

Note to Reader: Please see the ANSI ExSC February 23, 2018 Appeals Decision (attached), which affirms this decision (ExSC_087_2017) except as expressly modified.

ExSC_087_2017

ANSI Executive Standards Council (ExSC) September 14, 2017 meeting discussion concerning statements from patent holders required by section 3.1.1 of the ANSI Essential Requirements www.ansi.org/essentialrequirements

4.1. ANSI Patent Policy Implementation Issue

ANSI's Board of Standards Review (BSR) recently received a BSR-9 form from an ANSI-accredited standards developer (ASD) attaching a Letter of Assurance (LoA) from a standard essential patent (SEP) holder. The LoA states that the SEP holder would grant implementers of the standard a RAND license "under the infringed claims of these patents . . . to the extent necessary to practice wholly compliant implementations [of an ASD's standard] (emphasis added). ANSI's Patent Policy does not define "wholly compliant implementations" but simply states that an ASD "shall receive from the patent holder ... assurance that a [RAND] license to [SEPs] will be made available to applicants desiring to utilize the license for the purpose of implementing the standard." (ANSI Patent Policy, Section 3.1.1(b) (emphasis added). The question for decision by the ExSC is whether the "wholly compliant implementation" language is consistent with ANSI's Patent Policy.

Background: Upon receipt of the BSR-9, ANSI staff raised concerns about the LoA because: (i) read broadly, the "wholly compliant implementation" language could be interpreted to require that an implementer implement all normative elements of a standard in order to be eligible to receive a license; (ii.) neither the ANSI Patent Policy or the ASD's nearly identical Patent Policy explicitly provides for that kind of limitation; and (iii.) language contained in the ExSC's IEEE decision, dated February 25, 2016 (IEEE Decision), suggests that Section 3.1.1(b) of the ANSI Patent Policy language should be read to include any applicant desiring a license for any conforming implementation of the standard. IEEE Decision on page 7. Staff thus advised the SEP holder that, in staff's opinion, the "wholly compliant implementation" language "improperly narrows the kinds of implementers who can obtain a license" in violation of the ANSI Patent Policy. In keeping with its practice, staff invited the SEP holder to challenge that decision and the SEP holder sent a letter, received May 2, 2017, noting its objections.

The SEP holder maintains that Section 3.1.1(b)'s language – "for the purpose of implementing the standard" – which is also contained in the ASD's Patent Policy, "ha[s] never been defined" to include partial implementations of the standard and that the SEP holder "has always construed these terms to mean or include compliance with all mandatory portions of a standard." The SEP holder also maintains that ANSI's rejection of the LoA that applies only to "wholly compliant" implementations could have potentially harmful effects such as "incentiviz[ing] the creation of alternative, non-

compliant technologies..., extend[ing] the license assurance outside of the original field of use... and subvert[ing] the *quid pro quo* inherent in patent licensing related to standards setting.”

The ExSC initially reviewed these materials on May 17, 2017 and directed staff to request input from ANSI's Intellectual Property Rights Policy Committee (IPRPC). The IPRPC discussed the issue at its May 18-19 meeting and, failing to reach a consensus, issued a Letter Ballot, LB 544, which generated a lengthy email exchange by voting and non-voting members and numerous comments by voting members accompanying the ballot results. All of these materials were provided to the ExSC by ANSI staff for discussion during the ExSC's September 14, 2017 meeting in Executive Session.

Analyses: Having reviewed the record, including the SEP holder's letter, the Patent Policies of ANSI and the ASD, and the IPRPC's significant input arising out of LB 544, the ExSC finds that there is currently no agreement on the definition of the phrase “wholly compliant implementation.” Indeed, the definition of that term may be fact-specific and may vary from one type of standard to another. For example, where a standard prescribes an assembly of individual components, each of which has its own individual requirements, a “wholly compliant implementation” might mean a manufacturer of an individual essential component complying with the subset of normative requirements applicable to that individual component (for example, the trigger mechanism on a fire extinguisher that is contained in a fire extinguisher standard). On the other hand, where a standard is not capable of partial implementation or where it prescribes multiple requirements for a single device and the manufacturer is manufacturing the entire device, “wholly compliant” might mean complying with all of the normative requirements applicable to implementing the entire standard (“all normative elements”) (for example, the entire fire extinguisher). There are other possible interpretations of “wholly compliant implementation” as well.

Nevertheless, these alternative interpretations are not all equally reasonable in every circumstance. Without further clarification on what “wholly compliant implementation” means or what the standard requires, and absent express language in an ASD's own patent policy, the ExSC determines that “wholly compliant” or similar language means only what the ANSI Patent Policy already requires – that the license be for “the purpose of implementing the standard.” In other words, the implementation (whether for an individual component or for an entire device or process) must be within the field of use of the standard (*e.g.*, making a fire extinguisher's trigger mechanism for use in a fire extinguisher) and not extend to distinct, non-standard products (*e.g.*, using a fire extinguisher's trigger mechanism for use in a screen door). Thus, for a standard capable of partial implementation where each component has its own individual requirements, a “wholly compliant implementation” is one that meets *all* normative requirements for the individual component but is not required to meet all the other normative requirements of the standard. For example, a “wholly compliant implementation” of a fire extinguisher trigger would meet every one of the normative requirements applicable to the trigger, but such an implementation would still be “wholly compliant” with the standard if it did not meet normative requirements applicable only to *other* components like the fire extinguisher's hose attachment or tank. Where the “wholly compliant implementation” is used in the context of a standard not capable of partial implementation, then the term means just one thing – compliance with all normative elements of the standard.

Notwithstanding this interpretation, there may be circumstances where an ASD might determine it to be acceptable to define compliance to require meeting all the normative elements of a standard. We have said many times before that the *Essential Requirements* in general and the ANSI Patent Policy in particular establish the minimum required content for procedures developed by ASDs and ANSI encourages ASDs to customize their accredited procedures in a manner that is suited to their own needs. If a given ASD concludes that safety or other reasons make an “all-normative-elements” approach appropriate, the ASD (with advice from legal counsel) would be expected to make clear in

its own patent policy what limitations in a LoA will be permitted. Such policy would be subject to the ExSC's approval as part of ANSI's routine re-accreditation process.

In light of the foregoing, the ExSC directs staff to advise the BSR and IPRPC of this decision and to recommend to the BSR that it accept a LoA from the SEP holder (which we understand from the SEP holder will be amended to include required patent-transfer language) that includes the "wholly compliant implementation" or some agreeable similar language, provided that the ASD has indicated their review and acceptance of the LoA, which we recommend be done with input from legal counsel. Assuming no additional issues arise by further amendments, the LoA will be deemed satisfactory based on this decision and acceptance of the LoA by the ASD. If the ASD wishes to accept some other kind of customized limitations in the LoA, it must amend its patent policy and have it approved by the ExSC.

