

EARTO Position Paper on the European Licencing Framework for Standard Essential Patents

8 November 2017

EARTO voicing key concerns on EC plans towards a new Communication on SEPs

EARTO hereby provides input to the European Commission's discussions on the licensing of standard essential patents (SEPs) in the context of the EU Digital Single Market (DSM). EARTO is concerned that an unbalanced approach may be taken which would discriminate against IP rights' holders such as Research and Technology Organisations (RTOs). EARTO calls on the European Commission to ensure that its new Communication would not bring any additional risks and uncertainties in the DSM. Today, it is of utmost importance to ensure unity of all EU stakeholders towards a common European goal that is the DSM.

In particular, EARTO is concerned with the following:

- 1. The perceived problematic interactions between patents and standards are overestimated,**
- 2. Applying the concept of "licence for all" would considerably disturb the existing value-chain and would risk lowering the prices of licences for SEPs,**
- 3. The established framework of international treaties, regional and national jurisprudence, and commercial norms is underestimated,**
- 4. There is no focus on the European innovation ecosystem and protecting European knowledge-based economy and interests,**
- 5. Open Source Software is not suitable as a generic replacement for the existing IP-based standardisation processes as conducted by Standard Setting Organisations (SSOs),**
- 6. Setting up ex-ante patent pools to avoid problems that have been over-evaluated is not a viable solution,**
- 7. The global weakening of the IP system that this Communication would induce would considerably endanger innovation processes.**

Why RTOs are concerned by SEPs

The 350 European RTOs members of EARTO are an essential component to our European innovation system. RTOs closely cooperate both with industry, from SMEs to large multinationals across all industrial sectors, and with a wide array of public actors. RTOs have specific business models based on their specific management of Intellectual Property Rights (IPRs). RTOs are large patent portfolio holders and managers: this is why the two larger members of EARTO are holding first positions within patent-based innovation rankings today¹. Among others, their technology transfer activities towards their clients (large & small industry, public authorities, etc.) are based on how they manage their IPRs and patent portfolios as well as their activities in supporting standards development. RTOs' technology-transfer activities take place at all levels: local, national, European and international levels, and all those levels are tackled in their IP strategies, including patenting and linked work on standardisation.

RTOs' technology transfer activities linked to DSM creation

For the last decades, RTOs' technology-transfer activities with their attached IPRs and patents' management have been actively involved in creating today's DSM. Indeed, RTOs contributed to the development of the internet and telecommunication systems, along with internet-based and other communication-based products and services. For example, audio codecs such as MP3 and AAC were developed by the Fraunhofer Institute for Integrated Circuits IIS. Today RTOs are still enabling progress towards the DSM both at European and national levels.

RTOs are active in EU & international technical standardisation

RTOs are actively participating in Standard Setting Organisations (SSOs), Standard Development Organisations (SDOs) and digital standardisation communities (such as CEN-CENELEC, ETSI, ISO, ITU, DVB, ATSC, IETF, OMG,...).

This allows RTOs to support the development of crucial foundational technical standards. Those technical standards are of great importance to allow European industry to scale up technology

¹ [Reuters Innovation Ranking](#), The World's Most Innovative Research Institutions

developments to new products and services that will be internationally competitive and as such further develop the DSM.

Taking the changes in today's digital market into account in order to protect EU interests

At present, the digital market is developing in such a way that it includes app-based functionalities. Europe's competitors within this market are today betting on a new data-driven and app-driven market where the value of IPRs is diminished. Europe's capacities in terms of knowledge creation, technology-transfer and IPRs are key assets that enable it to not only stay competitive in the digital market, but also promote further investment into R&D and innovation. It is important to protect these key assets and not to allow our international competitors to diminish the European innovation ecosystem and knowledge-based economy.

Risks attached to disrupting our current EU digital market regulation

The new EC Communication seems to aim at taking actions that would disrupt our current European market regulation which protects our IPRs' value. We expect EC proposed actions to disrupt the current digital market dynamics, threaten our European innovation ecosystem, resulting in no next-generation business model for the DSM, and leaving industry & jobs creation and market leadership to overseas competitors operating in the seamless, international version of the DSM – being the Internet of Things (IoT).

