



CEN and CENELEC prescribed policies on copyrights and patents in standards

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Standards and intellectual property

▶ Legally, European standards are **horizontal co-operation agreements**

- Standardisation may bring together competitors to agree on technical specifications for their industry.
- EU competition law does not allow concerted practices, where competitors jointly decide on market conditions.
- The development of European standards may give rise to tensions between competing interests, and as a result lead to abuses and malpractices. This could create serious distortion of competition, even if this is unintentional.
- This may include – but is not limited to – patent ambush, royalty stacking and/or prevention of effective access.

▶ Standardisation would normally not restrict EU competition law if:

Clause 280 – European Commission Guidelines on Horizontal Co-operation Agreements

1. The standardisation process is subject to **unrestricted participation**
2. The procedure leading up to the adoption of a standard **is transparent**
3. Compliance with the standard is not mandatory (**voluntary application**)
4. Access to the standard is guaranteed on **fair, reasonable and non-discriminatory terms (FRAND)**

Standards and intellectual property

▶ What does “ACCESS” mean?

CEN and CENELEC Guide 4

“All interested parties have access to standards, by broad provision of information on their availability, and by **ensuring** that standards, including **any intellectual property rights** (IPRs) they might contain, **can be used** by market operators on **fair, reasonable and non-discriminatory conditions.**”

▶ Two ways of approaching it:

1. Access to the **standardisation process**
2. Access to the **standard once published**
 - to the work/content itself (governed by **copyright**)
 - for implementation (may involve essential **patents**)

CEN and CENELEC IPR Policy Framework

▶ What is an IPR policy?

CEN and CENELEC IPR Policies define and explain:

- How innovators inform others of protected inventions and commit to licence.
CEN and CENELEC **Guide 8**: Guidelines for Implementation of the Common Policy on Patents
- The conditions for using content of standards as copyrighted collective works.
CEN and CENELEC **Guide 10**: Policy on dissemination, sales and copyright of CEN-CENELEC Publication
- The conditions for using CEN and CENELEC trademarks and domain names.
CEN and CENELEC **Guide 24**: Use and protection of the trademarks and domain names of CEN and CENELEC

▶ Why do we need an IPR policy?

- to comply with **due process requirements** governing European standardisation.
- to prevent any undue distortion of competition to the benefit of special interests.
- to safeguard the intellectual property rights of CEN and CENELEC or third parties.
- to prevent others from using inventions and creations, **without prior permission**.

Licensing commitment/requirement

▶ Reminder of legal principles concerning licences

- IPRs are property rights
 - their use by a person (moral or physical) other than its owner requires an authorisation
 - in the case of IPRs, the authorisation is a licence (requirement of a legal contract)
 - International treaties and EU law also enshrine these principles related to ownership rights
- Licence (contractual agreement)
 - allows others to use inventions and creations
 - in accordance with specific terms and conditions, and restrictions
- Royalties in exchange for something of value (IP) is not the only issue addressed:
 - clauses include duration, territory, scope, reciprocities, guarantees / warranties, litigation/arbitration
- A licence allows each party to protect its interests based on a legally binding document

CEN and CENELEC and Patents

▶ What is a Patent?

- Exclusive right granted for an invention (product or process) conferring prohibition rights.
- Granted to an invention (no legal definition) that provides a technical solution to a technical problem.
- Conditions for patentability: lawful, novel, involve an inventive step and susceptible of industrial application.

▶ Are patents and standards compatible?

- Standards are merely ideas created to benefit the general public and industry as shared knowledge.
- Some technologies must be standardised to be widely used, which includes patented technologies.
- The use of a patented technology could be one way of complying with a standard's requirements.
- The use of alternative technologies remains possible ('technology neutral') as means to reach performance objectives.
- Where patented technology is used, it is included due to technical considerations and does not imply endorsement or promotion of the services, products or technologies of the patent holder.
- Standards shall not contain elements excluding market actors for any reason other than technical considerations.