The ExSC believes that guidance is needed from the IPRPC on what ASDs should do when they receive LoAs with custom restrictions not explicitly stated in the ANSI Patent Policy. The ExSC requests that the IPRPC review the ANSI Patent Policy and Guidelines, and provide proposed clarifications either in the form of amendments to the Patent Policy itself, through guidance provided in the IPRPC's Guidelines document or in some other manner.

ACTION: Communicate this discussion to the BSR, ASD, patent holder and IPRPC.



Via email only

February 23, 2018

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Dated Notice

Re: Decision of the ANSI Executive Standards Council (ExSC) Appeals Panel resolving multiple appeals from an ExSC Decision made on September 14, 2017 (the "Initial Decision")

Dear Appeals Participants:

On February 5, 2018, the ExSC Appeals Panel heard the above-referenced appeals. The decision of the ExSC Appeals Panel is attached.

Please be advised that **this transmission via email constitutes your official notification of the decision of the ExSC Appeals Panel.**

Parties to the ExSC appeal who believe that they have been or will be adversely affected by the results of the subject hearing are hereby notified of their right of further appeal to the ANSI Appeals Board.

Should a party to the ExSC appeal choose to appeal this decision to the ANSI Appeals Board, written notice of appeal and all appeals statements and supporting documentation must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **March 16, 2018**. The appeal shall be accompanied by a \$1,200.00 filing fee. If an extension for the filing of appeals materials is required, the party must contact the Secretary of the ANSI Appeals Board on or before **March 16, 2018**, or they will forfeit the right to further appeal. The appeals filing must comply with the requirements of Section 11 *Appeals process* of the *ANSI Appeals Board Operating Procedures*, a copy of which is attached to the email that transmitted this decision.

Thank you for your attention to this matter. If you have any questions please contact me at (212) 642-4914 or send an email to acaldas@ansi.org.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Executive Standards Council

cc: Appeals Hearing Observers

**ANSI EXECUTIVE STANDARDS COUNCIL
SUMMARY DECISION**

On September 14, 2017, the ANSI Executive Standards Council (“ExSC”) evaluated, under the ANSI Patent Policy, the sufficiency of a statement of assurance (also referred to as a letter of assurance (“LOA”)) supplied by a patent holder, which was submitted by Accredited Standards Committee (“ASC”) X9, Inc. (“X9”) in connection with a proposed American National Standard (“ANS”). In its decision (the “Initial Decision”), the ExSC upheld the statement of assurance, provided that certain additional actions were taken, and explained its reasoning. While the patent holder and X9 accepted the Initial Decision, appeals were filed by: (1) BlackBerry Limited, (2) Ericsson Inc., Koninklijke Philips N.V., Dolby Laboratories and Orange (Jointly), and (3) Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e. V. and Fraunhofer USA, Inc. (Jointly). The following parties appeared as respondents: (1) Cisco Systems, Inc., and (2) Intel Corporation, Dell Inc. and Google LLC (Jointly). Following a more than 4-hour hearing held on February 5, 2018, the ExSC Appeals Panel (“Panel”) met and resolved to affirm the Initial Decision, except as expressly modified in the decision below.

Appellant:	BlackBerry Limited
Represented by:	Gaëlle Martin-Cocher, BlackBerry Limited David Blonder, BlackBerry Limited Randy Mishler, BlackBerry Limited, by phone*
Appellant:	Ericsson Inc., Koninklijke Philips N.V., Dolby Laboratories and Orange (Jointly) (collectively “Ericsson”)
Represented by:	Dina Kallay, Ericsson Inc. Lindsay Leavitt, McKool Smith, Counsel for Ericsson Inc. Steve Stevens, Accredited Standards Committee (ASC) X9 Inc, (X9) by phone*
Appellant:	Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e. V. and Fraunhofer USA, Inc. (Jointly) (collectively “Fraunhofer”)
	Represented by: Patrick Bressler, Fraunhofer USA, Inc. Elisabeth Opie, Office of Elisabeth Opie, Counsel for Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e. V. and Fraunhofer USA, Inc. (Fraunhofer) James Konidaris, Office of Elisabeth Opie, counsel for Fraunhofer
Respondent:	Cisco Systems, Inc.
Represented by:	Gil Ohana, Cisco Systems Inc.
Respondent:	Intel Corporation, Dell Inc. and Google LLC (Jointly) (collectively “Intel” unless noted)
Represented by:	Scott Gilfillan, Intel Corporation Kevin Perkins, Dell Inc.

Hearing Date: February 5, 2018

Hearing Location: ANSI, New York

ANSI Executive Standards Council Appeals Panel¹

William Berger	Joe Lewelling
Neil Bogatz	Elise Owen
Scott Colburn	Stephanie Reiniche
Mary Donaldson	Jen Rodgers
Chris Dubay, Chair	Dan Ryan
Jessica Evans	Peter Shebell
Kerrienne Haresign	Sandra Stuart

In-person Observers

Lisa McIntyre, Google LLC
Earl Nied, Intel Corporation
Michael (Mike) Marion, Koninklijke Philips NV
Jim Harlan, InterDigital, Inc.
Barry Freedman, Nokia Networks
Brinkley Tappan, Department of Justice
Kim Chotkowski, Licensing Executives Society
Marc Sandy Block, IBM
Chiara Orlassino, European Union Delegation – New York

ANSI Counsel

Patricia A. Griffin, ANSI VP and General Counsel
Jeffrey Q. Smith, ANSI Outside Counsel

ANSI Staff

Anne Caldas
Elizabeth Gonzalez
Eleni Konstantopoulos
Jim Thompson

PRELIMINARY STATEMENT

These are unusual and highly contentious appeals. The matter involves a decision (the “Initial Decision”) made by the Executive Standards Council (“ExSC”) on September 14, 2017, addressing the sufficiency, under the ANSI Patent Policy, of a statement of assurance received from a patent holder concerning a proposed American National Standard (ANS) developed by Accredited Standards Committee (“ASC”) X9, Inc. (“X9”). The Initial Decision upheld the assurance, provided certain conditions were met, and explained the ExSC’s rationale. X9 and the patent holder accepted the decision, implemented the ExSC’s directions, and did not pursue the matter further. However, the text

¹ In Executive Session, ExSC Appeals Panel members Mary Donaldson and Elise Owen participated in discussions about, and the resolution of, issues concerning the procedural arguments identified and discussed at pages 10-13 below. They abstained from considering the substantive issues addressed by the ExSC Appeals Panel at pages 13-15 below.

of the Initial Decision ignited a larger disagreement about the meaning of the ANSI Patent Policy as it relates to statements of assurance generally. Multiple appeals were filed and multiple respondents joined the broader dispute.² The Appellants are: (1) BlackBerry, (2) Ericsson, Philips, Dolby and Orange (Jointly), and (3) Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e. V. and Fraunhofer USA, Inc. (Jointly). The respondents are (1) Cisco and (2) Intel, Dell and Google (Jointly).