Europe would move from being a technology and innovation leader to having an over-dependency on foreign-sourced solutions for the DSM. The impact of these disadvantages would be extensive, leading to:

- a decrease in the number of innovative European SMEs
- significant job losses in Europe
- cuts in future science programs and stagnancy in technological development
- loss of control of important platforms for the DSM to overseas entities or governments
- no European 'tomorrow's technology'
- undermining the development of Europe's digital industry
- undermining European competitiveness
- little or no return on investment to Member States and the European Framework Program
- fragmentation of an international market.

The disadvantages to IP right holders resulting from any discriminatory European Commission's intervention would, therefore, have a direct, broad, and substantial negative impact on the European Union's research and development base – undermining its own innovation system.

Accordingly, the following paragraph will detail EARTO concerns on the EC plans for a new Communication on SEPs.

1. The perceived problematic interactions between patents and standards are overestimated

First, the rationale behind the new EC Communication on SEPs is not based on fact² but rather on an overestimation of perceived problems around patents and standards. Such thinking, without any proof that there might really be any market failure, would only bring instability in our European innovation ecosystem through disrupting and unbalancing core legal and technical DSM foundations.

Second, the misconception regarding the role of SDOs affects one of the basic premises of the EC Communication. An SDO cannot be used as a licensing portal. This would take an SDO beyond its role and capability, and will interfere with the other elements of the innovation ecosystem.

Third, licensing – particularly when done on a bilateral basis – is about the building of a trusted relationship between the parties. This remains fundamental regardless of what databases may or may not be created, and as we move collectively towards markets that are supported digitally, there is a need for cooperation at the right levels rather than focussing on the comparatively few litigious companies which are aiming to substantively alter the foundations of our operating environment. The question does become redundant when thinking about the licensing of standard essential patents through patent pools, as these are quite transparent in terms of overall licensing terms and conditions (including royalty rates). The point here is good faith negotiations – both parties are expected to share sufficient information with each other during the negotiation of a licensing agreement so that a real negotiation can take place within a reasonable period.

² See for example also "[Troubling Aspects of the European Commission's Standard-Essential Patents Roadmap](#)" By Koren W. Wong-Ervin* (Global Antitrust Institute) ; Koren W. Wong-Ervin is the Director of the Global Antitrust Institute, and Adjunct Professor at Scalia Law, and former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission.

1.1 Standards Setting Organisations (SSOs) are fully able to deal with complex legal and IP policy issues and to develop standards, including standards involving software

The new EC plans seem to suggest that SSOs/SDOs are unable to deal with complex legal and IP policy issues regarding the licensing of standard essential patents which form an SSO/SDO standard. As stated earlier, licensing is outside the scope of any technical standards development or setting body. Deviating or alienating an SSO/SDO from its purpose will create inefficiencies in technology development and cannot form a legitimate basis for policy intervention.

FRAND: a powerful and market-conducive mechanism

FRAND is the touchstone of most SDO IP policies, and it works. Given the diversity of both contributors to, and users of, standards relevant to communications sectors, it is natural that there will be differences of opinion on what constitutes 'fair' and 'reasonable' in FRAND. Most certainly, the history of international trade illustrates that the meaning of 'fair' and 'reasonable' cannot be prescribed.

It is noted, respectfully, that the meaning of FRAND – whether it be of royalty rates or conduct of parties negotiating a license – cannot be prescribed. There is legitimate concern that interference with market dynamics, legal rights, or the role of the courts through ad hoc and prescriptive approaches to FRAND could have unintended and grave consequences for international trade, technological development, and societal aims. Indeed, where negotiations regarding intellectual property do result in the instigation of court or arbitral proceedings, all legal rights and obligations of the parties should remain intact, the discretion of a court or arbitral tribunal must remain unfettered, and each case must be assessed on its own facts and according to law.

Regardless of the jurisdiction in which a FRAND licence to standard essential patents is concluded, there is a common basis for understanding the framework of FRAND - in its full context - for international communications technology. This framework has international law as its foundations and international commercial norms pertinent to a particular transaction as the guiding touchstones. It is these foundations and touchstones which give those involved in international trade certainty.

Finally, when assessing appropriate FRAND payments for such licenses, there are numerous methods to value intellectual property and its use: no one methodology is preferred in the market or at law. In all jurisdictions, accepted market rates evidenced through concluded licenses, or licenses for comparable technologies, do appear to be the strongest indicator of a FRAND royalty.