CEN and CENELEC Patent Policy

▶ Guide 8 in a nutshell:

- It defines **how** innovators inform others of protected inventions
- It is aimed at guaranteeing an **effective access** to standards
- It shows the **practical difficulty** to formalise a 1-size-fits-all approach to standard essential patents (SEP)

▶ Based on three fundamental pillars:

- 1. Early disclosure:** facilitate informed choices and predictability over possible licencing terms
- 2. Balanced approach:** ensure a level-playing field for all stakeholders, including patent owners
- 3. Transparency:** ensure clarity on use of standard essential patents, via an SEP declarations database

CEN and CENELEC Patent Policy:

Early disclosure and licensing commitment

SEP Declaration

Option 1: Free-of-Charge

Patent holder prepared to negotiate licences free of charge on a non-discriminatory basis on reasonable terms.

Option 2: FRAND commitment

Patent holder prepared to negotiate licences on a non-discriminatory basis and on fair, reasonable terms and conditions.

Option 3: Unwillingness to licence

Patent holder is not willing to grant licences in accordance with option 1 or 2.

- **If a patent holder selects licensing option 1 or option 2, the following applies:**
 - **negotiations are left to the parties** concerned and are carried out outside CEN and CENELEC.
 - licensing declarations are **irrevocable**, to the extent the patent remains essential to the standard.
 - Licencing declarations **shall bind all successors-in-interest** as to the transferred patent.
- **If a patent holder selects licensing option 3, the following patent information is “requested”:**
 - granted patent number, patent application number (if pending).
 - an indication of which portions of the standard are affected.
 - a description of the claims covering the standard.
 - a standard will not be published with patented elements.

CEN and CENELEC Patent Policy:

Process Guidance to Technical Committees

► Requirements :

1. Use all efforts to inform CEN or CENELEC of patents/patent applications deemed essential.
2. Proceed, where possible or applicable, with **early disclosures** of granted patents or pending patent applications (meaning as early as possible throughout the work of the Technical Committee).
3. Notify CEN or CENELEC of all patents or patent applications deemed essential for the standard or Content, accordingly with the rules defined under Guide 8 on **declarations and commitments**.
4. Inform CEN or CENELEC of any **up-to-date legal status information** on essential patents or patent applications (e.g., change in ownership, lapsed application, jurisdictions, IPR still valid or in force).

► Duty of Chairs :

1. Ask, at an appropriate time in each meeting, whether anyone has knowledge of patents deemed essential for implementing the standard or Content. This must be reflected in meeting reports.
2. Ensure that patent holder(s)/applicant(s) sign(s) relevant SEP Declaration(s) prior to any publication.
3. Ensure that experts / contributors are well acquainted with the rules of CEN and CENELEC Guide 8.

CEN and CENELEC Patent Policy:

Process Guidance to Technical Committees

► Always remember:

1. The disclosure of patent information shall be made in good faith and on a best effort basis only.
2. TCs/WGs shall not take position on the scope, validity or specific licensing terms of essential IPRs.
3. Third-parties (non-members of Technical Committees) can also draw attention to essential IPRs.
4. Submit signed SEP declarations to CEN or CENELEC to be then added to a centralised database.
5. Licensing negotiations or discussions shall take place outside the CEN and CENELEC system.
6. In case of any doubts or questions, always contact CEN and CENELEC's legal team: legal@cencenelec.eu

► If a patent owner / applicant is unwilling to licence:

1. Notify, without delay, the responsible Project Manager and Technical Bodies at CEN or CENELEC.
2. Take appropriate action, incl. further examination or revision of the standard prior to publication.
3. In case of any doubts or questions, always contact CEN and CENELEC's legal team: legal@cencenelec.eu

CEN and CENELEC and Copyright

► What is Copyright?

- Exclusive right that protects a work that is an **original intellectual creation**.
- A work must be expressed in **concrete forms** (“expressions”).
- Copyright protects a wide range of works, incl. content structured in digital formats.
- Copyrighted works cannot be used or reproduced without **prior permission**.
- Copyright will subsist in the work for a certain number of years depending on the applicable law. Once this period is over, the copyright will no longer apply to the work, and it will be in the public domain.
- If there are several authors of a work, they all get rights in the **collective work**.