Although the immediate issue involved in the Initial Decision has been largely mooted by subsequent events, the Appeals Panel feels it is appropriate to resolve the instant appeals in order to clarify, and in some respects amplify, what was (and was not) intended in the Initial Decision, thereby better advancing an understanding of what the ANSI Patent Policy requires and the degree of flexibility it affords to ANSI-Accredited Standards Developers (“ASDs”). The Appeals Panel also wishes to announce what the ANSI ExSC contemplates going forward as it relates to assurances from patent holders. Finally, the Appeals Panel wishes to address the numerous procedural questions raised by certain Appellants, questions that reveal a misunderstanding of ANSI’s role, the responsibilities of its accreditation programs, and the role of ANSI staff assigned to support and facilitate these programs. For the reasons set forth below, the Appeals Panel rejects all the procedural arguments made in the appeals and affirms the Initial Decision except as expressly modified and clarified here.³

BACKGROUND

ANSI and its Role in U.S. Standardization

The American National Standards Institute (“ANSI”) is a private, not-for-profit, membership organization. ANSI serves as administrator and coordinator of the United States private sector voluntary standardization system. Founded in 1918, ANSI is not a standards developer, but rather it coordinates the creation, promulgation, and use of thousands of voluntary standards, norms, and guidelines that are used by industry and governments in the U.S. and around the world. The ANSI Federation is a public-private partnership, engaging government, industry, consumers, and the public in activities related to voluntary standards.

ANSI is not pre-disposed to any standardization issue or outcome. It serves as a neutral coordinator, facilitating the union of technical and other experts in a fair and open environment, thereby providing a level playing field to all involved, so that consensus-based positions and solutions can be debated and developed to address national and global priorities.

Domestically, one of ANSI’s responsibilities is to support the competitiveness of U.S. business and the American quality of life through the administration of the American National Standards (“ANS”) process. Within the ANS program, ANSI accredits more than 235 standards developing organizations (“SDOs”) whose scopes of activity span virtually all sectors and industries. Through a well-recognized and mature system, ANSI accredits these SDOs, approves consensus standards submitted by them as

² An ANSI Member sent an email several days before the hearing directly to some ExSC members setting forth its disagreement with the Initial Decision. The email violated ANSI’s rules of engagement, the ExSC Operating Procedures, and the schedule for this appeal. Accordingly, it was not considered by the ExSC.

³ This decision summarizes the key oral and written arguments presented to the ExSC Appeals Panel. While this decision does not reference every argument or point made in connection with the appeals, the ExSC Appeals Panel had full access to and considered the complete record.

ANS, and regularly audits their performance. Approximately 11,500 standards have been approved as ANS.

Internationally, ANSI is the sole U.S. representative and dues-paying member of the two major non-treaty international standards organizations, the International Organization for Standardization (“ISO”), and, via the U.S. National Committee (“USNC”), the International Electrotechnical Commission (“IEC”). ANSI also represents the U.S. in numerous other regional bodies.

The ANSI *Essential Requirements* and ANSI’s Program Oversight Committees

ANSI accredits SDOs to a set of procedural requirements contained in the *ANSI Essential Requirements: Due process requirements for American National Standards* (“*Essential Requirements*”). These *Essential Requirements* are maintained and administered by the ANSI ExSC, an ANSI Program Oversight Committee that has existed in some form since as early as 1950. The ExSC’s role is to “oversee the accreditation of standards developers” (By-Laws at 7.10), and the ANSI Board of Directors long ago directed the ExSC to “develop and maintain the criteria and procedures for the development and coordination of American National Standards and for the development and coordination of U.S. positions in international standards activities and for auditing such activity.” (ExSC Operating Procedures.)

The *Essential Requirements* contain procedural requirements such as openness, balance, and due process. These are fundamental characteristics of the development of ANS, which are voluntary consensus standards. In addition to these requirements, the *Essential Requirements* also require that ASDs include in their procedures certain normative policies, such as an interpretations policy, an antitrust policy, and, especially relevant here, a patent policy. ASDs must write their own procedures for developing proposed ANS and the ExSC determines if those procedures sufficiently align with the *Essential Requirements*.

A second ANSI Program Oversight Committee, the ANSI Board of Standards Review (BSR), has also existed in some form since as early as 1950. It is responsible for determining whether standards developed and submitted by ASDs are eligible to be approved as ANS based on evidence of procedural compliance. (BSR Operating Procedures.)

The ANSI Patent Policy

As noted, among the normative policies required by the *Essential Requirements* to be included in an ASD’s own procedures is a Patent Policy.⁴ ANSI’s Patent Policy permits essential patent claims to be included in a standard provided that certain safeguards are followed. The first Patent Policy was developed in 1932 and provided:

[t]hat as a general proposition patented designs or methods should not be incorporated in standards. However, each case should be considered on its merits and if a patentee is willing to grant such rights as will avoid monopolistic tendencies, favorable consideration to the inclusion of such patented designs or methods in a standard might be given.⁵

⁴ The first ANSI Patent Policy was adopted by the ANSI Board of Directors in 1932 and it was first included in ANSI’s accreditation procedures in 1974.

⁵ The Patent Policy developed by ANSI was later used as a model by many regional and international standards organizations.

Somewhat more neutral language was developed in 1974: “[t]here is no objection in principle to drafting a proposed American National Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach.” The current version of the Patent Policy begins: “[t]here is no objection in principle to drafting an American National Standard (ANS) in terms that include the use of an essential patent claim (one whose use would be required for compliance with that standard) if it is considered that technical reasons justify this approach.”⁶

A primary goal of the ANSI Patent Policy is to allow for the inclusion of essential patents in an ANS while minimizing the risk of antitrust and other liability that might otherwise result from potentially expanding the market for a patent claim. The Patent Policy does not seek to promote the interest of patent owners or patent users. Rather, it seeks to find a balance among the rights of the patent holder, the interests of others seeking to implement the standard, the consensus of the technical experts from different stakeholder groups on the desired content of the standard, the concerns and resources of the ASD, the impact on consumer welfare, and the need to avoid unnecessary strictures that would discourage participation in the standards development process.

