre des mesures de protection pour éviter que leur accès au marché ne soit entravé de façon irraisonnable.

Pour cela des moyens tels qu'un maximum de redevances cumulatives et des séries de conditions standard de licence peuvent être utiles. En outre, ces entreprises doivent savoir quels sont les brevets pour lesquels elles ont vraiment besoin de licences.

## Zusammenfassung

Während des Kongresses in Montreal im Jahr 1995 stellte sich die Frage, inwieweit das Interesse an einer Standardisierung von Produkten mit dem Interesse von Patentrechten kollidiert. Damals wurde beschlossen, dieser Frage während des Kongresses in Melbourne 2001 eine weitere Studie zu widmen.

Die nationalen AIPPI-Gruppen wurden gebeten zur Vorbereitung dieser Studie eine Reihe von Fragen zu beantworten, und dabei insbesondere auf die Situation in ihrem Land einzugehen.

Sowohl Standards als auch Patente beziehen sich in den meisten Fällen auf eine größere Wirtschaftseinheit als auf ein Land alleine, insbesondere was das Wettbewerbsrecht angeht. Das Wettbewerbsrecht in den Niederlanden wird in hohem Maße von den Vorschriften der Europäischen Union bestimmt, eine Tatsache, die die Arbeitsgruppe bei der Beantwortung der Fragen berücksichtigt hat.

Die Arbeitsgruppe hat sich ferner auf diejenigen Standards beschränkt, die de jure oder de facto für die Parteien bindend sind, die an dem spezifischen Gewerbegebiet, auf das sich die standardisierte Technologie bezieht, ein Interesse haben.

Es wurde häufig auf die Situation im Bereich der Telekommunikation verwiesen, da gerade auf diesem Gebiet in den letzten Jahren viele Standards und Patentrechte zustande gekommen sind.

Ausgangspunkt der Arbeitsgruppe war, dass einerseits der Patentinhaber, dessen patentierte Technologie Teil eines Standards geworden ist, eine angemessene Vergütung für seine Investitionen in Forschung und Entwicklung der patentierten Technologie erhalten muss, und dass andererseits Lizenzen von Patenten zum Schutz dieser Technologie für andere Marktteilnehmer zu Bedingungen zur Verfügung stehen müssen, die einen Marktzugang nicht faktisch unmöglich machen.

Dabei ist zu bedenken, dass die Aufnahme einer Technologie in einen Standard ganz allgemein nicht dazu führen darf, dass der Patentinhaber in Bezug auf diese Technologie enteignet wird. Es wird nicht bestritten, dass dieser Patentinhaber einen Wettbewerbsvorsprung haben kann.

Einerseits ist es erwünscht, dass die wichtigsten Patentinhaber einer bestimmten Technologie am Zustandekommen eines Standards beteiligt sind, dies schafft jedoch auch die Verpflichtung für diese Patentinhaber, ihre Patente anderen Marktteilnehmern für Lizenzen zu vernünftigen Bedingungen zur Verfügung zu stellen.

In vielen Fällen wird die Zahl der Marktteilnehmer, die im Markt der standardisierten Technologie aktiv sind sowie die Inhaber von Patenten dieser Technologie sind, begrenzt sein, so dass vielfach Lizenzen zwischen diesen Marktteilnehmern in Form von gegenseitigen Lizenzen ausgetauscht werden.

Besondere Aufmerksamkeit verdient die Position der Unternehmen, die über keine oder über nur wenige Patente auf dem Gebiet der standardisierten Technologie verfügen.

Die übergroße Mehrheit der Arbeitsgruppe ist der Auffassung, dass für diese Unternehmen Schutzmaßnahmen erforderlich sind, um zu verhindern, dass ihr Zutritt zu diesem Markt auf unbillige Weise verhindert wird.

Dazu können Mittel wie kumulative Lizenzhöchstgebühren und Standard-Lizenzbedingungen ein geeignetes Mittel sein. Ferner muss für diese Unternehmen klar sein, von welchen Patenten sie tatsächlich Lizenzen benötigen.