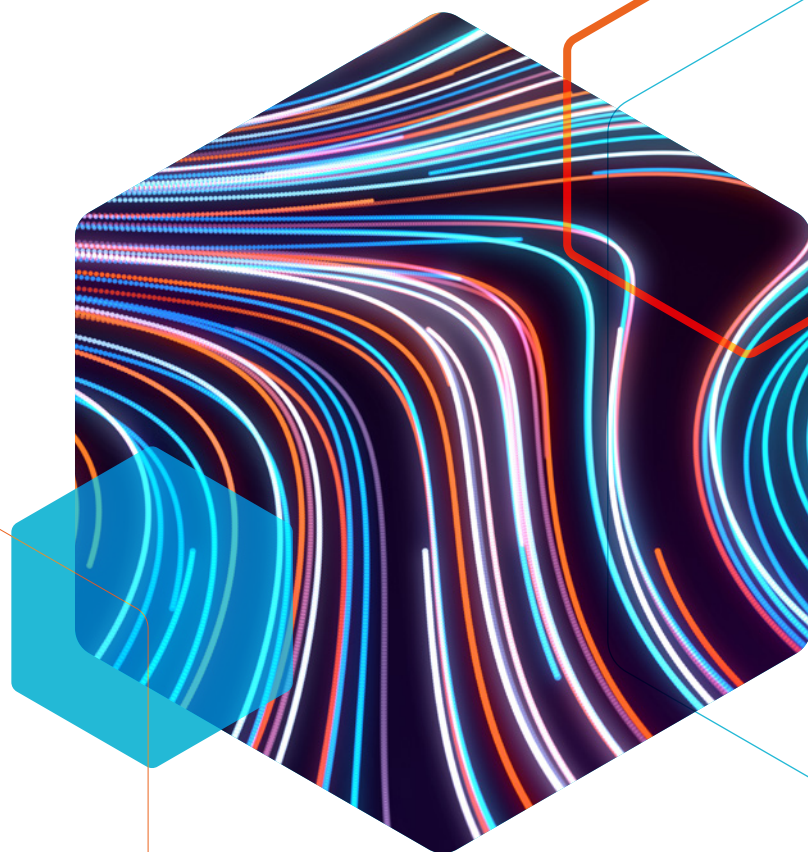


WIPO Strategy on Standard Essential Patents 2024–2026



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I. Introduction

The vision set out in the Medium-Term Strategic Plan 2022–2026 (MTSP)¹ of the World Intellectual Property Organization (WIPO) aims to ensure that innovation and creativity anywhere in the world is supported by intellectual property (IP) for the good of everyone. WIPO's mission statement in relation to this goal envisages the Organization taking a leading role in the development of a balanced and effective global IP ecosystem to promote innovation for a better and more sustainable future.

This high-level aspiration entails leveraging WIPO's global reach and neutrality. The Organization is working towards an IP system that facilitates innovation in an inclusive and balanced manner. In this context, **Standard Essential Patents** (SEPs) constitute an area that deserves special attention, as "balance" has a very special meaning in their licensing and enforcement.

Every Strategic Pillar of the MTSP – from (1) awareness-raising through (2) shaping the future of the IP ecosystem and (3) providing global services to (4) supporting stakeholders in using IP as a tool for growth and development – has active links to the question of how to use the patent system in a way that safeguards the necessary incentives for innovators while guaranteeing access to the fruits of technological innovation in a way that best serves the public interest. The discourse around SEPs cuts to the core of the issue of appropriation, rewards and access on fair terms. Accordingly, as stipulated in WIPO's Program and Budget for the 2024/25 biennium, adopted at the Sixty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO: "The [Patents and Technology] Sector will also continue to engage with Member States and external stakeholders to explore, identify, and address current issues stemming from areas such as the intersection of patents and technological standards".²

This WIPO SEP Strategy document provides a brief introduction to this specific field where IP and competition law intersect (Section II.A), then assesses the need for such a strategy (Section II.B), identifies guiding principles (Section III.A), presents WIPO's current activities in this domain (Section III.B) and sets out the main directions of initiatives in alignment with the MTSP (Section III.C), with a summary provided in Section IV.