Any distortion of policy and law blurs roles in the standard development ecosystem – from the role of standard development bodies to attempts to fetter the role of courts in international commerce. This in turn appears to be negatively impacting innovation itself, creating a costly and fragmented operating environment for legitimate participation in international standard setting and the implementation of the resulting intellectual property - most often through commercial enterprise.

SDOs require disclosure of the essentiality of standard patents

SDO declarations essentially require disclosure of any patents which are or could be essential to the implementation of a standard. This is a good faith disclosure, which is aimed at improving the chances of the implementation of a standard. There is no requirement to undertake an IP search, with the core requirement being timely disclosure. Timely disclosure will depend on whether the IP can be disclosed with some certainty around status and without taking away the right to obtain patent protection.

EARTO Recommendations

EARTO members advise the EU Commission not to introduce fundamental changes to this system, especially in respect of the suggested mandatory essentiality checks:

- First, it should be acknowledged that the final assessment of essentiality is the prerogative of the courts in the rare cases where there is a conflict.
- Second, the term is misleading, as the verification of essentiality is unlike ticking boxes in a short survey. It requires expertise and experience in essentiality assessment and is very time and resource intense. Fundamentally, essentiality checks are also questionably beneficial to the market: with changes to the patent (through patent amendment) and new standard updates or versions how carrying out multiple essentiality checks would be prohibitive to the inventor's business cycle.
- Third, a default verification of essentiality is made redundant by two mechanisms: whenever pools are created, essentiality of all the patents to the standard is verified by an independent expert and during licence negotiations, claim charts are provided by the patent owner following the conclusion of the Non-Disclosure Agreement (NDA).

Some significant concerns should the Commission pursue mandatory essentiality checks in some form are:

- inconsistent results arising between the Commission’s initiative and the assessments made by experts employed by patent pools, thus undermining any efficiency factor associated with pools; and
- those involved in patent pools could become more prone to litigation through challenges to validity and essentiality (as being seen in overseas jurisdictions, as in the case of *Core Wireless v- Apple*³).

This may on the one hand provide more clarity for technology implementers, but will certainly further increase the financial and procedural burdens to participate in standardisation processes conducted by European SSOs. An attempt to fundamentally change the IP Policies of European SSOs might therefore endanger the competitiveness of the European innovation ecosystem. In the US, the recently changed IP Policy within IEEE has caused many former contributors to refuse to participate under the new policy, causing technology development to slowdown and creating uncertainty regarding the creation of identifiable standards due to the high number of negative declarations.

An open question in this regard is whether there should also be disclosure of product specifications where it is asserted that a particular standard has been implemented in the product. This would create balance for negotiating parties, and true transparency. As noted below, however, the overarching decision of *Huawei v. ZTE* and local Member State decisions provides sufficient guidance on what should be disclosed during the negotiation of a licence for standard essential patents.

Would greater transparency help negotiations?

The Court of Justice of the European Union (CJEU) has issued a guidance on the question of transparency regarding the licensing of standard essential patents. In its decision of *Huawei v. ZTE*, the CJEU confirmed the framework for commercial negotiations regarding standard essential patents, with obligations resting on both the standard essential patent owner and the potential licensee. These principles have been since confirmed in a series of recent cases in Germany⁴ and England⁵, among other European jurisdictions.

These obligations are as follows:

- 1 The essential patent holder must ensure it has provided an alleged infringer of its patents notice of infringement by identifying:
 - 1.1 the relevant patent or patents it considers are being infringed; and
 - 1.2 the way in which its patents are said to be infringed.
- 2 The essential patent holder must ensure that it has provided the alleged infringer with a specific, written offer which sets out:
 - 2.1 the licence terms; and
 - 2.2 the royalty, including an explanation of its calculation.
- 3 The alleged infringer must ensure it either:
 - 3.1 accepts the offer or provides a counteroffer in good faith and without delaying tactics; or
 - 3.2 in the event that the alleged infringer rejects the offer, renders an account of the standard essential patent use and provides security.

