



## **Patents and Standards**

### ***Public consultation on patents and standards by the European Commission***

In October 2014, the European Commission began a public consultation on patents and standards. The aim of this consultation was to gather information and views on interplay between standardisation and intellectual property rights (IPR) such as patents. The purpose of the consultation was to allow stakeholders interested in standardisation involving patents to bring to the Commission's attention their views on:

- how the current framework governing standardisation involving patents performs; and
- how it should evolve to ensure that standardisation remains efficient and adapted to the fast-changing economic and technological environment.

The European Commission has the task of ensuring that the European Union's internal market functions efficiently. Therefore harmonisation standards are particularly important for the EU. Furthermore, an efficiently performing standardisation system is crucial for the EU's objectives in the areas of industry policy, innovation, services and technological development.

### ***IP Federation response***

The membership of the IP Federation is diverse, and so its response was general in nature. Thus the response, IP Federation policy paper No. 1/15, was entirely without prejudice to any response to the consultation which members of the IP Federation may make on their own behalf.

However member companies are very much aware of developments in telecommunications, and in particular that remote communication capability will soon be added to a wide range of products and devices as the "Internet of Things" becomes a reality. Standardised telecommunications technologies are therefore of increasing significance to a wider spectrum of manufacturers and service providers outside the immediate field of telecommunications, including member companies of the IP Federation, many of which have ongoing research and development activities which take account of these developments.

### ***Standardisation***

The IP Federation supports the development of open, consensual standards and their role in enabling new interoperable technologies to be developed in an open and inclusive manner for the benefit of society generally.

### ***Patents and standards***

Patents are a key ingredient in an open standardisation process because they allow participating companies to disclose and share their new technology openly and early, knowing that their inventions will be protected. Without patent protection participants in standardisation would be inclined to keep their technology secret, which would be incompatible with the aim of developing collaborative technology road maps in the form of standards specifications.

### ***Research and development***

IP Federation members are generally accustomed to working with other manufacturers on the technical development of complex products, and are familiar with the role that patents play and the commercial relations that result. Patents are used by member companies in different ways, depending on the nature of their business, but always in order to protect and utilise the very considerable investment which they make in research and development. The fact that an organisation such as the IP Federation, which exists in order to promote the value of intellectual property rights, has such a diverse membership is proof of the commercial importance attached to protecting research and development activity of all kinds through the patents system.

### ***Investment in standards***

Standards can involve substantial long-term investments both in technology contributions (research and development) and specialist resources. Technology contributions generate standard essential patents (SEPs). Successful standardisation is premised on a FRAND (fair, reasonable and non-discriminatory) licensing model which provides access to SEPs on reasonable terms while guaranteeing a fair and reasonable compensation for the use of patented technology to SEP owners. This process encourages continuing investment in useful technologies underpinned by a healthy open standards environment in Europe for the future.

### ***Licensing***

Patent protection enables licensing and the proper control of technology which must be shared in order to enable new 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 and new products and services. Where patents are assigned the legal provisions of most countries operate to protect the commitments made by licensor and licensee.

In the context of standards and telecoms, it is the experience of IP Federation members that the FRAND licensing model can work relatively well. There is a significant amount of patent licensing, although there has been a noticeable number of high profile disputes over recent years among the market leaders. The IP Federation believes it is important to carefully balance the interests of patent owners and implementers of the standards throughout the value chain, and any changes made should be based on empirical evidence of systemic problems. The impact of any such changes, including effects beyond the industries directly affected, should be carefully understood.

### ***Patent infringement***

Generally, whenever patent litigation is undertaken considerable values are at stake. It is never undertaken lightly, because it often 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. 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 require up to a 5 day trial (sometimes more). Decisions on both infringement and validity can be overturned on appeal.

For all these reasons legal costs are often very considerable and operate as a further restraint on litigation. In the UK a further consequence of the uncertainty and cost involved is that preliminary injunctions are rarely sought or granted, as any preliminary injunction which is granted requires a cross-undertaking in damages from the patent owner. Instead, where necessary the UK court will sometimes accelerate the process to trial in order to reduce it to 6 or 7 months instead.

Nevertheless, the IP Federation recognises that these considerations relevant to the UK may not apply to all other countries of the Internal Market.

These aspects apply equally 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. The IP Federation would generally support initiatives that would tend to improve legal certainty for SEPs and all aspects of SEP licensing, and thereby reduce the need for litigation.

### ***Patent quality and the European Patent Office***

IP Federation members have extensive experience of dealing with patent offices, in particular the European Patent Office, and the service they provide. The major patent offices in Europe, such as the EPO, German Patent Office and UK Intellectual Property Office, carry out the patent examination process to a high standard but there will always be room for improvement and the IP Federation supports the broad initiatives the EPO, and other patent offices, continue to take to improve the likelihood that all prior art has been found and that patents they grant will be held valid by the courts and other tribunals. We recommend that SSOs such as the European Telecommunications Standards Institute (ETSI) and the International Telecommunication Union (ITU) continue to work with patent offices to ensure that all available prior art is considered during the patent granting process and to place patent validity at the top of the agenda for all patent offices.

Patent quality is an emerging topic in the debate about patents and standards that is currently being addressed by many SSOs such as ETSI and ITU. However, patent quality is a very subjective criterion. Patent offices generally have little exposure to patents in the post-grant phase yet this is the stage when patent quality manifests itself in the real commercial world. Patent offices should not be side-tracked into attempting to come up with patent quality indices or other measures of patent quality; at best, such determinations will be nothing more than measures of parameters unrelated to the key issue of validity and at worst will be misleading and capable of manipulation.

### ***Commission response***

The Commission published its summary report on the public consultation on patents and standards on 27 October 2015. Respondents confirmed that patents feature an increasing role in many of the areas of ICT standardisation that are central to European policy initiatives such as the Digital Single Market and the Energy Union. Replies also indicate that patent licensing issues greatly concern patent holders and standard implementers alike. Replies have revealed the specific challenges companies face in acquiring information, negotiating licences, and in the case of smaller firms getting overall clarity of IPR infringement exposure. The divergence of opinions also testifies to a dynamic and at times adversarial environment.

Transparency of the patents covered by the relevant standards is an area where stakeholders see scope for improvements if the relevant measures to remedy the current opaqueness have costs that do not outweigh the enhanced transparency benefits. Stakeholders also see positive contributions to SEP licensing coming from an increased role of patent pools and alternative dispute resolution mechanisms. The FRAND concept has been confirmed as vitally important by stakeholders; however, there are doubts as to whether this general concept can be refined further. Patent transfers are of concern as reflected by the fact that rules in some standard setting organisations have recently been changed to account for this. Injunctions have been confirmed as a divisive topic, with further clarity expected by stakeholders to come primarily from the Courts.

On the whole, opinions differ significantly. Thus, based on further analyses the Commission will apply the insights gained from this public consultation and determine the best way to ensure a balanced licensing framework for SEPs as announced in the Digital Single Market Strategy for Europe.

David England, 23 December 2015