

IP Europe views on the European Commission's consultation on the evaluation and modernisation of legal framework for the enforcement of intellectual property rights

IP Europe¹ would like to thank the Commission for the opportunity to provide comments related to the Directive on the enforcement of intellectual property rights ("IPRED"). IP Europe is an alliance of R&D intensive European companies and research institutes devoted to innovation, from SMEs to global enterprises and non-profit research entities operating in a variety of industrial sectors. IP Europe is committed to building and preserving a balanced innovation eco-system where all stakeholders, in particular SMEs, can develop their businesses, protect their R&D investments and obtain a fair remuneration for their contribution to innovation.

With the above in mind, this position paper complements individual responses to the consultation on the IPRED submitted by IP Europe and by some of its SME members in particular. It highlights the importance of:

- 1) open standardisation in Europe and ensuring that appropriate incentives are maintained to encourage continued collaboration and contributions in the development of standards;
- 2) maintaining the current balanced framework, which allows patent holders to be reasonably compensated for their inventions and contributions to standards and to have the means to ensure such compensation through the courts; while at the same time guaranteeing a fair access to standard essential patents for all players and especially SMEs; and
- 3) accordingly, maintaining the present remedies, and scope of those remedies, available under the IPRED.

IP Europe is looking forward to a Digital Single Market (DSM) where billions of devices will be interconnected. To address such a level of complexity, a supportive intellectual property and open standards framework will play a fundamental role. A balanced framework is the basis of a sustainable innovative process between innovators sharing the results of significant (sometimes billions of EUR) R&D investments through standardisation, and those using that standardised technology to build their businesses.

Europe has achieved such a balance, in particular following the recent Court of Justice of

¹ See more at www.iptalks.eu/about-us/. The positions and statements in this paper do not necessarily reflect the detailed individual corporate positions of each member of IP Europe.

the EU (CJEU) decision on *Huawei v ZTE*.² In this decision the Court recognised that FRAND is a two-way street and provided sufficient guidelines for contributors and users of standardised technology to act in good faith while keeping the flexibility needed to address the specific circumstances of each particular case. We would also note that while the CJEU decision did not rule on the IPRED, the ruling nevertheless accomplishes the Directive's objective in relation to standard essential patents; namely ensuring the general obligations of fairness and equity of Article 3 in the application of Article 11 on injunctions is achieved.

This positive development by European judicial bodies does not, however, apply in all countries. In India and China it is still very challenging to enforce IP rights in a timely manner. In the US we have seen strong limitations to the enforcement of standard essential patents in recent years. This is a big concern for IP Europe's members and should be of equal concern to the European Commission. We would ask that this issue is treated as a key priority by the Commission to ensure the future of our European High-tech and R&D intensive industries at an international level. From a wider perspective, the EU needs to be consistent in defending the interest of European companies and right-holders against the efforts by foreign governments and institutions seeking to reduce or cap the value of patents, and in particular standard essential patents, for example in China or in India. In the US, we would also highlight that support has been given by certain arms of the US government to policies that have the effect of reducing the value of standard essential patents based on unfounded economic theories.

Finally, we observe a growing international trend where many international technology implementers, who barely contribute to standardisation, systematically use standardised technology protected by standard essential patents. These technology implementers fail to secure the necessary licenses and often force lengthy and costly litigation before engaging in good faith license negotiations³ with technology contributors and inventors. Technology contributors are thus unable to recover their R&D investments in a timely manner and in some cases this hold-out behaviour (also known as "technology free-riding") may lead to the end of their businesses, especially for SMEs who have limited resources. It is our strong belief that this hold-out trend will continue to increase if Standard Development Organisations (SDOs) and/or governments adopt radical policies, such as those inspired by the US-based Institute of Electrical and Electronic Engineers Standards Association (IEEE-SA), or if judicial systems support such theories in their decisions.

² See *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, case C- 170/13, 21 July 2015 available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=369399>

³ Many actors are willing to negotiate in good faith only after a court has found infringement, as only because there is the imminent risk of having their sales of infringing products stopped.