Regarding the overall conduct of the parties, a RAND or FRAND undertaking is an undertaking to make intellectual property accessible through a negotiated license on fair, reasonable and non-discriminatory terms. It attaches an obligation for both the licensor and the applicant to conclude a license in good faith. The negotiation and conclusion of international licensing agreements has also been addressed by courts beyond Europe, with the normal commercial negotiation approach that was affirmed in *Huawei v. ZTE* also be affirmed in India (such as in the *Intec* decision). One cannot forget that there are globally accepted ways of concluding commercial arrangements.

1.1 Patents and standards coexist in a multilateral international technology market, and the perceived number of litigations involving SEPs is disproportionately low as compared to licence agreements concluded through negotiation

The project of a new EC Communication seems to be based on the idea that there is an increasing number of conflicts between patents and standards. These observations seem to be based on three commissioned reports which have contentious foundations:

- Report for the European Commission on “Transparency, Predictability, and Efficiency of SSO-based Standardization and SEP Licensing” by Charles River Associates, 2017.
- Pentheroudakis, C., and Baron J., Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases, 2017.
- Blind, K., Pohlmann, T., Landscaping study of standard essential patents in Europe, 2016.

³ *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, 2015-2037, Fed. Cir. Apr. 14, 2017.

⁴ *St Lawrence v Vodafone*; *St Lawrence v Deutsche Telekom and HTC*; *Sisvel v Haier*; *One-red v ASUS and ACER*, *NTT DoCoMo v HTC*.

⁵ *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd and Huawei Technologies (UK) Co. Ltd* [2017] EWHC 711 (Pat) (*Unwired Planet v. Huawei*).

No conflict between IP and Competition Law

Despite the fact that, in recent years, there have been submissions made in both policy and legal fora that there is a tension between intellectual property enforcement and antitrust enforcement. The interaction between patent law and competition law is not characterised by an inherent conflict between IPR and competition rules. Both aim to promote consumer welfare and efficient allocation of resources (EU Guidelines Art 101, para 7):

- It has been consistently confirmed by courts in a number of jurisdictions that there is no legal presumption that standard essential patents grant any form of automatic monopoly over a (undefined) market in the antitrust context⁶, or that enforcing a patent right is an abuse of market power⁷.
- It is also very important to note that *'[t]here is no implication that there is an inherent conflict between intellectual property rights and [...] competition rules. Both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources.'*

Under European law, *Huawei v. ZTE* confirms that there is no special set rule that can be applied to standard essential patents. This is also reflected in the EU Guidelines: *'[...] the standards set forth in [those] guidelines must be applied in the light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and these guidelines must be applied reasonably and flexibly'*, and in the EU Horizontal Guidelines which provide that *'[...] even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis'*.

This distortion of policy and law has blurred roles in the standard development ecosystem – from the role of standard development bodies to attempts to fetter the role of courts in international commerce. This in turn appears to be negatively impacting innovation itself, creating a costly and fragmented operating environment for legitimate participation in international standard setting and the implementation of the resulting intellectual property – most often through commercial enterprise.

Patent Hold Up, Patent Hold Out, Royalty Stacking

The most common allegation framed within competition or antitrust law during a license negotiation for standard essential patents that are subject to a FRAND undertaking appears to be that a patent owner is seeking to extort money from a user of that intellectual property through the threat of injunctive relief – thus abusing a dominant position in the market. Such an allegation most often focuses on the royalty rate being sought as part of the license arrangement, ignoring the other elements of FRAND.

The fundamental flaw in the above-cited commissioned studies is that all are based or framed on the assumption of patent hold up and royalty stacking. It would be disingenuous to base any policy intervention on the outcomes of any of those studies. Indeed, there is no presumption that a standard essential patent grants market power and there is no presumption of patent hold up, patent hold out or royalty stacking.

The key point here is good faith negotiations – both parties are expected to share sufficient information with each other during the negotiation of a licensing agreement so that a real negotiation can take place within a reasonable period of time. It is confirmed in jurisdictions around the world that there can be no assumption of patent hold up or patent hold out. In the US, for example, there is the Federal Circuit decision of *Ericsson v. D-Link* (confirmed in the Federal Circuit decision of *CSIRO v. Cisco*) that there is no presumption that patent hold out or patent hold up, and if it is asserted and is causing problems, then it must be pleaded in court and the assertion supported by cogent evidence. The assessment is made on a case by case basis. Indeed, there is no presumption in fact or at law that patent hold-up⁸, royalty stacking⁹ or lock-in exist as the 'state of being'. *'Certainly something more than a general argument that these phenomena are possibilities is necessary'*¹⁰.