1 See WIPO's [Medium-Term Strategic Plan \(MTSP\) 2022–2026](#).

2 See WIPO's [Program of Work and Budget for 2024/25](#), page 22.

II. Landscape

A. State of play

Standardization is an issue of global importance. Standard Developing Organizations (SDOs) provide an open, inclusive and collaborative environment in which their members can agree on common technological platforms. In turn, this environment supports the rapid development, ratification and testing of globally relevant standards for systems, applications, products and services in a wide range of technologies, with a special emphasis on the information and communications technology (ICT) sector. Interoperability achieved through technological standards helps to lower costs for all involved, while laying the foundation for a competitive market at consumer level by enabling customers to base their purchasing decisions on features other than the basic yet essential need for connectivity – such as price, additional functionalities or design.³

On the one hand, the voluntary collaboration of competitors organized by SDOs can be viewed as a success story because it has led to a high degree of innovation and some of the most widely adopted technologies. On the other hand, the standard-setting environment comes with its own set of challenges. A process in which competitors develop standards that incorporate proprietary technologies is, by design, at the interface of IP law and antitrust law. SEPs are the patents that protect inventions which are necessary to implement a standard.

To address the inherent friction between making standardized technology available to implementers of the standard on the one hand, and the economic incentive due to the holders of granted patents on the other, a solid licensing system is crucial. SEP licensing needs to be done under fair, reasonable and non-discriminatory (FRAND) terms, so that the benefits of technological standardization flow through to society as a whole, while maintaining a balance between the legitimate interests of SEP holders and implementers – who can, and in many cases do, undertake both roles simultaneously.

The requirement to commit to FRAND licensing terms is rooted in the SDOs' intellectual property rights (IPR) policies. However, the enforcement of those undertakings, as well as determining what FRAND is, falls outside the purview of these bodies. Patent families can cover extensive territories by their national or regional members, often with claim sets that are not identical. Moreover, companies usually declare large portfolios as SEPs – often before the standard is finalized and when some patents have not yet been granted. This uncertainty inherent within the system, coupled with the lack of an authoritative assessment of essentiality,⁴ results in limited transparency regarding precisely which IP rights need to be licensed when implementing a standard.

³ Well-known connectivity-related standards include Wi-Fi, USB, Bluetooth, MPEG-4 and the different generations of cellular network technology, such as 4G and 5G.

⁴ “Essentiality” of a patent to a standard refers to the feature of that patent that the standard cannot be implemented without the use of the invention protected by the patent. This means, with a certain degree of simplification, that at least one claim is infringed if third parties put standard-compliant products or services on the market without a license.

It is apparent that the implications of a FRAND commitment are not interpreted on equal terms globally, regionally or even nationally – and antitrust rules also show differences across jurisdictions. In SEP licensing disputes, and consequently in litigation, several topical questions have proved contentious over the past decade, while concerns over abusive conduct, such as hold-up and hold-out,⁵ have been expressed.

Issues currently under scrutiny include:

- the need for, and the modalities of, essentiality checks;
- behavioral prerequisites for SEP holders and implementers prior to asserting their patents or FRAND defences;
- the methodologies of FRAND determination and their geographical scope;
- availability of injunctions;
- in certain environments, such as the Internet of Things, the level of the value chain on which a FRAND license needs to be provided and the basis of such licenses.

Courts in certain jurisdictions, while adjudicating disputes based on national rights, have shown a willingness to move toward assessing or even determining a global FRAND royalty rate for licensing the SEPs of the other party in litigation. To assert their jurisdictional sovereignty and prevent the initiation or continuation of parallel proceedings in other countries, some courts have issued anti-suit injunctions (ASIs), and others, as a countermeasure, anti-anti-suit injunctions. This phenomenon, albeit less prominent recently, can be seen as “judicial competition”, which makes litigation in this area even more complex, adding to the transactional costs in litigated cases. It has also raised disputes between certain jurisdictions, calling into question whether ASI practices comply with international trade rules.

