Munich, 5 October 2018

PUBLIC COMMENTS

By email: psa@ansi.org

Fraunhofer response to call for public comments in respect of proposed revisions to the ANSI Essential Requirements

A. Opening Remarks

We commend the ANSI for its engagement with a broad range of stakeholders in the consideration of proposed revisions to the ANSI Essential Requirements. We take this opportunity to comment on the proposed amendment to the ANSI Patent Policy (section 3.1 ANSI Essential Requirements) and the proposal to review the category of parties that can appeal the approval of a standard as an American National Standard (ANS) and file the withdrawal for cause of an ANS (Section 4.2.1.3.4 ANSI Essential Requirements).

The Fraunhofer-Gesellschaft (Fraunhofer)[1] is Germany's and Europe's largest industrial research organisation and has been actively contributing to international dialogue on the relevance of good governance in standardisation and the importance of intellectual property law in the context of high-technology strategies and innovation ecosystems.

Fraunhofer has very strong cooperation ties with the United States of America, including through its subsidiary Fraunhofer USA. This includes activities as a developer and holder of all types of intellectual property, including standard essential patents and other forms of intellectual property which have the potential for global adoption. From these activities, Fraunhofer has participated in many licensing programs developed to implement world-class, global technology solutions to ultimately serve societal benefit and advancement. Fraunhofer welcomes the opportunity to contribute to this important review and discussion.

B. Comments on ExSC_112_2018 - Proposed amendment to the ANSI Patent Policy

It is proposed to amend section 3.1.2 of the ANSI Essential Requirements to provide that:

---

1 Fraunhofer undertakes applied research of direct utility to private and public enterprise and of wide benefit to society. With a workforce of over 25,000 and an annual research budget of €2,3 billion, the Fraunhofer-Gesellschaft is Europe's largest organization for applied research, and currently operates a total of 72 institutes and research units. The organization's research focuses on the needs of people in the areas of healthcare, security, communication, mobility, energy and the environment. Fraunhofer's international sites and its representative offices act as a bridge to the regions of greatest importance to scientific progress and economic development. See also https://www.fraunhofer.org/ for specific details of Fraunhofer's activities in India.

> 'A record of the patent holder's statement shall be retained in the files of ~~both~~ the ASD and ~~ANSI~~ shall be made publically available (at the ASD's election, either on the ASD's website or ANSI's LOA repository.)'

It is considered necessary that ANSI continues to receive and maintain a record of the patent holder's statement. This is of particular importance for ANSI, specifically the ANSI Board of Standards Review (BSR) determination of whether a standard qualifies as an American National Standard (ANS).

Section 4.2.1.1 of the ANSI Patent Policy provides, inter alia, that:

> 'With respect to any proposal to approve, revise or reaffirm an American National Standard (including the national adoption of an ISO or IEC standard as an American National Standard) for which one or more unresolved objections have been reported, the BSR shall evaluate whether:
>
> a) the standard was developed in accordance with the procedures upon which the developer was granted accreditation, with particular attention given to whether due process was followed, consensus was achieved, and an effort was made to resolve any objections to the standard;
>
> b) any appeal to the standards developer with respect to the standard was completed; [...]
>
> f) **ANSI's patent policy is met, if applicable**;
>
> g) **ANSI's policy on commercial terms and conditions is met if applicable**;
>
> h) the standards developer provided the following or evidence thereof: [...]
>
> 8. **a declaration that the criteria contained in the ANSI patent policy have been met, if applicable**; and
>
> 9. **identification of all unresolved negative views and objections, with names of the objector(s), and a report of attempts toward resolution.** [...]' (emphasis added)

Additionally, given the ExSC Appeal Decision's restrictive interpretation of the ANSI Patent Policy, it falls upon ANSI to determine whether customized letters of assurance meet the requirements of the ANSI Patent Policy. Further, the ASD is required to provide ANSI with an identification of all unresolved negative views and objections. ANSI should therefore be provided with information of all patent holders who are unwilling or unable to grant a license under reasonable terms and conditions.