⁶ See: [EU Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements](#), in particular at paragraphs 3, 6, 7-9, and the remainder of Section 2 and the [EU Horizontal Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#) at paragraph 269. Guidelines under 'Purpose' at Page 1. See also the U.S. Department of Justice and the Federal Trade Commission [Antitrust Guidelines for the Licensing of Intellectual Property](#) (12 January 2017), in particular the General Principles set out on page 2, section 2.2 ; [Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition](#) issued by the U.S. Department of Justice and the Federal Trade Commission (April 2007) at Chapter 2. For U.S. case law regarding the seeking of injunctions, see the US Supreme Court in [EBay Inc. et al, Petitioners v. Mercexchange LLC 547 US 388](#) (2006); See also See 35 USC 154(a)(1), 261, and 283. Refer also to *Weinberger v. Romero-Barcelo* 456 US 305 (1982).

⁷ Bostyn, Sven and Petit, Nicolas, [Patent=Monopoly: A Legal Fiction](#) (December 31, 2013).

⁸ 'Patent hold-up exists when the holder of a SEP demands excessive royalties after companies are locked into using a standard.' *Ericsson v. D-Link*, at *7 - 8.

⁹ See *Ericsson v. D-Link*, footnote 8 at *50.

¹⁰ *Ericsson v. D-Link*, at *54, where the US Court of Appeals for the Federal Circuit addressed this.

In the U.S., the consequence of finding patent hold out (referred to as wilful infringement in the courts) is the awarding of treble damages. Wilful infringement is also coming into focus of the European courts, where we are also seeing that case law from European jurisdictions strongly focuses on assessing the overall conduct of the owner of a standard essential patent and a potential licensee, rather than establishing an appropriate royalty rate between these parties who fall into dispute regarding FRAND.

If we look abroad, conduct has been considered in recent US case law, in order to assess damages for patent infringement. Treble damages were awarded in *Core Wireless Licensing S.a.r.l v. LG Electronics, Inc. and LG Electronics Mobilecomm U.S.A., Inc.*¹¹. In Final Judgment, the court stated that 'LG's decision to terminate negotiations and continue operations without a license was driven by its resistance to being the first in the industry to take a license, and not by the merits or strengths of its non-infringement and invalidity defenses'¹². In the case of *SRI International Inc. v. Cisco Systems Inc.*,¹³ attorney fees and enhanced damages were awarded against the defendant for both wilful infringement and its aggressive and unreasonable conduct of the trial.¹⁴

It is the conduct of both parties to the commercial negotiation for the licensing of standard essential patents which is important, with the touchstone being acting in good faith for those negotiations.

2 Applying the concept of "licence for all" would considerably disturb the existing value-chain and would risk lowering the prices of licences for SEPs

Compulsory licensing of standard essential patents is not warranted, nor is the dictation of a licensing point. The Commission's Horizontal Cooperation Guidelines clearly state that access to technology is the goal of standardisation, and aim to provide a framework which recognises legal rights and commercial norms while permitting assessment of fact situations on a case by case basis¹⁵. Mandating a per se 'license to all' rule that would severely impact SEP holders' rights, disrupt FRAND practices recognised by *Huawei v. ZTE*, and impact on long-standing conventional and customary industry practices (and corresponding business and licensing model) which have been instrumental in driving an overwhelmingly successful ecosystem. 'License to all' is inherently incompatible with the Horizontal Cooperation Guidelines¹⁶, and ignores consequences on IP regarding patent exhaustion, appropriate valuations of IP, and European RTO participation in global innovation systems.

EARTO Recommendations

EARTO members strongly believe that this concept would considerably disturb the existing value-chain and risks devaluing SEPs so that their true value cannot be appropriately determined for actual use cases. In any case, licensing practices should not be addressed or determined at the level of an SSO/SDO.

