

Modernising ICT Standardisation Policy in the EU: the Way Forward (ENTR/D/4)
European Commission – BREY 6/60
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**Comments of the Computer & Communications Industry Association
concerning the European Commission's Consultation on the White
Paper "Modernising ICT Standardisation in the EU - The Way Forward"**

The Computer & Communications Industry Association (CCIA) is dedicated to open markets, open systems, and open networks. CCIA members participate in the information and communications technology industries, ranging from small entrepreneurial firms to the largest in the business. CCIA members employ nearly one million people and generate annual revenues exceeding \$200 billion. CCIA and its members subscribe to the principle of "full, fair, and open competition."

CCIA commends the Commission for undertaking this inquiry in ICT standards. Standardisation is extremely important for promoting innovation, user confidence, and competition in ICT. Standards are critical in public sector applications, since businesses and citizens must be assured that government services are not biased in favor of certain stakeholders or susceptible to manipulation and disruption. It is essential that governments be able to reference industry standards whether they are developed by traditional standards development organizations or by consortia. However, the referencing of standards should be keyed to specific expectations concerning the standards development process, continued evolution, availability, and usability.

General Comments: Need for Policy Framework

The strategic importance of ICT standards has broad and diverse policy implications that demand a close and continuing examination of different ICT ecosystems. Particular attention must be paid to the problematic relationship between patents and standards in order to reduce and, where possible, eliminate the tensions and conflicts that have built up within recent years. The Commission should be aware of emerging trends in patent assertion and the growing potential of patents for undermining investments in standards, products, and services on a large scale – especially where the final product or service is complex and networked. The patent owner's potential reward for asserting patents against a standard after the standard has been adopted can far exceed the normal rewards from patent exclusivity in a transparent market.

With this in mind, the Commission should examine the merits of different SDO and consortium approaches to patents and licensing in terms of the economic incentives and interests behind different uses of patents and standards. The analysis must encompass not only the traditional institutional view of “open” as a matter of process but the user view of “open” in terms of availability and use. Royalty-free availability is extremely important when there are a large number of potential implementers, especially when many are SMEs. It should be made clear that royalty-bearing licenses discriminate against open source distribution and business models, which explains why software standards organizations adopt policies requiring royalty-free licensing. Royalty-free availability is less important when implementers are all directly involved in the standards setting process and are limited in number by high barriers to entry.

The Commission should explore, articulate, and support the natural division of labor between standards and patents. As the White Paper suggests, specifications for interoperability should be minimal. The more minimal the specification the less likely it will include patentable functionality, although the likelihood of conflict also depends on the quality of issued patents. For example, minimal specifications for the exchange of data are to a large degree arbitrary choices that should not meet threshold requirements of inventive step or patent-eligible subject matter. The growing conflict between standards and patents illuminates the burden of including logical manipulation of numbers and symbols as patentable subject matter.

The institutional imbalance between patents and standards should be recognized and remedied. Patents are monetized with increasing frequency in a variety of ways; they are managed by a well-resourced constellation of professionals and institutions, and patents. Patents are often presented as supreme legal rights that trump other economic and social values – including large investments in standards and complex products made by both providers and users. By contrast, standards are managed by engineers as shared or social assets whose value cannot be directly measured or monetized. This imbalance is especially pronounced in ICTs where standards are uniquely important and patents are on the whole considerably less valuable than in pharmaceuticals, chemicals, and biotechnology. Yet where an unknown patent reads on an industry-wide ICT standard, it enjoys the potential for holding an entire industry hostage and extracting value up the burden on the affected economic sector.

Specific Recommendations

1. Since patent ambush by non-participants cannot be dealt with by the standards entity itself, it is essential that it be addressed publicly. As it is, opportunistic patent holders are motivated to hide patents and delay asserting them until the technology is widely adopted as a standard and embedded in high-value products. The Commission should develop and implement policies for

requiring patent holders to assert rights in a timely manner and insulating users of qualified open standards processes against surprise attacks.

2. Similarly, commitments made by patent holders, whether in the form of a license, a promise to license, or a covenant not to sue, should be enforceable against assignees of the patent. Non-practising patent holders face no liability from countersuit and so enjoy greater freedom in asserting patents. Since patents will be most valuable in the hands of non-practising entities, arbitrage will move patents from “low-value” uses (as part of large operating company portfolios) to high-value uses (holdup of operating companies by non-practising entities or “trolls”).

3. The Commission should monitor the problem of “royalty-stacking.” Better information is needed on whether royalties on patents may be disproportionate to other inputs – and how this may be changing over time as a result of changes in industry structure, globalization, and other factors.

4. Since few find it worthwhile or prudent to challenge prices under a RAND commitment, the Commission should encourage ex ante licensing commitments through non-collusive maximum-price offers. Such offers should be made prior to any a group commitment to a technology path that may infringe on the patent. Ex ante licensing will help reduce ex post price discrimination that can be justified under volume pricing or other “nondiscriminatory” rationales that come into play when patent holders are able to negotiate with users individually and in isolation.

5. The Commission should encourage and help all standards organizations to develop guidelines and best practices for patent disclosure and licensing commitments. Sound internal processes help assure the quality and usability of standards and minimize concerns about disruption and abuse.

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