The ExSC Appeal Decision as well provides that:

> 'ANSI will no longer accept customized statements of assurance (unless pursuant to an accredited, customized patent policy or an ISO/IEC/ITU Declaration Form) that deviate from the language of the ANSI Patent Policy and **staff should return any such LOAs to the ASDs**.' (emphasis added)

This means that pursuant to the ExSC Appeal Decision, ANSI still retains the authority to make the ultimate decision as to which statements of assurance deviate from ANSI Patent Policy. There is no delegation of such authority to the ASD. Therefore, although the proposed amendment contemplates that there is no continuing need for ASDs to submit statements of assurance to ANSI, customized statements of assurance will still need to be assessed by ANSI to determine whether they deviate from the ANSI Patent Policy.

ANSI and the U.S. Government work together via the NIST- ANSI Memorandum of Understanding (MoU), under which ANSI represents the United States of America in International Standards Organizations and holds delegated authority from NIST. With respect, ANSI has not and cannot further delegate to ASDs the authority it has received from the U.S. Government in relation to U.S. standardization activity. The NIST-ANSI MoU does not grant the right to ANSI to sub-delegate the powers granted to it from the U.S. Government.

We consider it important that a full, open and appropriate discussion of any proposed amendments to the ANSI Patent Policy be undertaken in the ANSI Intellectual Property Rights Policy Committee (IPRPC) before adoption. The ANSI IPRPC is the appropriate committee with responsibility for the ANSI Patent Policy as reflected in section 7.05 of the ANSI Constitution and By-laws and section 5 of the ANSI IPRPC Operating Procedures.

C. Comments on ExSC_113_2018 - Proposed revision to section 4.2.1.3.4 of the ANSI Essential Requirements regarding Withdrawal for Cause

It is proposed to amend section 4.2.1.3.4 of the ANSI Essential Requirements to provide that:

> '[...] Except in the case of an ANSI Audited Designator, a request ~~an application~~ for withdrawal for cause of an American National Standard may be submitted to the BSR by any directly and materially interested party who has been or will be adversely affected by the ANS, or the ExSC. The burden of proof to show adverse effect shall be on the requestor. The request shall be in writing, filed in accordance with appeals filing specifications, directed to the Secretary of the BSR and accompanied by a filing fee. ~~An application submitted by any materially interested party shall be accompanied by a filing fee~~. This fee may be waived or reduced upon sufficient evidence of hardship.
>
> If the request is submitted by a directly and materially interested party who has been or will be adversely affected by the ANS: [...]'

The intention behind the proposed amendment is indicated to be ensuring consistency with respect to the category of parties that can appeal the approval of a standard as an ANS and file the withdrawal for cause of an ANS.

With respect, the proposed revisions appear intended to limit the parties who may appeal the maintenance of a standard as an ANS. Such an intention would constitute a substantial change in scope of the ANSI Essential Requirements and would serve to restrict the openness and due process with which ANSI is expected to operate. ANSI is the only body with the mandate to accredit U.S. voluntary consensus standards developing organizations. Further, ANSI is the U.S. representative in international standards bodies. It is also the only body with a mandate to set policies related to national standards. ANSI maintains its primary goal as '*the enhancement of global competitiveness of U.S. business and the American quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems and promoting their integrity.*'

The proposed revisions in particular conflict with footnote 3 of the ANSI Essential Requirements. This footnote has been consistent since the ANSI Essential Requirements version of 2008. It provides that:

> '[...] clause 4.2.1.3.4 Withdrawal for Cause provides a mechanism by which an interested party may at any time request the withdrawal of an existing ANS.'

It is acknowledged in the ANSI Essential Requirements that standardization activity affects a very broad range of interests. Section 2.3 of the ANSI Essential Requirements inter alia provides that:

> '[...]In defining the interest categories appropriate to a standards activity, consideration shall be given to at least the following:
>
> a) producer;
> b) user;
> c) general interest.[...]
>
> [...] Appropriate, representative user views shall be actively sought and fully considered in standards activities. Whenever possible, user participants shall be those with the requisite technical knowledge, but other users may also participate. User participation should come from both individuals and representatives of organized groups.
>
> There are several user categories:
>
> 1. User-consumer: Where the standards activity in question deals with a consumer product, such as lawn mowers or aerosol sprays, an appropriate consumer participant's view is considered to be synonymous with that of the individual user – a person using goods and services rather than producing or selling them.
>
> 2. User-industrial: Where the standards activity in question deals with an industrial product, such as steel or insulation used in transformers, an appropriate user participant is the industrial user of the product.
>
> 3. User-government: Where the standards activity in question is likely to result in a

standard that may become the basis for government agency procurement, an appropriate user participant is the representative of that government agency.