ANSI’s current Patent Policy is contained in Section 3.1 of the *Essential Requirements* and is adopted verbatim by nearly 90% of ANSI’s ASDs. It provides in relevant part:

3.1.1 Statement from patent holder

The ASD shall receive from the patent holder or a party authorized to make assurances on its behalf, in written or electronic form...

b) assurance that a license to such essential patent claim(s) will be made available to applicants desiring to utilize the license for the purpose of implementing the standard either (emphasis added):

- i) under reasonable terms and conditions that are demonstrably free of any unfair discrimination; or
- ii) without compensation and under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

Such assurance shall indicate that the patent holder...will include in any documents transferring ownership of patents subject to the assurance, provisions sufficient to ensure that the commitments in the assurance are binding on the transferee, and that the transferee will similarly include appropriate provisions in the event of future transfers with the goal of binding each successor-in-interest.

The assurance shall also indicate that it is intended to be binding on successors-in-interest regardless of whether such provisions are included in the relevant transfer documents.

Thus, under ANSI’s Patent Policy, where an essential patent claim is contained in a proposed ANS submitted by an ASD, the patent holder (directly or through authorization) must provide an “assurance that a license to such essential patent claims will be made available to applicants desiring to utilize the license for the purpose of implementing the standard.” As the ExSC Appeals Panel observed in its decision, dated February 25, 2016, relating to the IEEE reaccreditation (“IEEE Decision”), the “purpose of implementing” language in Section 3.1.1 of the Patent Policy is “broad enough to include any applicant desiring a license for any conforming implementation of the standard.” The focus on

⁶ The term “compliance” is not defined in the Patent Policy.

“implementing the standard” serves to limit any assurance to the field of use of the standard. *See* Initial Decision. Stated differently, the ANSI Patent Policy does not require a patent holder to make a license available to an applicant for some purpose other than implementing the standard.

The ANSI Patent Policy also does not impose on the patent holder an obligation to license without conditions. Rather, the policy grants patent owners the right to condition the availability of the license so long as it does so “reasonably” and “without unfair discrimination.” Recognizing that industries and standards can be quite different, the Patent Policy makes no attempt to spell out what terms and conditions are “reasonable” and what distinctions are “fair.” Those issues are capable of being defined by the policies of an ASD or on a case by case, fact-specific basis.⁷ The ANSI Patent Policy is not a compulsory licensing scheme and, of course, any essential patent claim holder can refuse unilaterally to license its technology if it wishes. However, in such an event, a standard incorporating the patent claim may not be designated an ANS.

History of Form Statements of Assurance

At least as early as 1974, ANSI instituted a “form” statement of assurance similar to the later-developed ISO/IEC/ITU-T Licensing Declaration Form, on which patent holders could “check” a box stating which kind of reasonable-and-non-discriminatory (“RAND”) commitment it offered. The form, a copy of which is attached, was discontinued in 2000 for reasons that are unclear.⁸ Beginning around that time, patent holders began submitting to ASDs (and ASDs to ANSI) individualized, customized assurances employing language that does not appear in either the ANSI Patent Policy itself or in most ASD’s patent policies. For example, the statements included language (typically undefined) to the effect that a RAND assurance would be provided “for such portion of any product that is fully compliant with the standard,” “to practice the patent in products that are fully compliant with the standard,” “but only in respect of the patented features technically necessary for such an implementation,” and, most recently, for a “wholly compliant implementation” of the standard. As discussed further below, the underlying request by X9 and the appeals here arise out of the use of these kinds of customized, undefined conditions contained in statements of assurance submitted to ANSI.

The Intellectual Property Rights Policy Committee

In 2005, ANSI created a new committee called the Intellectual Property Rights Policy Committee (IPRPC). The IPRPC was intended to meld together two then-existing *ad hoc* committees, the Patent Group and the Copyright Ad Hoc Group, and provide a single policy resource for addressing domestic and international intellectual property rights issues. Among other things, this new Committee (which initially maintained the Patent Group as a subcommittee) became responsible for “developing Institute positions on issues relating to the incorporation of essential patents or other proprietary intellectual property in national, regional or international standards.” (By-Laws at 7.05.)

The creation of the IPRPC, and the delegation to that Committee of the development of policy positions relating to the ANSI Patent Policy, raised questions about whether the ultimate responsibility for interpreting and enforcing the Patent Policy should be shifted from the ExSC to the IPRPC. These early questions were resolved in favor of the ExSC retaining its authority over all aspects of the

⁷ The Patent Policy is not “one size fits all” and the ExSC has long sought to give an ASD room to experiment and tailor its own policies. *See Motorola v. VITA*, October 1, 2007, at 9. As noted in the *IEEE* Decision, the *Essential Requirements* in general (and the ANSI Patent Policy in particular) establish the minimum required content for procedures developed by ASDs. ANSI encourages ASDs to customize their accredited procedures in a manner that is suited to their sectors. *IEEE* Decision at 7.

⁸ *See* Patent Group Meeting Minutes, July 2000.

Essential Requirements, including the Patent Policy.⁹ This decision was conveyed to the ANSI IPRPC in March 2007 and was reiterated in the IEEE Decision (see page 6, note 9). Given the expertise residing in the IPRPC, the ExSC often solicits input from the IPRPC when interpreting or considering revisions to the ANSI Patent Policy, and did so when the issue relating to the X9 standard was presented.

The Role of ANSI Staff as Gatekeepers and Facilitators

ANSI staff plays an essential role as an interface between ANSI's Governance, Policy, and Program Oversight Committees. Among other things, staff supports all work done by the ExSC, BSR, and IPRPC (and its predecessor committees), administers the ANS compliance programs, advises relevant Program Oversight Committees, interfaces with ASDs and third parties to answer questions and explain the ANS process, and reviews incoming BSR-9 Forms,¹⁰ including making initial determinations of compliance with respect to whether any accompanying statement of assurance from a patent holder sufficiently aligns with the text of ANSI's and the ASD's Patent Policies. Staff also coordinates matters between committees such as when the ExSC seeks input from the IPRPC on matters of interpretation of the ANSI Patent Policy. None of these roles is new – they have existed for decades.