3 The established framework of international treaties, regional and national jurisprudence, and commercial norms should not be underestimated

As noted above in Section 1, FRAND is an exceptional, powerful, and market-conducive mechanism. FRAND describes a set of commercial principles, which provide precise, delimited ramifications of the licensing process. A FRAND undertaking is an undertaking to make IP accessible through a negotiated license on fair, reasonable and non-discriminatory terms. It requires good faith negotiation between the parties to conclude a license (*Huawei v. ZTE*). These principles and their practical implementation have been confirmed by the Court of Justice of the European Union in *Huawei v. ZTE*. They constitute a solid legal basis for Standard Essential Patent Licensing in Europe. The CJEU in *Huawei v. ZTE* affirmed that the holder of an Essential Patent is in the best position to determine FRAND, and that recognised commercial practices in the field should be considered (such as other licences in place for the subject standard essential patent(s)). Courts in several jurisdictions of the Member States of the European Union adopted the guidance of the CJEU in *Huawei v. ZTE*, which demonstrates that the principles elaborated by the CJEU are being promulgated by national courts.

EARTO Recommendations

EARTO members urge the Commission to consider any of its high-level recommendations considering the developing jurisprudence and following a detailed impact analysis.

¹¹ Case No. 2:14-cv-912-JRG (hereinafter referred to as *Core Wireless v. LG*).

¹² *Core Wireless v. LG*, at page 3.

¹³ Civ. No. 13-1534-SLR (hereinafter referred to as *SRI v. Cisco*).

¹⁴ See *SRI v. Cisco*, at pages 64-68.

¹⁵ E.g. paragraph 279 states that the non-fulfilment of "any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1)" but will rather require self-assessment.

¹⁶ See paragraph 284, which provides: 'In the case of a standard involving IPR, a clear and balanced IPR policy, adapted to the particular industry and the needs of the standard-setting organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organisation' (footnotes omitted).

4 The focus should be put on the European innovation ecosystem and protecting European knowledge-based economy and interests

This overestimation of problems leads to conclusions that are not appropriately assessing the reality of the current situation in Europe, and mainly seems to have relied on datasets pertaining to the US innovation ecosystem before the America Invents Act, and before the US Supreme Court's ruling in *Bilski* (*Bilski v. Kappos*, 561 U.S. 593 (2010)) and *Alice* (*Alice Corp. v. CLS Bank International*, 573 U.S. 34 S. Ct. 2347 (2014)). These new US provisions have resulted in an increase in the quality threshold required for the grant of patents by the US Patents and Trademarks Office (USPTO).

Globally, in the USA since 2010 and the redress actions for increasing patent quality, the number of SEPs has decreased. For example, the number of SEPs declared in standards at ETSI decreased by 35% between 2010 (start of the correction in the US) and 2015¹⁷, further illustrating the importance of using recent datasets. Globally also, the total number of IP lawsuits has decreased. In the USA, this is thanks to the redress actions for increasing patent quality and thanks to the America Invents Act of 2011. For example, the number of patent cases filed in the third quarter of 2017 showed a decrease of more than 30% compared to the third quarter of 2012¹⁸. Moreover, the number of defendants in patent litigations has even dropped more dramatically because, thanks to the America Invents Act of 2011, the number of defendants per litigation has also dropped dramatically¹⁹. These redress actions in the USA brought the quality of USPTO examination more in line with the EPO practice and has greatly mitigated earlier problems in the US.

Europe has a generally well-functioning and internationally competitive market, with the rule of law intact and guidance for standardisation participation and implementation available. Achieving the objective of having a DSM will involve multi-disciplinary and multi-stakeholder cooperation, significant investment, and a sharing of rewards. The public discussions and debates relating to standard setting and the licensing of standard essential patents appear to have failed to mature from a 'them against us' approach. And even though there is absolutely no empirical evidence of the systemic problems referred to in the three reports²⁰, its authors say the European Commission considers that these problems do exist, and need addressing through policy intervention.

With the advent of 5G and IoT, Europe will need to endorse the FRAND model, as affirmed by the CJEU, in order to maintain its global leadership role in future standardisation. While fine-tuning where necessary should be possible to ensure a true and fair balance between all commercial interests, EARTO members urge the Commission to focus on the particular strengths and qualities of the European Market. A Vision for Europe in the DSM with high-level policy guidelines should acknowledge all actors and stakeholders in this research-intensive sector.