Given the challenges outlined above, in order to focus resources and to avoid lengthy and costly litigation, different means of alternative dispute resolution (ADR) are also available to parties that are willing to submit their differences to such procedures.

Jurisdictions in which SEP disputes arise frequently are considering which policy measures they need to add to existing or emerging market mechanisms (for example, patent pools, licensing frameworks with targeted incentives and technological solutions). Given the lack of consensus on even fundamental issues between the strongly positioned SEP holders and the often equally strong implementers, it comes as no surprise that these policy development efforts face challenges and may lead to case-by-case scrutiny in the absence of broad agreement on general principles.

Proposed legislative or regulatory interventions are facing skepticism from all sides and, in the absence of a track record of government policy solutions with proven benefits, many stakeholders seem to prefer a market-based approach. However, policy initiatives and consultations on these issues are helping to invigorate the discourse and bring the players to the negotiating table. As a bare minimum, enhanced transparency of the SEP landscape for interested market participants is vital.

B. Needs assessment

There are several factors which are currently creating particular challenges at the intersection of patents and standards, including:

- the globalization of the value chain;

5 “Hold-up” is a term that describes a situation where a SEP owner uses the threat of an injunction to extract supra-FRAND licensing terms, while “hold-out” refers to implementers using the technology covered by SEPs without a license, employing, inter alia, delaying tactics to avoid having to pay FRAND royalty rates.

- increasing potential for cross-border or global SEP disputes, including a tendency toward global adjudication and forum shopping;
- the potential involvement of all industry sectors in the digital economy;
- the growing complexity of issues involving standardization processes, which cut across numerous legal domains (such as patent law, competition law, contract law and trade law, among others).

Importantly, this area does not solely concern those countries where there is a proliferation of high-stake lawsuits. Courts in an increasing number of jurisdictions are being tested by SEP cases and, as deployment of technology becomes global, larger markets with less experience of such disputes will be targeted by both licensing deals and court cases. National industrial, innovation or IP policies need to take account of the developments in the area of standardization, and developing countries must be prepared for the ramifications of their industries' need to access or use standardized technologies that involve proprietary solutions, to ensure that they are licensed on fair terms. On a related note, the globalization of the ICT product market and the related worldwide consumption of ICT goods make SEP licensing issues relevant to all economies, as the outcome of any SEP-related dispute may impact the availability of certain products in a given region.

The issues described above result in a set of challenges that policymakers, judges, SDOs and industry stakeholders are all facing, to varying degrees. These challenges may be grouped along the following lines:

- the density of SEPs in certain technological areas attached to a standard, entailing questions of patent quality, essentiality and overall transparency;
- the differing methodologies used for assessing essentiality and determining FRAND rates;
- the transactional costs of protracted and multi-jurisdictional litigation;
- the incentives to conclude a license instead of exercising exclusion from the market or delaying tactics;
- the differences in judicial practices that result in forum shopping and varying outcomes;
- the emergence of SEPs in industries and market segments where they have not typically been found, due to technological development and convergence.

In light of the above challenges, it appears that there is a growing need for information, guidance, solutions and services at the international level. Given the inherently global nature of both the implementation of standardized technologies and, consequently, SEP licensing, as illustrated above, it is apparent that **WIPO, as an organization with acknowledged neutrality and a worldwide membership, has a role to play in complementing the national and regional strategic initiatives in this area.**

However, addressing any of these issues by WIPO requires the collaboration of Member States and regional organizations, SDOs, industry stakeholders and the legal community to ensure fair and balanced access to essential technologies.

This Strategy's purpose is to lay the foundations for the activities that WIPO will pursue in the field of SEPs during the 2024–2026 period. Some of these lines of action will be the continuation of ongoing activities (see Section III.B), others will represent new initiatives and some of them will be pilot projects.

