EARTO Answer to EC Consultation on Patent & Standards

26 January 2015

Following the EC consultation launched by the services of DG Growth on a "**modern framework for standardisation involving intellectual property rights**", EARTO hereby answers the call for comments by the European Commission. The 350 RTOs members of EARTO play an important role in the innovation ecosystem, covering public and private sectors, addressing all societal challenges and supporting major industry as well as SMEs. The total economic impact of RTOs is estimated at up to €40 billion annually, and at over €100 billion taking account of longer-term spill over effects.[1] They hold a high number of patents and are very active in standard settings[2].

Accordingly, the experts of EARTO Working Group Legal Experts have carefully looked at the study documents and would like to point out some important issues linked to the study "*Patents and Standards Final Report*" (Ref. Ares (2014)917720 - 25/03/2014). In short, EARTO experts would like to point out the following key messages:

1. The study on which the questionnaire is based overestimates the eventual problems of interactions between patents and standards. The study is based on outdated data and information (before 2010) and is not taking into consideration the latest developments in the field of patents (e.g. June 2014 Alice vs CLS Bank case and other references listed below). Accordingly, **the study overestimates tensions between patents and standards in Europe today. This brings the study to conclusions that are not appropriate viewing the reality of the current situation in Europe. Some of the suggestions given by the study are even potentially harmful and counterproductive for innovation in Europe in general.**

2. The study makes the assumption that Europe is facing similar problems as in the US regarding patents management (e.g. patents trolls or tensions between patents and standards) while this is clearly not the case. Accordingly, there is **no need for EU governments to take intrusive action as the issue is not visible in Europe (contrary to the USA before 2010. Taking any public action and regulatory measure as suggested by the study would actually be disturbing a framework working well in Europe**. **The latest developments in the USA demonstrate that law regarding patents and patent enforcement is not being abused.[3] Further, USA government's redress actions regarding patent quality since 2010 are already having positive effects on their patenting system and have lowered the tensions between standardisation and patents**. Regarding this latter issue in the US, the tension between patents and standards was tackled by authorities by raising the quality thresholds of patents accepted and by rejecting the low quality ones. Indeed, the number of patent lawsuits in the US shows a sharp decrease since 2011. In addition, the number of withdrawals by UPSTO of low quality patents with large spectrum applications (which were the principal cause of the tensions between patents and standard) has increased even more sharply since June 2014. For example, between June and August 2014, USPTO has withdrawn 830 patents including 50 only for IBM Company. Last years' efforts to increase patent quality in the US has also led to the reduction of the number of patent litigations, largely facilitated the negotiations to determine whether a patent is essential to a standard and lowered the tensions between patents and standards. Thus, the main action taken by the USA to lower the tension between patents and standards was to raise the quality thresholds of patents: many experts in the USA today believe that there is no additional action necessary.

[1] Technopolis, 'Impacts of European RTOs: A Study of Social and Economic Impacts of Research and Technology Organisations', October 2010, at page 5; available at http://www.earto.eu/fileadmin/content/03_Publications/SummaryEARTO_TechnopolisReport_2011_01.pdf. This is the latest available independent study on the impact of European Research and Technology Organisations.

[2] For example, in France ~120 CEA's researchers are involved in official standard setting organisations (ISO, AFNOR, CEN CENELEC, ETSI, IEC, etc.).

[3] *Ericsson Inc. v. D-Link Inc. et al* (Case 13-1625, December 4, 2014 and cases cited therein. The courts have affirmed that each case is to be assessed on its own cicumstances, with no presumption in favour of either a licensor or licensee. See also *EBay Inc. et al., Petitioners v. Mercexchange, LLC* (554 U.S. 388 (2006).

3. **Should any action be taken to improve the currently well working European patenting system, such action should be aiming only at supporting the well qualified patents courts in Europe by boosting the quality of patents delivered by the European Patent Office (EPO).** When patents are involved in standards, increasing patent quality will also facilitate the negotiations to determine whether a patent is essential to the standard or not, because there will be fewer patents involved in these negotiations and those to be looked at will be of higher quality and easier to assess. Continuing to ensure a high quality of EU patents, combined with keeping a good number of well-qualified patents courts in Europe, is the key for maintaining a healthy patents system in Europe. The role of the EPO to continue boosting patent quality in all fields is important and should be further supported by the European Commission[4]. Indeed, the EPO and standards bodies recognised this in the late 2000s, with joint EPO and SDO initiatives - aimed at patent quality and transparency, and therefore greater legal certainty and improved searching which can help save litigation costs – being underway since at least 2007.[5] The joint initiatives of the EPO and ETSI appear to be the most advanced at this stage, and further improvements can and should be made to ensure that these trends continue.