While the specific roles of individual staff members are set forth in their job descriptions, some staff assignments are expressly called out in ANSI procedures. For example the Operating Procedures of the ANSI BSR describe the BSR Secretary's role in the BSR-9 review process, directing her to determine whether sufficient evidence of compliance with clause 4 (Approval and withdrawal of ANS) has been provided for BSR consideration and decision. If not, she is charged with requesting that the submitter provide the necessary information as promptly as possible. Similarly, the Operating Procedures of the ANSI ExSC reference the ANSI General Counsel's role, noting that the ExSC will “act, as necessary, on recommendations or appeals presented by resident counsel on the basis of legal considerations” (Operating Procedures of the ANSI BSR at 6.1, Operating Procedures of the ANSI ExSC at 7(e)).

PROCEDURAL HISTORY OF APPEALS

These appeals have a complex procedural history. The letter of assurance issue first arose on March 9, 2017, when ASC X9, Inc. (X9) submitted a BSR-9 form to ANSI requesting that the BSR approve one of its standards as an ANS.

X9's Patent Policy largely replicates ANSI's Patent Policy in relevant respects. Like ANSI's, it says:

X9 shall receive from the patent holder or a party authorized to make assurances on its behalf, in written or electronic form acceptable to ANSI and X9, either:

...

b) assurance that a license to such essential patent claim(s) will be made available to applicants desiring to use the license for the purpose of implementing the standard (emphasis added)

⁹ See IPRPC Meeting Minutes, March 2007 (“the ExSC will retain all responsibility for “interpreting the [ANSI Patent Policy](albeit with requested input from the Patent Group from time to time when appropriate) and enforcing such policy”).

¹⁰ BSR-9 *ANS Formal Submittal Checklist* is a form used by ASDs to transmit evidence of consensus in support of an individual standard's approval as an ANS.

It also contains the requisite patent-transfer language.

The BSR-9 submitted by X9 indicated that the specification included an essential patent and the ASD provided a statement of assurance from the patent holder. However, as observed by ANSI staff, the patent holder's statement of assurance was facially deficient in that it:

- a. failed to include language required by the Patent Policy relating to transfers of RAND-encumbered patents; and
- b. deviated from the text of ANSI's Patent Policy in that it granted a RAND license "under the infringed claims of these patents to the extent necessary to practice wholly compliant implementations (WCI) of the [ASD's] standard" instead of, as the ANSI Patent Policy contemplates, a RAND license "to applicants desiring to utilize the license for the purpose of implementing the standard"

In light of one clear deficiency and the ambiguity of the "wholly compliant implementation" language, the IPRPC leadership was consulted and agreed with the staff opinion.¹¹ ANSI staff thereafter advised X9 (and X9 in turn advised the patent holder) that the absence of patent-transfer language rendered the assurance deficient and that inclusion of the "wholly compliant implementation" language was also potentially problematic because it was not contained in either the ANSI or X9 Patent Policy, undefined in the Letter of Assurance (LOA), and therefore ambiguous.

ANSI staff advised X9 of staff's view that the assurance as submitted was insufficient, but invited X9 and the patent holder to challenge that finding if either disagreed. The patent holder itself then contacted staff to express disagreement with staff's assessment of the "wholly compliant implementation" point (although it agreed that the patent-transfer language was improperly omitted). Staff invited the patent holder to request that the ExSC review the issue and make its own determination. The patent holder accepted the invitation, sending a letter, received by ANSI on May 1, 2017 (Redacted Version), challenging staff's assessment and stating that the "wholly compliant implementation" language reflected the patent holder's understanding that the ANSI Patent Policy requires "compliance with all mandatory portions of a standard." (Undated letter from Patent Holder at 2.) The patent holder did not identify how it came by its understanding.

On May 17, 2017, after an initial review of the patent holder's letter of explanation and a brief discussion of the issue, the ExSC directed ANSI staff to request input from the IPRPC. Since the patent holder had conceded that the requisite patent-transfer language was missing from its statement of assurance, the only issue considered by the IPRPC was whether the "wholly compliant implementation" language was deficient. IPRPC Letter Ballot 544 was designed to elicit the IPRPC's view whether "Section 3.1.1(b)..., when adopted verbatim (or by reference) by an ASD into its accredited procedures, permit[s] a holder of an essential patent claim to submit a letter of assurance to that ASD conditioning its RAND license on a 'wholly compliant implementation' of the ASD's standard." (Question 1)¹²

¹¹ Neil Bogatz, the IPRPC Vice Chair and member of the ExSC, recused himself from those discussions.

¹² IPRPC LB 544 asked two questions:

1. Does Section 3.1.1(b) above, when adopted verbatim (or by reference) by an ASD into its accredited procedures, permit a holder of an essential patent claim to submit a letter of assurance to that ASD conditioning its RAND license on a "wholly compliant implementation" of the ASD's standard?

2. If your answer to question 1 is "no", can an ASD modify its patent policy, consistent with the ANSI Patent Policy, to allow a patent holder to submit a letter of assurance to that ASD conditioning its RAND license on a "wholly compliant implementation" of the ASD's standard?

The ANSI IPRPC voting members submitted numerous (and sometimes conflicting) comments in support of their 15 “yes” and 12 “no” votes.¹³ Those comments and a lengthy email exchange among IPRPC voting and non-voting members were reviewed by the ExSC. It is noteworthy that 25 out of the 34 IPRPC members who voted on the ballot elected not to share their official votes/comments with other IPRPC voting members. Accordingly, the parties to these appeals do not know how their colleagues characterized and explained their “yes” or “no” votes through their comments. The ExSC has such information.

On September 14, 2017, the ExSC considered the matter at its regular meeting and issued, as part of its meeting report, the three-pronged Initial Decision that: (i) defined, in the absence of further clarification, “wholly compliant implementation” to mean “within the field of use of the standard,” whether for an individual component or for an entire device or process; (ii) required X9 to resubmit a new statement of assurance to the BSR that was consistent with the ExSC’s Initial Decision and acceptable to X9; and (iii) required, going forward, that ASDs amend their patent policies to make clear what if any additional limitations would be permitted in an LOA. As mentioned, X9 and the patent holder have accepted the Initial Decision and since come to a resolution of the issue, defining “wholly compliant implementation” in the patent holder’s statement of assurance to address the ExSC’s Decision and resubmitting to ANSI a revised BSR-9 form.¹⁴ The BSR has since approved X9’s revised BSR-9 submittal and the associated standard as an ANS.

APPEALS

As noted, multiple appeals were timely filed challenging the Initial Decision. Although neither X9¹⁵ nor its patent holder appealed the Initial Decision, other patent holders and implementers filed appeals and responses. Specifically, (a) BlackBerry, (b) Ericsson, Philips, Dolby and Orange (Jointly), and (c) Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e. V. and Fraunhofer USA, Inc. (Jointly) filed three separate appeals and (d) Cisco and (e) Intel, Dell and Google (Jointly) filed two separate responses.