III. Main directions of action

A. Guiding principles

The three guiding principles of the WIPO SEP Strategy can be summarized as follows:

1. **Neutrality.** WIPO must take due account of the relevance of a wide range of stakeholders from different backgrounds in the SEP field in order to ensure an unbiased, inclusive, representative and multifaceted approach.
2. **Complementarity.** WIPO's activities must be geared toward creating added value by addressing genuine needs, without replicating or preempting existing or planned measures at national or regional level.
3. **Voluntary nature.** Any activity or service deployed by WIPO should remain optional for both Member States to take part in and other parties to use.

B. Current activities

In addition to the new lines of action (see Section C), WIPO is already undertaking certain activities relating to SEPs, and the topic is on the agenda of several events organized by WIPO.⁶

Following a proposal by the Delegation of Canada at the 34th session of the **Standing Committee on the Law of Patents** (SCP), a sharing session was held during the 35th meeting of the Committee in October 2023 on the practical experiences of observers and other stakeholders in relation to SEPs and FRAND licensing. The SCP's 36th meeting will hold a further sharing session on Member States' policy experiences in this area. SCP sharing sessions and other activities agreed among Member States can help to increase awareness on SEP issues and may be conducive to substantive discussions.

The **WIPO Arbitration and Mediation Center** (AMC) has been actively involved in the area of FRAND disputes since 2015.⁷ The AMC offers tailored ADR services – notably mediation, arbitration and expert determination – which are voluntary and confidential in nature. The AMC provides model submission agreements that parties may use to refer a dispute concerning the determination of FRAND terms for resolution by one or more of these mechanisms. Mediation services are also offered as a facilitation mechanism for the negotiation and conclusion of FRAND licensing agreements in a process known as “deal mediation”. Such mediation is not restricted to the context of a dispute between parties but may be used to facilitate ongoing

6 For example, the WIPO (2023) [Master Class on IP Adjudication](#) and the WIPO 2020 [Intellectual Property Judges Forum](#) included dedicated sessions on SEPs in their programs, and *An International Guide to Patent Case Management for Judges* includes information on how SEP disputes are handled in China and the United States of America.

7 The AMC has already administered over 70 FRAND mediation requests. These requests for WIPO mediation included licensing negotiations between large SEP holders and implementers in the context of court litigation in several jurisdictions. Other examples include cases involving a patent pool administrator and implementers in relation to ongoing unsuccessful patent licensing negotiations. In addition, IP courts in China have referred 10 ICT patent infringement cases to WIPO mediation.

licensing negotiations. Referral to WIPO expert determination can also be useful during FRAND licensing negotiations, including to establish whether a patent is essential.

To facilitate the submission of FRAND disputes to WIPO ADR, the AMC has published the document titled *WIPO ADR Options for FRAND Dispute Management and Resolution*,⁸ which explains the AMC's FRAND services in detail. Such services provide industry with a means to minimize potential disputes early on and offer added value to entities with limited experience of FRAND negotiations, such as small and medium-sized enterprises (SMEs). The AMC promotes these services in collaboration with various stakeholders⁹ and continues to garner industry interest through targeted communication.¹⁰

These ongoing activities relating to the work of the AMC and SCP will be carried forward and developed further, as appropriate.

C. Strategic directions

After a period of reflection to gain a clearer understanding of how the global SEP policy landscape is evolving and how the Organization can meaningfully contribute to the discourse, combined with a review of policy and case law development, **four thematic clusters of initiatives** have been identified in alignment with the principles set out in Section A. Each of the four thematic clusters is labelled with the corresponding Expected Results (ER) from the MTSP framework.¹¹

1. WIPO as a forum for global dialogue – ER 2.2, 2.4 and 4.3

WIPO is particularly well-placed to provide a platform for global dialogue. This includes conversations, symposia and other forms of events that allow stakeholders from various fields and professions to share their views and contribute to the discourse. Sharing experience, case law, policy considerations and the outcomes of consultations or legislative measures helps to build a shared understanding of the area and the underlying dynamics and may lead to cross-fertilization of ideas and best practices among Member States and stakeholders.

