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Patents and Standards:

A modern framework for standardisation involving intellectual property rights

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Respondent profile

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Introduction

TIIC - Technology, Innovation and Investment Council represents leading European technology inventors who believe that investment in R&D and innovative products need to be protected by intellectual property rights which stimulate innovation and improve society. Established in February 2013 in response to widening divergence between the needs of technology inventors and European policy proposals, the council seeks to inform decision-making about the impact of intellectual property on new technical knowledge. To do this, TIIC Council works with policy makers and regulators to encourage a deep understanding of how and why technology investment decisions are taken and how IP rights protect employment.

Patents and Standards

Patents are a key ingredient in promoting innovation, on the basis that patents can protect successful results of R&D investments, allowing the inventor to seek return on these efforts and incentivising further investments in R&D. Patents also create legal certainty around technology ownership which is critical in enabling collaborative R&D activities and technology transfer. In the standardisation context this is seen through licensing programmes. Licensing agreements foster open standardisation because they allow participating companies to disclose and share their new technology openly and early, knowing their inventions will be protected. The patent system therefore encourages participation in standardisation; the alternative is for technology developers to keep their technology secret. In complex technologies, however, one company cannot by itself offer the interoperability and performance at a reasonable price requested by the market. As the world becomes ever more interconnected, i.e. more and more devices are able to 'talk to each other', interoperability and high performance will become increasingly relevant. To the extent that the European standardisation policy continues to promote open standards, TIIC sees patents playing a decisive role.

Evidence-based Policy

TIIC urges the European Commission to engage in evidence-based policy. The study underpinning the questionnaire has significant methodological, statistical and empirical flaws. The study did not review existing market data or trends; the sample of interviews are statically irrelevant, the theories reviewed are unproven and contentious. Ensuring that the right policies are developed; these need to address observable market needs. Problems need to be accurately defined and the solution proportionate.

Unfortunately the study identifies theoretical problems, proposing equally theoretical solutions with no assessment of the likely impact of such 'solutions'.

Before taking any action that may change a well-functioning system, TIIC invites policy-makers to assess the implications of policies that reduce the attractiveness of patent protection or of contributing patented technologies. Any change will impact research & development, access to risk capital and the development & deployment of future of standardization in different sectors such as automotive, smart grids, key enabling technologies, 5G and internet of things. Thus, TIIC strongly recommends an evidence-based policy to obtain a positive instead of a negative impact on such important issues.

Investment in Standards

Standards involve substantial long term investments both in technology contributions (research and development) and specialist resources. Technology standards are increasingly dynamic in nature, mutating and improving over time. Technology contributions in standard setting organisations (SSOs) may, if patent protected, generate standard essential patents (SEPs). Successful standardisation is premised on a FRAND (fair, reasonable and non-discriminatory) licensing model which provides access to the standardised technology on reasonable terms, while guaranteeing a fair and reasonable return on investment (ROI) in standardized technology to SEP owners. This virtuous circle encourages continuing investment in standards and thus underpins a healthy open standards environment in Europe. It has been extremely successful so far and there is no evidence that it will not be for the future.

Any developments or initiatives that might disturb this virtuous circle could have serious, albeit unintended, consequences. European standardisation policy should seek to create the most attractive environment for standardisation efforts and encourage R&D for standardised technologies. For this reason the ability of SEP owners to license their patents effectively and efficiently on FRAND terms is a fundamental requirement.

Patent system threatened by last developments in standardisation IP discussions

Policy should favour a truly open, consensual standards environment, recognising the vital role that open standards play in enabling new interoperable technologies to be developed in an open inclusive manner for the benefit of consumers and society generally. Standardisation in the telecoms field has been phenomenally successful. Mobile telecoms are the most vibrant, dynamic, competitive market known to mankind. It has evolved rapidly with a constant flow of new entrants from around the world achieving rapid success without the upfront investment in standards R&D.

The impact of proposing unbalanced changes to system will affect participation and development of standardisation. It is notable that the China IPR Helpdesk recently gave guidance to European SMEs, following increased regulatory intervention in China in ICT standardisation, particularly that *“Patenting standards are no longer a brilliant idea; Contrary to the traditional notion, standard essential patents now seem to have limited value; Implementation patents are much more valuable than standard essential patents”*¹. The underlying question is therefore whether Europe is willing to promote technology leadership in the global race for innovation, as well as to provide the right framework for R&D intensive companies that contribute to the European standards system.