4. User-labor: Where the standards activity in question deals with subjects of special interest to the American worker, such as products used in the workplace, an appropriate user participant is a representative of labor.'

Section 2.3 further provides that where appropriate, additional interest categories should be considered. These additional interest categories are elaborated in footnote 2 of the ANSI Essential Requirements which provides that:

> 'Further interest categories that may be used to categorize directly and materially affected persons consist of, but are not limited to, the following: a) Consumer; b) Directly affected public; c) Distributor and retailer; d) Industrial/commercial; e) Insurance; f) Labor; g) Manufacturer; h) Professional society; I) Regulatory agency; j) Testing laboratory; k) Trade association.'

It is notable that general interest has been determined to be an important consideration in determining the interest categories in relation to standards activity. Ultimately, the determination of a direct and material interest that would be adversely affected by a standard ultimately includes the user of a product incorporating the standard developed within an ASD. Given ANSI's broad mandate, there is a correspondingly broad range of stakeholders who would be directly and materially interested and would be adversely affected by the adoption and maintenance of an ANS.

It is therefore already contemplated in the ANSI Essential Requirements that the categorization of directly and materially affected persons is very broad and essentially open-ended. A reading of the current withdrawal for cause provisions in conjunction with footnote 3 of the ANSI Essential Requirements clearly indicates that the intention was to leave it open to the widest possible category of interest, including directly affected public and individual consumers.

This means that there is no restriction or special categorisation of parties who may request the withdrawal of an existing ANS. The broad range of stakeholders is further reflected in section 2.5.2 of the ANSI Essential Requirements where the general public is invited to participate in the process of creation, revision, reaffirmation or withdrawal of an ANS. It provides that:

> 'In addition, **proposals for new American National Standards and proposals to revise, reaffirm, or withdraw approval of existing American National Standards shall be transmitted to ANSI using the BSR-8 form, or its equivalent, for listing in Standards Action in order to provide an opportunity for public comment** [...]
>
> Such listing may be requested at any stage in the development of the proposal, at the option of the standards developer, and may be concurrent with final balloting. However, any substantive change subsequently made in a proposed American National Standard requires listing of the change in Standards Action.' (emphasis added)

Fraunhofer

Any attempt to create a distinction between the category of parties that can appeal the approval of a standard as an ANS and those that can file the withdrawal for cause of an ANS (with the intention to limit those who can request a withdrawal for cause) would be irregular and inconsistent with the ANSI Essential Requirements. It would also go against the universally accepted principles of transparency, openness and due process enshrined in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) to which the U.S. Government is committed.

D. Conclusion

ANSI's Patent Policy and Essential Requirements should cater for a diverse range of stakeholders in a variety of situations and sectors, with due regard to the international context within which standardization takes place. Unnecessary and improperly pursued changes specifically targeted at a particular sector should not be allowed to affect the numerous other sectors under ANSI's umbrella.

It is in the interests of ANSI and its broad range of stakeholders that ANSI remains well informed of any factors that may affect the adoption of an ANS. It is equally important that the broad range of stakeholders be allowed to request the withdrawal of an ANS which no longer meets the requirements for maintenance as an ANS.

The United States Government is bound to ensure adherence to the WTO Agreement Technical Barriers to Trade (TBT Agreement) throughout its territory, which clearly provides guidance on standards development activity of non-governmental organisations.[2] As a representative of the U.S. Government in the field of standardization, ANSI should have regard to the universally accepted principles of due process, transparency and openness enshrined in the WTO TBT Agreements. Any proposed changes to the ANSI Essential Requirements should be in accordance with internationally accepted principles in relation to technical standardization. Amendments that would result in a reduction of due process, openness and transparency should not be allowed to proceed.

We would be happy to respond to any questions regarding the above comments and remain in dialogue with ANSI on these issues which are important to sustainable innovation and globally competitive American Industry.

Stefanie Mielert
Head Legal Corporate Governance
Fraunhofer-Gesellschaft

2 TBT Agreement, Article 3