ICLE International Center for Law & Economics

ICLE Response to EU Commission Call for Evidence Concerning a New Framework for Standard-Essential Patents
May 11, 2022
Geoffrey A. Manne, Dirk Auer, Kristian Stout and Ben Sperry

Introduction

We thank the European Commission for this opportunity to comment on its call for evidence concerning a new framework for standard-essential patents. The International Center for Law and Economics (ICLE) is a nonprofit, nonpartisan research center whose work promotes the use of law & economics methodologies to inform public-policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth. ICLE's scholars have written extensively on competition, intellectual property, and consumer-protection policy.

In this comment, we express concerns about the commission's plan to update the legal framework that underpins standard-essential patent licensing in Europe.

For obvious reasons, the way intellectual property disputes are resolved has tremendous ramifications for firms that operate in standard-reliant industries. Not only do many of the firms in this space derive a large share of their revenue from patents but, perhaps more importantly, the prospect of litigation dictates how firms structure the transfer of intellectual property assets. In simple terms, ineffectual judicial remedies for IP infringements and uncertainty concerning the resolution of IP disputes discourage firms from concluding license agreements in the first place.

The key role that IP plays in these industries should impel policymakers to proceed with caution. By virtually all available metrics, the current system works. The development of innovative technologies through standards development organizations (SDOs) has led to the emergence of some of the most groundbreaking technologies that consumers use today;[1] and recent empirical evidence suggests that many of the alleged ills that have been associated with the overenforcement of intellectual property rights simply fail to materialize in industries that rely on standard-essential patents.[2]

At the same time, "there is no empirical evidence of structural and systematic problems of holdup and royalty stacking affecting standard-essential patent ("SEP") licensing."[3] Indeed, "[t]he notion that implementers in such innovation–driven industries are being suffocated by an insurmountable patent royalty stack has turned out to be nothing more than horror fiction."[4] Yet, without a sound basis, the anti-injunctions approach increasingly espoused by policymakers unnecessarily "adds a layer of additional legal

complexity and alters bargaining processes, unduly favoring implementers."[5]

Licensing negotiations involving complex technologies are legally intricate. It is simply not helpful for a regulatory body to impose a particular vision of licensing negotiations if the goal is more innovation and greater ultimate returns to consumers. Instead, where possible, policy should prefer allowing parties to negotiate at arm's length and to resolve disputes through courts. In addition to maintaining the sometimes-necessary remedy of injunctive relief against bad-faith implementers, this approach allows courts to explore when injunctive relief is appropriate on a case-by-case basis. Thus, over the course of examining actual cases, courts can refine the standards that determine when an injunctive remedy is inappropriate. Indeed, the very exercise of designing *ex ante* rules and guidelines to inform F/RAND licensing is antagonistic to optimal policymaking, as judges are far better situated and equipped to make the necessary marginal adjustments to the system.

Against this backdrop, our comments highlight several factors that should counsel the commission to preserve the rules that currently govern SEP-licensing agreements:

For a start, the SEP space is far more complex than many recognize. Critics often assume that collaborative standard development creates significant scope for opportunistic behavior—notably patent holdup. However, the tremendous growth of SEP-reliant industries and market participants' strong preference for this form of technological development suggest these problems are nowhere near as widespread as many believe.

Second, weakening the protections afforded to SEP holders would have second-order effects that are widely ignored in contemporary policy debates. Weaker SEP protection would notably encourage firms to integrate vertically, rather than to specialize. It would reduce startup companies' access to capital markets by making it harder to collateralize IP. Curbing existing IP protections would also erode the West's technological leadership over economies that are heavily reliant on manufacturing and whose policymakers routinely undermine the intellectual property rights of foreign firms.

Finally, critics often overlook the important benefits conferred by existing IP protections. This includes the comparative advantage of injunctions over damages awards, as well as firms' ability to decide at what level of the value chain royalties will be calculated.

Read the full comments here.

[1] *See, e.g.,* Dirk Auer & Julian Morris, *Governing the Patent Commons*, 38 CARDOZO ARTS & ENT. L.J. 294 (2020).

[2] *See, e.g.,* Alexander Galetovic, Stephen Haber & Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. COMPETITION & ECON. 549 (2015). This is in keeping with general observations about the dynamic nature of intellectual property protections. *See, e.g.*, RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 42-44 (2013).

[3] Oscar Borgogno & Giuseppe Colangelo, *Disentangling the FRAND Conundrum*, DEEP-IN Research Paper (Dec. 5, 2019) at 5, *available a*t https://ssrn.com/abstract=3498995.

[4] Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L.J. 1381, 1411 (2017).

[5] Borgogno & Colangelo, *supra* note 3, at 5.

View Article