T-TIP Standardization and IP Policies

***Key Messages**: T-TIP presents a unique opportunity to promote innovation and maintain high international patent protection standards, while encouraging patent quality and limiting onerous international forum shopping or rules that encourage patent "trolling" in the US. The EU, however, should forcefully oppose any US negotiators calls to import the recent and controversial IEEE IP policy changes into TTIP as this would weaken the ability of innovators to obtain a fair return of their R&D investments and restrict the ability of holders of essential patents to seek injunctive relief amongst others. The EU should also make clear that while the T-TIP should contain a strong patent protection chapter, some IPR issues would be better dealt within a new multilateral treaty initiative involving key EU trading partners.*

With nearly 100 million jobs in the transatlantic economy depending on comprehensive Intellectual Property ("IP") Protection, it is a fact of life that strong patent protection is one of the cornerstones of innovation and economic growth[1]. Moreover, a Digital Single Market with over 26 billion connected devices by 2020 can, as recognised by the European Commission, only occur through standardisation and open, non-proprietary, technology platforms.

Considering the importance of patent protection on both sides of the Atlantic, the EU-US Transatlantic Trade and Investment Partnership ("T-TIP") presents a unique opportunity to promote innovation and maintain high international patent protection standards, while encouraging patent quality and limiting onerous international forum shopping or rules that encourage patent "trolling" in the US.

Worryingly, some Silicon Valley-based companies are pressing US T-TIP negotiators so that they advocate for the inclusion of weak IEEE-inspired IP rules[2] either in the standardization *or* in the IP charter of T-TIP. If adopted in T-TIP such rules would have immediate international repercussions and possibly become a "global IP standard".

This school of thought sponsored by non-European companies that are large "consumers" of IP, has recently led to a controversial change of the IPR Policy of the Institute of Electrical and Electronics Engineers (IEEE). This change makes it considerably harder for innovative holders of patents essential to IEEE standards to protect and obtain a return of their R&D efforts. As a result of this policy change, a major contributor, Qualcomm has declared a long list of patents it will not license under the new policy. Other contributors have declared that they will not submit Letters of Assurance under the new IPR Policy. IEEE has however chosen not to make them public. Now that they think the IEEE battle has been won, some US companies are trying to export similar principles and pressing American negotiators to expand the IEEE policy changes to the T-TIP on the basis of controversial anecdotal evidence and misleading comparisons between the litigious US legal system and the one prevailing in the EU. The EU would make a great mistake to accept any weakening on patent enforcement for standardized, but also non-standardized, technologies:

- First, the calls for the weakening of patent protection in the US are essentially driven by the excesses of the American litigation system, which result from a unique combination of factors that are not present in Europe, such as the reliance on jury trials, the differences in the patent quality post-granting between USPTO and EPO, the adoption of what are considered to be excessive damages, exorbitant litigation costs, the use of "contingency fee" mechanisms, and the fact that each party pays its legal costs, whereas Europe applies the "loser pays" principle to discourage unmeritorious claims from being filed.

[1] Intellectual Property Right and the US Economy – Industries in Focus, prepared by Economics Statistics Administration and U.S. Patent and Trademark Office, March 2012 and EPO/OHIM Study -- 35% of EU jobs rely on IP industries http://europa.eu/rapid/press-release_IP-13-889_en.htm

[2] See http://standards.ieee.org/develop/policies/bylaws/sect6-7.html

- Second, standardization has been a major European success with, for instance, standards, such as GSM and UMTS, and European technology leaders, such as Ericsson and Nokia, along with European telecom operators leading the path to the mobile communication industry, which is one of the fastest growing sector of the global economy. While non-European manufacturers may wish to use European technologies at low cost by reducing patent protection (such as for instance by depriving patent holders from the ability to seek injunctions and/or adopting methodologies designed to cap royalties to very low amounts), the EU should not fall into the trap of turning up-side-down the European standardization system, which would cripple the financing of its most innovative companies. As former Vice-President of the European Commission responsible for the Digital Agenda, Neelie Kroes said on 26 February 2013 at the Mobile World Congress: *"Europe used to lead the world on wireless. (…) European 5G is an unmissable opportunity to recapture the global technology lead"*[3]. This goal would not be achievable if the rules of the game are suddenly changed to the disadvantage of European companies.