   After investing in this area to contribute to the European Union being a source of global innovation and a healthy, competitive environment for business, it would be contrary to the EU's interests to take away rights to protect quality patents or standard essential patents through injunctive relief (and based on the actions on relatively few, mainly non-European, litigious companies involved in SEP exploitation). We would also consider this to be contrary to WTO membership obligations, and in particular commitments set out in Articles 33 and 41 of the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPs Agreement), which are required to be part of member national law.[6]

   Any interference with the current balance of basic rights and obligations held by patent owners and licensees would fundamentally impact on EARTO members, and therefore the European Union's global standing for innovation, competitiveness, and quality of life for its Member States.

Finally, please note that to our knowledge no member of EARTO has been approached by the study makers. Should this have been the case, we would have been happy to provide inputs on such developments which are very carefully followed by our members being themselves managers of large patents portfolio. In all cases, **EARTO experts remain ready to provide further input and are available for further discussion**.

[4] See http://blog.epo.org/uncategorized/patents-standards-challenging-task-patent-offices

[5] *As part of its overall strategy, the EPO has been seeking closer involvement with standards organisations in recent years to ensure that the patent system contributes to the promotion of innovation and a healthy, competitive environment for business. For this reason the EPO has concluded similar agreements with ETSI, ITU, IEC and the IEEE*. See http://www.epo.org/news-issues/news/2013/20130611.html

[6] On this point and specifically regarding injunctions, we take the opportunity to highlight that the much-cited US case of EBay Inc. et al, Petitioners v. Mercexchange LLC (547 US 388 (2006) does nothing more than confirm that the general law applies to patents and that there is no general rule in favour of (and therefore nor against) the seeking of injunctive relief to protect property (there being in the form of patents). See pages 261 and 283 of this decision.
The Opinion of Advocate General Wathelet, delivered on 20 November 2014, Case C-170/13 also confirms that patents and the subgroup of standard essential patents are subject to the normal general (civil) and intellectual property laws of the relevant jurisdiction (see paragraphs 7, 8 and 9 of this Opinion).

References of interest on US Situation and on US government redress actions regarding patent quality since 2010

- BILSKI ruling, Supreme Court of the United States, Decision of 28 June 2010 file 08-964.
- Leahy–Smith America Invents Act (AIA) of 2011, PUBLIC LAW LEAHY–SMITH AMERICA INVENTS ACT 112–29, 16 September 2011.
- *"The Evolving IP Market: aligning patent notice and remedies with competition"*, the US Federal Trade Commission, in March 2011.
- *"FACT SHEET: White House Task Force on High-Tech Patent Issues",* US White House, June 2013.
- Alice vs CLS Bank ruling of the Supreme Court of the US, Case 13–298, June 2014.
- *"Apply it to the USPTO: Review of the implementation of Alice vs CLS Bank in Patent Examination"*, Gray-Le-Coz & Duan, 3 November 2014.
- *"Lemley: the case for Congressional patent reform is far weaker than it was a year ago",* IAM Blog 10 October 2014.

EARTO *is a non-profit international association established in Brussels, where it maintains a permanent secretariat. The Association represents the interests of about 350 RTOs from across the European Union and "FP-associated" countries.*

EARTO Vision*: a European research and innovation system without borders in which RTOs occupy nodal positions and possess the necessary resources and independence to make a major contribution to a competitive European economy and high quality of life through beneficial cooperation with all stakeholders.*

EARTO Mission*: to promote and defend the interests of RTOs in Europe by reinforcing their profile and position as a key player in the minds of EU decision-makers and by seeking to ensure that European R&D and innovation programmes are best attuned to their interests; to provide added-value services to EARTO members to help them to improve their operational practices and business performance as well as to provide them with information and advice to help them make the best use of European R&D and innovation programme funding opportunities.*

EARTO Working Group Legal Experts*: is composed of 25 corporate legal advisers working within our membership. Established autumn 2013, this Working Group has also worked on the revision of the State-Aid Rules & the GBER last year. Our experts also worked on setting-up the new DESCA Consortium Agreement model for Horizon2020.*

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