This cluster of activities encompasses:

- (a) ongoing work at the SCP;
- (b) potential SEP-specific global events (such as WIPO Conversations or targeted workshops organized collaboratively with other international organizations that are involved in trade, standardization or development to examine these particular angles of the discourse);
- (c) continued engagement with judiciaries worldwide, including through the WIPO Judges Forum and Master Classes.

2. WIPO as a source of knowledge and data – ER 1.1, 2.4, 3.2 and 4.3

Another of WIPO's strengths is its ability to serve as a hub for knowledge, given the data and expertise it has within its global reach. As information relating to SEPs is scattered and hard to gather, enhancing transparency on various aspects of the field contributes to gaining a clearer understanding of the key issues and lowering transactional costs.

Initiatives that are conducive to the above goals include:

- (a) the creation of a dedicated SEP page on the WIPO website;
- (b) hosting databases and repositories (such as collections of SEP case law in WIPO Lex and competition law regulatory frameworks on the SEP page);
- (c) conducting studies on salient topics such as FRAND determination methodologies;

⁸ Now in its third edition, the document is available at: www.wipo.int/amc/en/center/specific-sectors/ict/frand.

⁹ Stakeholders include IP authorities, SDOs, SEP holders, implementers and IP associations.

¹⁰ Information on past and upcoming AMC events is available at: www.wipo.int/amc/en/events.

¹¹ See WIPO's [Medium-Term Strategic Plan \(MTSP\) 2022-2026](#), page 7.

(d) enabling a voluntary declaration function for standard essentiality in PATENTSCOPE. These activities, which represent the first batch of initiatives under this Strategy starting in 2024, will offer access to pertinent information and material (such as policies, case law, methodologies and essentiality declarations) obtained either through research or by way of voluntary declarations.

3. WIPO as a venue for amicable agreement – *ER 3.1*

WIPO will continue to expand its role as an important venue not only for ADR but also for deal facilitation, which fosters technology licensing. The AMC's tailored mediation, arbitration and expert determination services, and the tools to facilitate access to them (such as model submission forms), are continuously being fine-tuned.

The promotion and further development of ADR (including deal mediation services in SEP-related disputes, such as FRAND licensing) is an important cornerstone of the Strategy. New partnerships are being built and raising awareness of the efficiencies that such impartial processes can offer is an important part of the activities planned.

4. WIPO as a provider of services – *ER 3.2, 3.3 and 4.5*

In addition to the lines of action listed above, WIPO can also provide services that are directly accessible to the targeted stakeholders. One important area to explore is enhancing patent quality by facilitating access to publications and standardization documentation held at SDOs. IP Offices around the world would benefit from such access for the purposes of prior art search, with due regard to the accessibility of these reference materials and the business models of the organizations in possession of them. On a different note, assessing the demand for and the feasibility of deploying a voluntary essentiality check service using the pooled resources of IP Offices and, eventually, an AI-assisted element has been identified as a medium-term goal.

The activities within these four clusters span the three-year term of the Strategy and are subject to the success, sustainability and uptake of the individual deliverables. Implementation of the WIPO SEP Strategy will include monitoring the developments in technology, industry trends, the global political climate and national or regional policies, as well as legislative or regulatory measures. Both the Strategy itself and the individual activities will be adapted, where necessary, and any activities that do not deliver the expected added value or cannot be implemented because of a lack of support from essential external collaborators will be abandoned or discontinued.

IV. Summary

WIPO has a role to play at an international level in addressing the global issues surrounding SEPs and FRAND licensing. The worldwide distribution of products incorporating standardized ICT technology underlines the need for initiatives that go beyond national or regional borders. Without any intention to replace or correct market mechanisms or domestic policies, the International Bureau of WIPO is contemplating a series of activities that will foster dialogue, enhance transparency and assist parties to find amicable solutions in their SEP licensing negotiations.

Serving as a global platform for discussions and a vital information hub, as well as offering complementary and voluntary solutions, WIPO is ideally placed to contribute to the international discourse on SEPs to the benefit of policymakers, judges and industry alike.