EARTO Recommendations

Similarly to the [EARTO paper](#) published in January 2015 as an answer to EC's Consultation on Patents and Standards in 2014, EARTO sees no need for fundamental changes in the Standard Setting processes in Europe. Moreover, EARTO members would like to warn against the overestimation of problems as potentially harmful and counterproductive for innovation in Europe in general, with the risk to take actions that would be lowering the value of licences for SEPs or imposing certain business models by excluding others, or complicate without reason the standardisation process.

5 Open Source Software is not suitable as a generic replacement for the existing IP-based standardisation processes as conducted by SSOs

EARTO members recognise the perspective that Open Source Software (OSS) might have in some selective fields, e.g. eGovernment where data interchange is of paramount importance. However, they also believe that OSS is not suitable as a generic replacement for the existing IP-based standardisation processes as conducted by SSOs. This choice should be left to the stakeholders in the respective markets, wherever and whenever possible. The technology landscape is always comprised of different IP (eg copyright, patents, trademarks, trade secrets) and is accessible through different models (eg proprietary, open source, mixed models).

A clear example of the interaction between standards and open source is the ETSI MANO project, wherein there is a strict project management protocol put in place to ensure that there is no contamination of standard through unknown third-party IP. In the MANO project, the dichotomy is

¹⁷ [Landscaping Study on SEPs](#), IPIytics, 2017

¹⁸ Lex Machina Q3 2017 Litigation Update; October 18th, 2017

¹⁹ Intellectual Asset Management; "Alice decision a big reason for sharp fall in US patent litigation, says Mark Lemley"; 9th of October, 2014

²⁰ Report for the European Commission on "Transparency, Predictability, and Efficiency of SSO-based Standardization and SEP Licensing" by Charles River Associates, 2017.

Pentheroudakis, C., and Baron J., Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases, 2017. Blind, K., Pohlmann, T., Landscaping study of standard essential patents in Europe, 2016.

ensured through processes which enable OSS developers to gain access to standard specifications and testing applications outside of ETSI. OSS developers are then welcome to provide user feedback on the said specification in the form of text, but they do not participate in the standard drafting process. OSS appears to be a useful tool for fast-tracking specification development which meets market needs, and for having options for implementation of a standard available in a short time-frame.

However, one should avoid creating a dichotomy between hardware licencing managed by SSOs and open source software managed by OSS communities, under the presumption that software standards should be "open". On the contrary, it should be noted that in many fields of technology software and hardware solutions are intertwined, eg. Internet of Things (IOT) and 5G.

In addition, the existence of digital standardisation communities that on average do not favour a single type of business model (not limited to OSS for software; not against Computer Implemented Inventions), such as IETF and OMG, makes this dichotomy even more artificial. Moreover, even in digital fields, a standard is often a technical specification and not a software per se. Therefore, there is no reason to impose the business model of the means to address a technical specification.

EARTO Recommendations

EARTO members therefore strongly advise that any implementation of this EC Communication should leave room for SEPs that pertain to Computer Implemented Inventions and should not favour OSS licences as the preferred licensing model for software involved in digital standards. If not, the legal possibilities for creating a return on investment could influence the technical choices and directions taken in technical standardisation. RTOs firmly believe that this should be avoided in the interest of a sound innovation ecosystem. In addition, there are some technical standards that cannot be described in plain language, but are themselves formulated as software, often as commented (C) source code. These are in fact "essential copyrights". Care should be taken not to interfere with existing practice developed over the years by the SSOs and by digital standardisation communities having sound IPR policies for essential patents and essential software copyrights. In supporting OSS licences as the preferred licensing model for software involved in digital standards, the project of EC Communication is therefore too restrictive in its analysis, which could hamper the development of the DSM, innovation in Europe and the software industry (software publishing) in Europe, and software/digital activities that RTOs might have within the digital industry.

Unfortunately, this project of EC Communication favours one business model against all other business models for software and SEPs, and appears to penalise certain business models. EARTO calls on EC not to put in place unsustainable proposals and to stay in line with Europe's foundations for the DSM, strictly avoiding discriminating against all forms of intellectual property. All business models can co-exist and will collectively contribute to meeting the DSM's objectives for the benefit of society, as well as consumer choice, market demand and public procurement. As only 10% of European software publishers chose the pure OSS model to finance their RD&I, 90% of European software publishers would be de facto excluded from software standardisation activities²¹. Favouring open source in standardisation might therefore result in low tech DSM standards and harm European's software industry.