Eligible for copyright protection:

- Literary works
- Artistic works
- Computer programs and databases
- Paintings, drawings, photographs
- Etc.

Excluded from copyright protection:

- Legislation
- Mere ideas
- Procedures or methods of operation
- Mathematical concepts
- Etc.

CEN and CENELEC and Copyright

▶ Is copyright compatible with standardisation?

- Standards are copyrighted collective/collaborative works that:
 - are made by a set of independent experts and contributors (authors).
 - meet the threshold of originality, as reflecting free and creative choices.
- Copyright can exist even for a work that has been dictated by technical considerations.

▶ Important to remember:

- Just because a party developed or accessed a standard, it does not mean that it can be used free of charge.
- Any use or reproduction of a standard requires the prior permission of the rightful copyright owner.
- A licence is required by law, even for the purpose of conformity presumption with a standard's requirements.
- Any use or reproduction of copyrighted content of other standardisation bodies require prior permission.
- Avoid plagiarism when reproducing copyrighted content (requirement to cite and reference original sources).
- European standards do not form part of legislation. Hence, application or use of standards remains voluntary.
- To ensure the effectiveness of standardisation as policy tool, the standardisation system must be financially viable.
- The sale and licensing of standards is necessary to sustain the European standardisation bodies' business models.

CEN and CENELEC and Copyright

▶ **Standardisation work at CEN and CENELEC is:**

- only partly publicly financed (20% EC/EFTA support)
- predominantly refinanced through sales or licensing via the Member NSBs/NCs

▶ **Different model to other standardisation bodies :**

- The system is not hybrid (unlike ISO or IEC that may directly sell and distribute)
- Prepayment is required before any use (content is accessible via NSBs/NCs only)

▶ **Purpose of the CEN and CENELEC Copyright Policy (Guide 10) is to explain:**

- Why standards or other developed Content are protected by copyright.
- How standards or other publications are distributed and/or sold.

Process Guidance: Establishing copyright ownership



CEN Members

- Exclusive right of exploitation in own territories
- Scope of licencing: irrevocable, **exclusive exploitation right**, worldwide, transferrable, free-of-charge, sub-licensable
- Rights: translate, communicate to the public, sell, distribute or otherwise, by any means and in any form
- CEN retains copyright ownership, under Belgian law

- Adequate copyright notices of the granted rights
- Original author(s) retains 'moral rights' (inalienable)
- No adverse effects on the CEN or CENELEC Content

Exploitation Rights Assignment Statement (ERAS)

- Signature requested at every meetings
- Scope of assignment: irrevocable, **exclusive**, worldwide, transferrable, free-of-charge, sub-licensable
- Covers all languages, irrespective of the means or forms
- Contractual terms governed by Belgian law

Transfer of rights from Experts

CENELEC Members

- Exclusive right of exploitation in own territories
- Scope of licencing: irrevocable, **exclusive exploitation right**, worldwide, transferrable, free-of-charge, sub-licensable
- Rights: translate, communicate to the public, sell, distribute or otherwise, by any means and in any form
- CENELEC retains copyright ownership, under Belgian law

- Adequate copyright notices on the granted rights
- Original author(s) retains 'moral rights' (inalienable)
- No adverse effects on the CEN or CENELEC Content

Exploitation Rights Licence Agreement (ERLA)

- IPR owner contacted to fill in and sign the ERLA
- Scope of licencing: irrevocable, **non-exclusive**, worldwide, transferrable, free-of-charge, sub-licensable
- Covers all languages, irrespective of the means or forms
- Contractual terms governed by Belgian law