- Third, voices are now heard in the US and in Europe that the true challenge is not to weaken patent protection in Europe or in the US, but to strengthen such protection in Asia and other parts of the world so as to create a level playing field. That view is correct. If we allow patent protection to be weakened in the context of the T-TIP, it will be subsequently impossible to convince other major trading partners, such as China and India, to strengthen their own regimes so as to protect our innovators from having their technologies stolen by unscrupulous competitors. Worse, some trading partners may see the weakening of our own patent regimes as an opportunity to adopt industrial policies designed to grab technologies developed by Western companies at low costs.[4]

  This does not mean that our patent regime is free of challenges. For instance, initiatives may have to be taken to avoid fuelling the proliferation of so-called "patent trolls" behaviour, which focus on aggressive litigation and seek to extract large amounts of money from manufacturers to their sole benefit, not feeding any profits back into further innovation.[5] But these initiatives should not be at the expense of the true European innovators or the legitimate licensing entities that represent them.

  By ensuring that the T-TIP contains a strong chapter on the protection of IP, the EU would not only send the right signal to innovative companies in Europe, but it would also send a signal to our other trading partners re-affirming their commitment to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This means that the insertion of an IPR chapter in the T-TIP should not be an opportunity to devalue the principles contained in the TRIPS, but on the contrary to ensure their effective implementation in the EU and US legal orders by reaffirming the following TRIPs commitments:

  - The loser-pays principle (Articles 45(2) and 48(1) TRIPs) should apply incorporating a special framework for SMEs, such as the rule in US patent law that the loser-pays principle only applies in "exceptional" cases.

  - So that enforcement is not unnecessarily costly (Article 41(2) TRIPs), discovery in US patent litigation should be delayed until after the Markman ruling, so that no prohibitive discovery costs are incurred until it has become clear what the scope of the patent is, and discovery can be avoided by early settlement.

[3] http://europa.eu/rapid/press-release_SPEECH-13-159_en.htm

[4] For instance, India's National Manufacturing Policy adopted in 2011 promotes the compulsory licensing of patented technologies as a means of effectuating technology transfer with respect to green technologies. Concerns have also been expressed that the Chinese authorities may aggressively enforce their competition laws to lower the royalties charged by Western companies.

[5] These trolls may, for instance, acquire these patents from bankrupt firms and use them to harass companies until they accept to pay them a fee. These trolls should not be confused with licensing entities that help innovators to monetize their patents in order to obtain a fair return on their investment.

- For enforcement to be fair and equitable (Article 41(2) TRIPs), T-TIP parties should implement rules on privilege along those contained in the UPC Rules of Procedure so that IP practitioners in one T-TIP party enjoy privilege of confidential information in the other T-TIP party.

- For patent acquisition not to be unnecessarily costly and complicated (Articles 62(4) and 41(2) TRIPs), both T-TIP parties should fully implement the Patent Law Treaty without any reservations. This will streamline requirements on the form and contents of patent applications, as well as some other formalities, and thus reduce red tape.

The EU should not tolerate the efforts of some large non-European manufacturers that are thriving on the inventions of others to weaken the ability of patent holders to enforce their patents or to obtain fair and reasonable compensation for their innovative activities. The head of the US Patent Office recently recognized that such a short-term view would hurt the sectors in which the US and the EU are best placed to succeed in the economic race.

The EU should also make clear that, while the T-TIP should contain a strong patent protection chapter, some IPR issues could be better dealt with in a multilateral forum. For instance, it would not make sense for the EU to accept the introduction in the T-TIP of the so-called "grace period"[6] for patents as long as a similar measure is not introduced in China and other major trading partners. In a global economy, multilateral coordination, rather than bilateral negotiation, is necessary to harmonise and improve substantive patent law regimes while maintaining a level playing field.

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[6] The term "grace period" refers to the period of time in which a business can apply for a patent for an invention after which details of the invention have already been made public.