Some examples of measures, if adopted, that would significantly shift the balance in favour of those implementing standards and thus remove all incentives for companies to participate in open standardisation would be the following:

(1) imposing any kind of rules or prescription on calculating a FRAND royalty. (IP Europe understands that there is no one method for determining license fees or damages for infringement. In particular, calculation based on the smallest saleable unit is considered 'untenable': *CSIRO v Cisco Systems, Inc*⁴. See also *Ericsson Inc. v D-Link Systems Inc*⁵. and the 'Guidelines on the application of Art. 101 of the TFEU'⁶. We also recognise that in the future IoT and 5G spaces many different means of obtaining a royalty will be more appropriate depending on the technology being implemented);

(2) prohibiting or significantly limiting standard essential patent holders from seeking or obtaining injunctive measures, e.g. by granting automatically damages based on proportionality instead of injunctions or not granting such remedies in a timely manner (e.g. delaying any injunction until an appeal is decided in favour of the patent holder). (Injunctions play a major role for standard essential patent holders who typically own a number of standard essential patents and face unwilling licensees using litigation strategically to avoid a license on a portfolio basis⁷);

(3) forcing patent holders to grant licenses at any point in the supply chain, such as at the component supplier level, where the well-established practice is to license at the level of the end products. (Similar to the reasons noted in (1), in the IoT and 5G sectors, for efficiency, cost and practical reasons, including avoiding double royalty payments, it may be more appropriate to license at a different level in the supply chain depending on the nature of the product or service.⁸); or

⁴ *CSIRO v Cisco Systems, Inc* 809 F.3d 1295, at para 1303 (Federal Circuit Court, 2015)
<http://www.leagle.com/decision/in%20FCO%2020151203167/CSIRO%20v.%20CISCO%20SYSTEMS,%20INC>

⁵ *Ericsson Inc. v D-Link Systems Inc*⁵. 773 F.3d 1201, at para 1226 (Federal Circuit Court, 2014)
<http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/13-1625.Opinion.12-2-2014.1.PDF>

⁶ Guidelines on the application of Art. 101 of the TFEU to technology transfer agreements', (2014) C 89/03, paras 8-9. [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328(01)&from=EN)

⁷ Companies, both large and small, who own standard essential patents typically own a number of them and license them as a portfolio. These companies, like all companies, depend on timely remuneration – in their case, so as continue their R&D investments. The seeking of an injunction is often the only means available to stop the infringement, or to obtain monetary compensation for an ongoing breach, until the appropriate license is in place. In this regard, it is noted that – while the application for an injunction may relate to one patent in one jurisdiction - a recent court decision in Germany has confirmed that world-wide portfolio licensing is an accepted commercial norm and therefore it is legitimate to make a FRAND offer in such a manner. See *Saint Lawrence v Vodafone*, District Court Düsseldorf 4a O 73/14, 31 March 2016.

⁸ This would also be especially harmful for SMEs as it would imply more licensing agreements, increase the transition costs and, having to deal with different licenses for the same product, unnecessarily risk not being FRAND. The reason is that not all standard essential patents are typically practiced by any particular

(4) granting the injunction right only in favour of manufacturers based on “proportionality” and in other cases assuming that damages are always sufficient to compensate infringement. (As noted in (2) injunctions are necessary to ensure that an unwilling licensee enters into a portfolio license).

Therefore, we would like to caution the European Commission against any changes in the treatment of intellectual property inspired by such radical new rules as those adopted by the IEEE-SA, as this would significantly reduce the incentives to invest in standards related R&D. These changes devalue the patented technologies of the mostly-EU companies used in global standards and are already wiping out incentives for European innovators to continue investing in the development of IEEE-SA global standards, such as WI-FI. Similar changes in Europe would threaten the continued existence of open technology standards and promote their widespread replacement by proprietary solutions, which would no longer allow European innovators and SMEs in particular unhindered access to the best open technology platforms they need to innovate and create good jobs in high-value European growth sectors such as IoT, 5G, connected cars, smart energy or in “industry 4.0”, to cite a few.

For the above reasons and to ensure continued building on global successes by European innovators, we strongly believe in maintaining the balance in open standards and ensuring that not only the technical discussions, but also the IPR Policy discussions, in SDOs take place under an open, transparent and consensus based⁹ process. Only in an open standards ecosystem, which respects these principles, will SMEs have an opportunity to build their businesses on top of open standardised platforms or even compete with other (big) players as contributors.

IP Europe therefore calls on the European Commission to maintain the level of IP protection in Europe which has been successful over many years in establishing our technological lead in mobile telecommunications, on the basis of a huge R&D effort and to discard initiatives that would wipe out the value of patents and incentives to invest in technology standards.

For this to happen, we see no need for the Commission to review the Enforcement Directive but rather to continue building a dialogue with industry, SDOs and the research community, and allow courts to interpret the guidelines given by the European Court of Justice in light of the specific circumstances of each particular case.

component, therefore standard essential patents would potentially have to be licensed to one or more components with the remainder being licensed at the OEM device, or some other, level.

⁹ Consensus is understood as no sustained opposition by any materially affected stakeholder group. See ETSI definition of consensus “General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interest and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments (see ISO Guide 2:1991)”, available at https://portal.etsi.org/directives/35_directives_dec_2015.pdf.