TIIC is concerned that the current trend in the policy debate is pushing the delicate stakeholder balance unfairly in favour of licensees. The risk is that this will push future R&D investment away from open standardisation and the attendant guaranteed FRAND-based access to SEPs, towards more proprietary solutions which, if not totally exclusive, come with potentially very high (monopolistic) barriers to entry. There is an equal risk to push future R&D investment away from the European market.

The changes adopted on 8 February 2015 by the IEEE-SA Patent Policy is a stark example of what can happen when IPR policies are fundamentally changed to favour one group over another. Where rules contain such changes, it will very much impact the incentives of contributors to take part in standardisation and their strategies of investment in the development of technologies that are fundamental to standardization efforts. The changes adopted by IEEE, include a number of contentious elements referred to in the Consultation (such as injunctive relief, smallest saleable component and incremental value) were pushed through by a small group of companies with aligned interests, without the inclusion of or meaningful consultation with other stakeholders, and this despite multiple requests for transparency, openness, impartiality and consensus. IEEE's existing IPR rules have resulted in the hugely successful standardisation and dissemination of e.g. Wi-Fi technology. We believe the significant modifications may have serious, adverse consequences for the development of new technologies in future.

Licensing

The patent system creates legal certainty that enables licensing and proper control of technology which must be shared in order to enable new interoperable products. The adaptability of intellectual property rights means that commercial licences can be structured in many different ways to suit the business circumstances and needs of the parties. This adaptability enables new commercial relationships, new products and services and addresses new paradigms such as required by the evolving ICT ecosystem.

¹See:

http://www.china-iprhelpdesk.eu/docs/publications/China_HD_Guide_China_IPR_Considerations_for_the_ICT_business.pdf.
The document does not appear to be available anymore.

Generally speaking, licensing disputes are relatively infrequent. Where such disputes occur they normally concern commercial issues which can, if necessary, be resolved through court proceedings in the country concerned or, if the parties so choose, through arbitration. Commercial pressures usually operate to drive a resolution, since licensing is about enabling a wider market to the benefit of both parties. Commercial considerations often also favour arbitration as the means of dispute resolution.

In the context of standards and telecoms, the FRAND licensing model has traditionally worked remarkably well. There has historically been a significant amount of patent licensing, most of which has concluded successfully without dispute. While there have certainly been some high profile disputes over recent years, this is no more than might reasonably be expected in such a dynamic, successful and highly competitive, international high-technology market.

It is important to maintain a proper balance of interests between patent owners and potential licensees so as not to disturb those elements that contributed to a historically well-functioning FRAND licensing model. No changes should be made or encouraged which would tip the balance in favour of access to SEPs without empirical evidence of systemic problems and without carefully understanding the impact of any such changes. Specifically, initiatives that would for example restrict the availability of usual remedies, such as the right to seek injunctive relief against a licensee unwilling to take a FRAND license or that would artificially undermine the value of a SEP, and thereby discourage future investment in standards technologies, should be avoided. Standardisation policy in Europe should seek to make European standards efforts the most attractive, in the competition for technology standardisation. This requires sufficient consideration for two essential elements: 1) to create conditions capable of attracting the best possible technology to create technically relevant standards; and 2) to make sure that the standard is deployed broadly and used by many different implementers.

The FRAND model – still fit for purpose?

Efficient and balanced FRAND licensing is critical for implementing interoperability in an open standards environment and ensuring continued investment in standards by the widest constituency of industry participants.

As said, the FRAND model has traditionally worked well in telecoms. However, the trend evolving nowadays is that the behaviour of the SEP owner is being scrutinized far more closely than the conduct of prospective licensees, placing far higher expectations on the part of the SEP owner than on the part of the prospective licensee. It has also led to intervention around the world resulting in the effective price setting for technology which is a concerning trend for European technology developers. There is a misplaced and unsupported belief that SEP owners are avariciously seeking royalty rates in excess of FRAND and that this is blocking the standard. This essentially hypothetical ‘problem’ has been given the label ‘patent hold-

up'. It has caught the imagination of academics, economists and policy makers alike. Although one would have expected after 15 years of theoretical discussion to see some evidence of this phenomenon; this has not been the case so far as indicated recently in a meeting of the Competition Committee of the OECD².