Appellants do not object to the manner in which X9 and its patent holder resolved the underlying dispute. Rather, they challenge some or all of the language used in, and reasoning employed by, the Initial Decision. Some urge that the Initial Decision be withdrawn altogether (Ericsson and Fraunhofer) or modified in part (BlackBerry). Ericsson and Fraunhofer (but not BlackBerry) also challenge the right

¹³ The IPRPC LB 544 voting tally follows:

Q1	Q2	Abstain on Entire Ballot	No Ballot Returned
15 Yes 12 No 1 Abstain	14 Yes 4 No 6 No Answer 4 Abstain	6	3

¹⁴ The definition reads as follows: “(1) a use that implements all required portions of the X9.124 Part 2 specification; or (2) in the case of a system, a component of that system that implements a subset of the required portions of the X9.124 Part 2 specification, but only for so long as that component is and remains combined with other components such that the resulting combination implements all required portions of the X9.124 Part 2 specification.”

¹⁵ As noted above, X9 did not file an appeal with the ExSC; however, X9’s Executive Director was identified by Ericsson as one of its three speakers at the ANSI appeals hearing. All ASDs were notified in writing of the Initial Decision and none contacted ANSI to request information about filing an appeal.

of the ExSC to resolve the relevant issues at all and raise a number of alleged procedural transgressions by the ExSC and ANSI staff in this matter, all of which, they maintain, require the ExSC Appeals Panel to withdraw its Initial Decision.

For their part, Respondents contend the ExSC has the authority to address the relevant issues and that ANSI's actions are consistent with its policies and procedures and with principles of due process. Respondents differ somewhat as to the appropriate relief. In the written submissions, Cisco accepts the ExSC's Initial Decision as written, while Intel, Dell and Google suggest that the ExSC Initial Decision should be modified somewhat to improve clarity.

DISCUSSION AND ANALYSIS

A. Procedural Arguments

Appellants Ericsson and Fraunhofer (but not BlackBerry) raise a number of "procedural" arguments, which they maintain should result in the immediate "revocation" of the ExSC Decision. They assert that: (1) the ExSC and ANSI staff failed properly to identify the "respondent(s)" on this appeal; (2) staff acted improperly when assessing the sufficiency of the Patent Holder's assurance; (3) staff acted improperly in referring the matter to the ExSC for review; (4) staff improperly relied on the IEEE Decision; (5) the ExSC improperly ignored the IPRPC's input and, under the guise of "interpretation," the ExSC in fact "changed" the ANSI Patent Policy; and (6) ANSI's General Counsel should be recused from advising the ExSC in this appeal and all related activities. Respondents Cisco and Intel, Dell and Google argue that both the ExSC and ANSI staff acted properly and in accordance with ANSI's rules. We address - and reject - each of Appellants' arguments, in turn, below.

1. The ExSC Properly Invited Materially-Interested Parties, including IPRPC members, to be "Respondents" on the Appeal

Appellants Ericsson and Fraunhofer argue that the ExSC (and ANSI staff) misidentified the "respondents" on this appeal. (Ericsson Brief at Annex 23; Fraunhofer Brief at 5-8.) They maintain that Section 17 of the ExSC's Operating Procedures does not allow IPRPC members to respond to the appeals since they are not parties "who must respond to the appeal" as suggested by the Operating Procedures. Instead, Appellants contend, the ANSI General Counsel or the ExSC itself should be required to reply to the appeal because, in light of their alleged procedural transgressions, they are in fact the ones "who must respond to the appeal."

These arguments are without merit. Based on input from ExSC leadership, ANSI staff appropriately adapted the ExSC appeals rules to provide for participation by all materially-interested parties, including IPRPC voting members, given the unusual posture of this matter (including the fact that the original interested parties were not pursuing an appeal). This process was intended to ensure due process for all who participated in the IPRPC discussion of the matter (voting and non-voting members) and any other interested party who wished to file or respond to an appeal. The core purpose of the ExSC's appeals process is to allow it to reconsider a decision, not to argue as a party the merits of a prior decision. As detailed below, both the ANSI General Counsel and the ExSC acted within their respective roles and responsibilities and, in all events, would not under any circumstances be called upon to "respond" to allegations raised in an ExSC appeal brought before the ExSC or the Appeals Board.

2. ANSI Staff Acted Appropriately in Assessing the Sufficiency of the Statement of Assurance

Appellants Ericsson and Fraunhofer also contend that the ANSI General Counsel lacked the authority to address the sufficiency of the X9 patent holder's statement of assurance. (Ericsson Brief at 4-6, 18-19; Fraunhofer Brief at 9-11.) Relying principally on the *Guidelines for Implementation of the ANSI Patent Policy* ("Patent Guidelines"), Ericsson maintains that the ANSI General Counsel improperly evaluated:

the terms and conditions of the X9 Letter of Assurance, in direct violation of the [Guidelines] ('While ANSI's counsel will verify the information required from the patent holder has been supplied, counsel will not undertake to evaluate whether the terms and conditions satisfy the substantive test set forth in Section 3.1....')

Ericsson Brief at 18-19. This argument also lacks merit.

As stated in the IEEE Decision, "the ANSI Patent Policy Guidelines are merely suggestions." IEEE Decision at 8. Indeed, these Guidelines were written to "assist voluntary standards developers...in understanding and implementing the ANSI Patent Policy." The "purpose" section of the Guidelines expressly notes that the "Guidelines are suggestions" and that "adherence is not essential." Guidelines at 3. They are not binding on anyone, including ANSI's General Counsel.

More importantly, the Patent Guidelines expressly state that:

"[w]hile ANSI's counsel will verify that the information required from the patent holder has been supplied, counsel will not undertake to evaluate whether the terms and conditions satisfy the substantive test set forth in Section 3.1 (*i.e. whether the terms and conditions are "reasonable" and/or "free of any unfair discrimination"*) (emphasis added).

This sentence, and in particular the highlighted clause (which was left out of Ericsson's Brief and minimized in Fraunhofer's) means that ANSI's counsel will not evaluate the ultimate question of whether the terms of a given license are "reasonable" or are free from "unfair discrimination," something that in prior years the ANSI General Counsel was expressly called upon to do.¹⁶ The Patent Guidelines do not state or imply that the General Counsel will refrain from evaluating the facial validity of a statement of assurance submitted by an ASD to ANSI as part of its BSR compliance requirements. Indeed, this is part of her job and she acted well within the scope of her authority as General Counsel.