Transfer of rights from Third-Parties

CEN and CENELEC
CONTENT/PUBLICATION

Collaborative Work

Technical
Committee

Working
Group

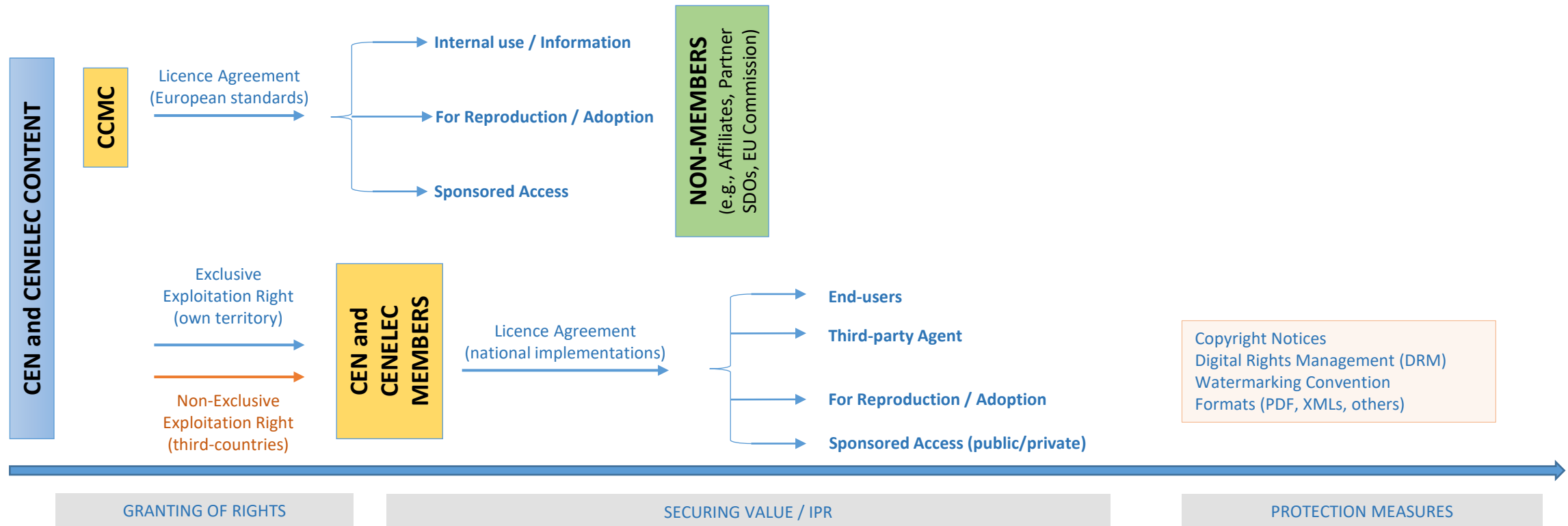
Pre-existing Work

Process Guidance: Distribution of CEN and CENELEC standards

- ▶ Policy on sale and distribution of standards is managed by the Joint Commercial Advisory Committee (JCAG)

- advises on copyright matters and distribution activities
- reports to the CEN and CENELEC Administrative Boards

**CEN and CENELEC
GUIDE 10**



CEN and CENELEC Copyright Policy:

Process Guidance to Technical Committees

► Always remember:

1. CEN and CENELEC have the copyright in all their Publications and/or Content.
2. CEN and CENELEC do not sell or distribute European standards in a centralized manner.
3. CEN and CENELEC assign the exclusive right to exploit their Content to their respective Members.

► Any granted rights or transfers must be evidenced:

1. Experts in Technical Committees must sign an **Exploitation Right Assignment Statement (ERAS)**.
2. Third-party contributors to a standard must sign an **Exploitation Rights Licence Agreement (ERLA)**.
3. If not yet the case, the reproduction of content of other standardisation bodies require an agreement.
4. Any documents cited above must be saved and made easily accessible, as may be needed over time.
5. Further guidance may be found here: <https://boss.cen.eu/reference-material/guidancedoc/pages/copyright/>
6. In case of any doubts or questions, always contact CEN and CENELEC's legal team: legal@cencenelec.eu