In practice we are seeing the opposite; i.e. that the bigger problem is not SEP owners seeking unjustified royalty rates, but rather that the rights of SEP owners are increasingly challenged by companies using the standards and who have generally incurred little or no upfront R&D costs in standardised technologies. These companies are spring-boarding off the innovations and investments of others – while at the same time increasingly reluctant to take the necessary licences, even to negotiate a licence, on offered FRAND terms for the SEPs they are infringing. This phenomenon is known as '*reverse hold up*' or '*hold out*'.

The weight of evidence shows that 'hold-out' is not only real and present, but a significantly more serious problem in the real commercial world than the hypothetical risk of patent 'hold-up'. Reducing or diluting sanctions available to SEP owners will only serve to exacerbate the problem of hold-out, emboldening infringers to hold-out against taking a FRAND license and so frustrate the ability of SEP owners to achieve the fair and reasonable return on their upfront R&D investment that they deserve.

It would help, therefore, to restore balance and equilibrium in SEP licensing if the conduct of the prospective licensee also has to be taken into account, better still for there to be a formal expectation or requirement (e.g. a strengthened contractual requirement) on prospective licences not to engage in purely tactical and/or dilatory behaviour of the type alluded to in the recent (20.1.14) Opinion of the CJEU Advocate General in case C-170/13 (*Huawei vs ZTE*), but to proactively enter constructive negotiations with a view to concluding a FRAND license in a timely manner. After all it takes two parties to conclude a FRAND licence.

The nature of the FRAND obligation on a SEP owner with respect to any particular prospective licensee should depend on the conduct of that prospective licensee. If the prospective licensee's conduct shows they are not acting in good faith, it should not be inconsistent with the FRAND obligation that all usual remedies should remain available against that particular unwilling licensee, without restriction, including injunctive relief.

Patent Litigation

Generally, whenever patent litigation is undertaken considerable values are at stake. It is never undertaken lightly, because it usually places the subsistence of the patent concerned at risk. Patent litigation is complex: legal approaches to the questions of validity and infringement are very highly developed and a defendant often deploys both these forms of defence, whether in the UK, elsewhere in Europe, or the US.

² "Intellectual property and standard setting", note by Anne Layne-Farrar (Charles River Associates, United States), 122nd meeting of the OECD Competition Committee on 17-18 December 2014 --

Challenges to validity usually involve new facts, evidence and arguments which are of uncertain effect. In the UK a dispute over one or two patents will usually take at least 12 months to reach trial and requires up to a 5 day trial (sometimes more). Decisions on infringement and validity are separate and can be overturned on appeal. Patent litigation, like all litigation, is therefore inherently uncertain.

For all these reasons legal costs are very considerable, and operate as a further restraint on litigation.

It is not really different in the realm of standardisation – litigation is the exception not the norm, and only occurs as a last resort in cases of significant commercial value. There has, however, been a paucity of rigorous empirical study looking at the incidence of patent litigation and analysis of conclusions that can be drawn. This ignores the complexity of litigation and its fundamental role in the patent system.

It is critical to appreciate the so-called Smartphone patent wars. This litigation occurred where different business models, based on support for different operating systems, clashed over a market worth well over a trillion euros. During the various disputes innovation continued apace and very few injunctions were granted or even maintained. Much policy concern ignored the fact that litigation rarely focused on standards-related patents but rather design and utility patents, software patents or non-essential patents. Discussion also ignored the fact that patent wars occur often, and end, in numerous industries. To seek to change IPR policies without a proper understanding of patent litigation will have unintended consequences, possibly even increasing the likelihood of litigation.

TIIC would not support any initiatives that would tend to promote more legal disputes and hence the need for more dispute resolution than there is today. Any initiatives that would alter the delicate balance in favour of licensees against the interests of patent owners is likely to result in more, not less, legal disputes and have a detrimental effect of efficient licensing.

Conclusion

In summary, changes of the legislative and regulatory framework (including SSO patent policy rules) in the area of Patents and Standards should be based on sound evidence of observable negative impact in the market of the current system. They should have as their primary and overarching objective encouraging investment and R&D in fundamental technologies for contribution to standards efforts, as well as the promotion and conclusion of efficient FRAND-based SEP licensing. It should not result in discouraging R&D investment, or in rent-shifting nor to encourage legal disputes. To achieve this goal the balance of incentives needs to be restored, to encourage SEP infringers to negotiate and conclude in a timely manner FRAND licences offered by SEP owners, with meaningful sanctions if failing to do so.