3. ANSI Staff Acted Appropriately in Referring to the ExSC the Statement of Assurance Submitted by X9

Ericsson also maintains that the General Counsel erred by referring to the ExSC issues about the statement of assurance submitted by X9 to ANSI along with a BSR-9. Again relying on the Patent Guidelines, Ericsson states that "such a decision is the exclusive province of the [BSR]." Ericsson Brief at 18-19. Ericsson is incorrect, and once again ignores relevant qualifying language in the Patent Guidelines (Patent Guidelines at 5).

The General Counsel's referral of the matter to the ExSC was entirely appropriate. Among the "added responsibilities" of the ExSC listed in its Operating Procedures is to "[a]ct, as necessary, on

¹⁶ See ExSC's 1996 revision to the *ANSI Procedures for the Development and Coordination of American National Standards*, the precursor to the *ANSI Essential Requirements*.

recommendations or appeals presented by resident counsel on the basis of legal considerations.” ExSC Operating Procedures at 7.2(e). In this case, the General Counsel, ANSI’s “resident counsel,” appropriately regarded the Letter of Assurance as calling for an interpretation of the Patent Policy and was well within her authority under Rule 7.2(e) to ask the ExSC to consider the matter.

Ericsson fails to appreciate that it is the ExSC’s responsibility (not the BSR’s) to maintain the criteria and procedures for the development and coordination of American National Standards. The Patent Policy is one of the normative criteria included in the *Essential Requirements*. Here, an interpretation of the Patent Policy was necessary to assess the sufficiency of a statement of assurance submitted by X9. Indeed, since the ExSC maintains the *Essential Requirements*, the BSR routinely looks to the ExSC for interpretations, so that the BSR can apply such interpretations in its review of evidence of consensus and compliance submitted by ASDs in support of the approval of a standard as an ANS.

4. The IEEE Decision is Relevant, Although Not Dispositive

Appellants Ericsson and Fraunhofer also argue that ANSI’s General Counsel and the ExSC in its Initial Decision had “no basis” to state that the IEEE decision might be relevant to the issue presented. (Ericsson at 11-14; Fraunhofer at 19-20.) The argument is without merit. The IEEE Decision specifically discusses the very language at issue here. It is, in fact, the only decision that addresses the particular phrase contained in the ANSI Patent Policy at issue here: the obligation to extend a license “to applicants desiring to utilize the license for the purpose of implementing the standard.” As observed in the IEEE decision, the language as written is broad enough to include “any applicant desiring a license for any conforming implementation of the standard.” At the same time, the Patent Policy recognizes a patent holder’s right to license with limitations, and there may be circumstances where such limitations could extend to particular types or classes of applicants.

Thus, while not dispositive, the interpretation of the language contained in the IEEE decision is plainly “relevant” to the issue here.

5. The ExSC Did Not Ignore the IPRPC’s Input nor did it “Change” the Patent Policy – it Merely Interpreted the Policy

Ericsson and Fraunhofer also maintain that the ExSC “ignored” and/or “defied” the expert advice from the IPRPC as presented in the results of LB 544. Both of these claims are untrue.

As the Initial Decision expressly recites, the ExSC reviewed the “IPRPC’s significant input arising out of the LB 544,” including the lengthy comments and email exchanges between IPRPC members (voting and non-voting). Ironically, certain language contained in the Initial Decision to which these Appellants take exception was, in fact, drawn from or brought about by the dialogue occurring in the IPRPC. The ExSC thus did not “ignore” much less “defy” the IPRPC.¹⁷

Moreover, Appellants’ argument rests on the erroneous assumption that the ExSC is required to defer to the IPRPC. It is not, and no such requirement exists. The ExSC is the final arbiter of the *Essential Requirements*.¹⁸ While the IPRPC may suggest changes, interpretations, or amendments to the Patent Policy in accordance with its own Operating Procedures, it is the ExSC that is charged with the ultimate

¹⁷ Nor did the ExSC “go against” the IPRPC ballot results. The ExSC, in fact, accepted the “wholly compliant implementation” formulation, as reflected in the Initial Decision.

¹⁸ ANSI’s National Policy Committee (NPC) is required to approve any *revisions* to the *ANSI Essential Requirements* after proper vetting through the ANSI ExSC. Contrary to the positions of certain Appellants, however, the NPC has no role in the ExSC’s day-to-day responsibility in interpreting and applying the *Essential Requirements*.

responsibility for interpreting and enforcing such policy. Its interpretative decisions may only be reviewed by the Appeals Board.

Equally misguided is the suggestion by Fraunhofer and Ericsson that the ExSC's decision "amended" or "changed" the Patent Policy. What the ExSC did was merely "interpret" the Patent Policy (*i.e.*, "explain" it). An interpretation seeks to explain what words mean. By contrast, an amendment changes the words being interpreted. There were no changes made to the words of the Patent Policy. These Appellants may not agree with the interpretation, but that does not transform the Initial Decision into an amendment.

6. There is No Basis on Which to Recuse the ANSI General Counsel

Appellants Ericsson and Fraunhofer also requested that ANSI's General Counsel be precluded from involvement in the appeal due to an alleged conflict of interest and/or bias. (Ericsson Brief at 26-27; Fraunhofer Brief at 7-8.)

The ExSC considered the recusal request on the morning of the February 5th hearing outside the General Counsel's presence. The Appeals Panel determined then, and reaffirms in this decision, that the ANSI General Counsel did not engage in any wrongdoing, her conduct was fully in compliance with ANSI's procedures and her own job responsibilities, and she has no conflict or bias. The General Counsel, therefore, was (and will continue to be) permitted to participate in the hearing and in all aspects of this or any future appeals as dictated by her job responsibilities and ANSI's procedures and rules. Once again, although certain Appellants may not agree with the General Counsel's opinions, it is her job to offer these opinions in good faith and in accordance with her duties to ANSI. There was nothing improper about her actions.

B. Substantive Arguments

While Appellants Ericsson and Fraunhofer focus mostly on alleged procedural irregularities, Appellant BlackBerry and Respondents Intel, Dell and Google focus principally on the words used in the Initial Decision, suggesting that certain changes be made, such as scaling back examples and removing discussion, to improve clarity (Intel Brief at 3). For its part, Respondent Cisco argues that the decision is appropriate as written, but acknowledged during the February 5th hearing that some of the examples used by the ExSC might be confusing. Appellants Ericsson and Fraunhofer stated at the hearing that they do not agree with BlackBerry's suggested revisions to the Initial Decision.