6 Setting up ex-ante patent pools to avoid problems that have been over-evaluated is not a viable solution

EARTO members firmly believe that setting up ex-ante patent pools to avoid problems that have been over-evaluated is not a viable solution. Patent owners need to keep autonomy of their patents to be included in eventual patent pools linked to the standards. Patent pools are voluntary and can only be created ex-post, when and where actually needed to manage the licensing programs if they are too big to be managed by one of the owners, or where "one-stop shopping" proves necessary to accommodate the needs of the licensees of SEP's. It should also be noted that a patent can be a SEP under several technical standards set by various SSOs. It is further noted that competition law requires that SEPs be available on both a bilateral licensing basis, even if the relevant standard essential patents are the subject of pool licensing.

7 The global weakening of the IP system that this Communication would induce could considerably endanger innovation processes

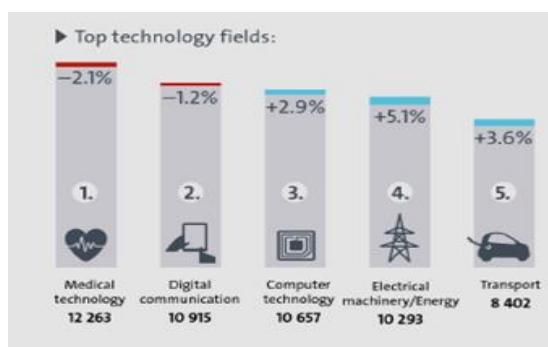
The Commission's communication risks considerably weakening the role of IP as a driver for innovation while at the same time putting in place the Unitary Patent and the Unified Patent Court which aim at reinforcing the role of IP. This seems quite contradictory.

Indeed, Digital communication patents and Computer Technology patents were the second and the third most active patent fields at EPO in 2016²². Therefore, the global weakening of the IP system in

²¹ Communiqué de presse; 14/01/2016; AFDEL; SFIB; FEVAD; Syntec numérique; , Projet de loi République Numérique

²² [EPO Annual Report 2016 Infographic](#)

ICT that this communication would induce would lower incentives for ICT players to file ICT patents (either hardware or Computer implemented patents CII) and EPO would be harmed”



Besides, as demonstrated by recent studies by the EPO and EUIPO, IPR-intensive industries have “accounted for 39% of the EU’s economic output [some EUR 5.7 trillion annually] and 26% of employment during the period 2008-2010, attesting to the value of IP to the European economy”²³. The study also shows the impact on employment, trade and contribution to GDP²⁴:



A further study by the EPO and EUIPO demonstrates that the general public would not support any dilution of rights of IP holders. Indeed, the study found that the general perception of 97% of respondents believe it is important that inventors, creators and performing artists can protect their rights and be paid for their work. 70% believe nothing can justify the purchase of counterfeit goods. 78% believe that buying counterfeits ruins businesses and jobs²⁵.

EARTO and its Working Group Legal Experts remain ready to provide additional input on this topic and are available for further discussion with EU institutions to ensure a sustainable European regulatory framework for IPRs, which is crucial for technology transfer in the R&I Ecosystem and key to boost innovation-led growth in Europe.

EARTO - European Association of Research and Technology Organisations

Founded in 1999, EARTO promotes Research and Technology Organisations and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.

RTOs - Research and Technology Organisations

From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs’ technologies cover all scientific fields. Their work ranges from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.

EARTO Working Group Legal Experts: is composed of 25 corporate legal advisers working within our membership. Established in autumn 2013, this Working Group has also worked on the revision of the State-Aid Rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020. More recently they were at the origin of the EARTO Paper on Open X, the EARTO Background Note on the US Federal Agencies Data Sharing Policies, and the EARTO voting recommendation for Globally Competitive Standardisation in the Digital Single Market.

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²³ EPO and EUIPO, [Intellectual property rights intensive industries and economic performance in the European Union](#), Industry-Level Analysis Report, October 2016 Second edition, at page 3.

²⁴ [Joint EPO-EUIPO study highlights economic benefits of IP for Europe](#), EPO, 2016

²⁵ [IP Perception](#), EUIPO, 2017