1. The ExSC's Specific Direction to X9 and the Patent Holder is Effectively Moot

As a threshold matter, we note that the Initial Decision, to the extent it requires X9 and the patent holder to resubmit a new statement of assurance in accordance with the decision, has been superseded by subsequent events and is effectively moot. X9 and the patent holder have come to a definition of "wholly compliant implementation" and their amended BSR-9 and statement of assurance has since been approved by the BSR. Mr. Stevens confirmed at the hearing that he believes the new statement of assurance satisfies X9's procedures and the Initial Decision.

2. Requirements for Letters of Assurance

When language like "wholly compliant implementation" is not defined by an ASD's own customized patent policy or in the statement of assurance, it is difficult to assess compliance with the ANSI Patent Policy, which does not contain such language. This is what likely made it difficult for the IPRPC in voting on LB 544, because the "votes" of the members often turned on assumptions in their comments

concerning what the term “wholly compliant” was intended to mean, a problem the ExSC also encountered.

Certain Appellants note that ANSI has “accepted” letters containing similar language in the past and argue that this precludes ANSI from addressing customized assurance language now. They are mistaken. The specific issue here has never been examined or resolved previously. The receipt of past LOAs by ANSI, particularly where they were not the subject of a challenge at either the ExSC or the BSR, is not binding on these program oversight committees, as Appellants suggest.

In an effort to provide future guidance to ASDs who may confront similar forms of customized assurances, in the Initial Decision the ExSC outlined potential considerations through the use of examples, drawing in part on the discussion that occurred at the IPRPC and the ExSC. It appears that this effort and the use of the examples and the discussion of whole versus partial implementations has generated controversy. Although this was not the ExSC’s intention, we see some merit in arguments about why the language used is susceptible to confusion or misinterpretation. Accordingly, in keeping with the constructive input received from BlackBerry, Intel, Google and Dell, endorsed by Cisco at the hearing, we take this opportunity to clarify and amplify the Initial Decision, by replacing the discussion set forth in the 5th and 6th paragraphs of the Initial Decision and substituting in their place the following:

- Having reviewed the record, including the SEP holder’s letter, the Patent Policies of ANSI and the ASD, and the IPRPC’s significant input arising out of LB 544, the ExSC finds that there is currently no agreement on the definition of the phrase “wholly compliant implementation.” Indeed, the definition of that term may be fact-specific and may vary from one type of standard to another. Alternative interpretations may not be equally reasonable in every circumstance.
- Without further clarification on what “wholly complaint implementation” means or what the X9 standard requires, and absent express language in X9’s own patent policy, the ExSC determines that “wholly complaint implementation” in this instance means only what the ANSI Patent Policy already requires – that the license be for “the purpose of implementing” the standard. In other words, the implementation must be within the field of use of the standard and not extend to products not covered in the standard.
- We emphasize that this decision neither approves nor disapproves of similar forms of customized language that may have been included in letters of assurance previously provided to ANSI. This decision also does not mean to interpret any such language.

We note this new text is similar, but not identical, to the proposal made on appeal by BlackBerry and accepted to varying degrees by Intel, Google and Dell and Cisco.

3. The Initial Decision Did Not Intend to Create a “Default” Interpretation of the ANSI Patent Policy Requiring Patent Holders to Always License at the Component Level

We also take this opportunity to emphasize that paragraph 7 of the Initial Decision was not intended to create a “default” interpretation of the ANSI Patent Policy requiring licensing at the component level. While the ExSC determined in the IEEE case that such a requirement was not inconsistent with the ANSI Patent Policy, that does not mean that ANSI’s Patent Policy requires licensing at the component level. We do not wish to express or imply any such “default” interpretation and we leave it to negotiations between patent holders and implementers to decide what licensing terms are appropriate in particular standards, subject to the terms of an ASD’s patent policy.

The ExSC does not accept the arguments advanced at the February 5th hearing principally by Ericsson that the ANSI Patent Policy requires only “access” to essential patent claims, as opposed to a “license” to such claims. Nor do we accept arguments that the ANSI Patent Policy cedes unilaterally and unconditionally to patent holders the right to decide “where on the value chain” they choose to license. These words and concepts are not reflected in the current language of the ANSI Patent Policy.

Seeking to eliminate issues like those encountered in this matter, the ExSC determines that, in the future, ANSI will no longer accept customized statements of assurance (unless pursuant to an accredited, customized patent policy or an ISO/IEC/ITU Declaration Form¹⁹) that deviate from the language of the ANSI Patent Policy and staff should return any such LOAs to the ASDs. ASDs remain free to determine the scope of their own patent policy, consistent with ANSI’s Patent Policy, and to define what must be included to implement their standards. Such customized patent policies are, as they have been, subject to ANSI’s reaccreditation process through the ANSI ExSC.

The ExSC also hereby establishes a Task Group to evaluate the continuing wisdom of the Patent Policy’s requirements concerning statements of assurance, including whether: (1) there is a continuing need to require that ASDs submit statements of assurance to ANSI; and (2), if so, to evaluate the feasibility of reinstating a simple, standardized form of assurance that includes a “check the box” type of format. The ANSI IPRPC Chair is invited to select three IPRPC members to join the ExSC task force and to provide input. We ask that the work of the Task Force be completed three months from the date of this decision (in time for the next revision cycle of the *Essential Requirements*).

CONCLUSION

Although the immediate issue involved in the Initial Decision has been largely mooted by subsequent events, the Appeals Panel has clarified and amplified what was (and was not) intended in the Initial Decision, thereby better advancing an understanding of what the ANSI Patent Policy requires and the degree of flexibility it affords to ANSI-Accredited Standards Developers. The Appeals Panel sets forth what ANSI contemplates going forward as it relates to assurances from patent holders. Finally, the Appeals Panel addresses the numerous procedural questions raised by certain Appellants, rejecting the procedural arguments and affirming the Initial Decision except as expressly modified and clarified here.

¹⁹ See Patent Statement and Licensing Declaration for ITU-T or ITU-R Recommendation | ISO or IEC Deliverable

**STATEMENT OF PATENT HOLDER CONCERNING THE USE OF
PATENTED DEVICE OR DESIGN IN CONJUNCTION WITH AN
AMERICAN NATIONAL STANDARD**

Note: This form is to be used to record the statement of a patent holder whose patented device or design (pending or approved) may have to be used by a person or organization complying with an American National Standard. This statement is filed and retained pursuant to clause 1.2.11.2 of the *American National Standards Institute Procedures for the Development and Coordination of American National Standards*.

1. Name of Patent Holder: _____

Address: _____

Contact Name and Title: _____

Contact Telephone & Facsimile: _____

Contact Email: _____

2. Patent Number(s):

Patent Number	Pending or Approved?	Date of Expiration

1. Designation and Title of Proposed ANSI Standard: _____

List sections of standard to which patent claims relate: _____

