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Submitted to Consultation on Standard Essential Patents
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Basic Information

What is your name?

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What is your organisation?

Organisation:
Computer & Communications Industry Association

What sector is your business active in?

Type your answer in the box provided:
Trade association for technology, communications, and Internet companies.

How large is your organisation by number of employees?

Type your answer in the box provided:
Our organization has approximately 40 employees, representing member companies with more than 2 million employees worldwide.

In what capacity (role) are you responding to this consultation?

Type your answer in the box provided:
Senior Counsel for Innovation Policy

Company information

Please provide any company information that is relevant to responding to this consultation :

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 2 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

Potential measure 1: Rate Determination Track (RDT)

1. Would an RDT within IPEC meet our objectives of providing fast and efficient rate determinations?

Provide your answer in the box below:

In many circumstances, an RDT would not be able to provide such determinations. SEP negotiations can be complex not because they occur outside of a tribunal but because many different factors go into determining a FRAND rate. This weighs against an RDT providing significant efficiency gains.

In addition, the effectiveness of an RDT would depend heavily on the ultimate structure and procedures adopted for the RDT. The RDT proposed in this consultation would only be available in circumstances where "infringement, essentiality, and validity are not in dispute." In this circumstance, a court would similarly be able to omit the infringement, essentiality, and validity phases. As such, an RDT is unlikely to be significantly faster or more efficient than a general court can be in those circumstances. Both the RDT and a court would need to examine the same wide scope of evidence, review similar expert analysis, and ultimately conduct the same determinations of what a FRAND rate should be.

And because infringement, essentiality, and validity typically are in dispute, it is unclear how much benefit would actually be provided by the proposed RDT. As such, while it is possible that it may provide a fast and effective rate process in some circumstances, in the event an RDT is adopted we would recommend trialing it via a pilot program prior to full-scale adoption in order to ensure that it both provides improved rate determinations and is actually utilized.

2. Locating an RDT in an existing court structure has advantages, but are there any alternatives that could achieve the government's objectives?

Provide your answer in the box below:

3. What are your views on how the government could ensure a rate determination route is accessible to SMEs?

Provide your answer in the box below:

4. What should the remit and scope of an RDT be e.g. reasonable licence rates and terms; who brings the claim (licensor, licensee or other parties)?

Provide your answer in the box below:

A RDT as described in the proposal, which does not address cases unless there is no dispute on infringement, essentiality, and validity, would effectively be limited to determination of a reasonable license. This could include both rates and non-rate terms, although in some circumstances parties might disagree solely on a type of rate but not other terms. The RDT's remit should not extend beyond rate determination, and in any given case should not extend beyond the terms actually in dispute between the parties.

Regarding who brings the claim, it should not be limited. Either of the licensor or licensee could bring the claim. In appropriate circumstances, a third-party might be a relevant claimant as well. For example, a manufacturer could conceivably bring a rate determination request on behalf of its customers to address a set of abusive assertions against those customers by a SEP holder. Similarly, an industry association could bring a request on behalf of its membership.

5. Are you aware of any additional evidence or research the IPO could utilise to inform the development of the RDT, or alternatives to the RDT that achieve the same outcomes?

Provide your answer in the box below:

6. How do you think an RDT should be structured and resourced to be effective and accessible (e.g. composition of a panel with relevant expertise, decision-making processes, procedural rules)?

Provide your answer in the box below:

7. In your view, how would the government's proposed RDT provide efficiencies above and beyond what is available elsewhere in the High Court?

Provide your answer in the box below:

As discussed in our answer to Question 1 above, an RDT is unlikely to be significantly faster or more efficient than a general court can be in at least some circumstances. Both the RDT and a court would need to examine the same wide scope of evidence, review similar expert analysis, and ultimately conduct the same determinations of what a FRAND rate should be. However, any process that would help provide a faster, more accurate rate within the scope of the interim license framework would be useful and promote efficiencies in private industry and at the courts.

In addition, as discussed in more detail in response to Question 8 below, the inclusion of an aggregate royalty rate guidance process would significantly improve efficiencies by both providing critical information to market participants before they decide whether to implement a standard and by reducing the burden on the courts if licensing rates are litigated. The High Court is less suited to gathering this type of information and generally must be reactive to a case being filed, rather than a proactive option potential licensees and licensors can examine prior to investing resources.

8. What would be your preferred model to base licence rate calculations? What specific methodologies or principles do you believe should be considered?

Provide your answer in the box below:

CCIA strongly recommends that UKIPO propose an aggregate royalty rate determination. This applies both to the RDT proposal and more generally to SEP licensing negotiations. A new entrant into a standardized market lacks any publicly-available information on aggregate royalty rates for the adoption of a standard and licensing needed SEPs. The lack of any information on total royalty burden makes it difficult—if not impossible—to estimate the total cost of production of a product, which in turn renders business decisions on whether to enter a standards-based product market significantly riskier. This, in turn, tends to depress competition and thereby increase consumer prices.

Beyond the new entry concerns, the lack of aggregate royalty rate information makes it difficult for a potential licensee to understand whether a received offer is actually FRAND. In litigation, this dynamic also exists, with courts lacking information about aggregate royalties. This lack of information makes royalty determination in litigation more difficult as well.

Rather than having aggregate royalty rates for the patent licenses needed to implement a standard be hidden information, determined only behind non-disclosure agreements and in court cases, UKIPO should propose a transparent, open process designed to provide guidance on the expected aggregate royalty rate. Such a process would broadly facilitate FRAND licensing of SEPs, promote competition by reducing the licensing risk barrier to entry, and promote adoption of standards into new product markets and the expansion of existing standards-based product markets. It would also combat the royalty-stacking problem in which the sum of demanded royalty rates from individual licensors exceeds the value of the standardized technology. Guidance on an aggregate royalty rate for a given standard would also support the calculation of individual licensing rates in negotiations and litigation.

UKIPO is well-suited to manage such a process. Fees for usage of the process could be provided by parties requesting an estimate, limiting the impact of fees on SME access to the process. Any such process should be an open process in which any interested party can participate and submit evidence for evaluation by a neutral panel. Participants would include both SEP owners and SEP users—many of whom, like a number of CCIA's members, are involved

with both sides of the licensing negotiation.

Regarding specific methodologies used to determine a rate, whether individual or aggregate, CCIA does not take a position on if any methodology would be universally appropriate. However, any methodology utilized must have sufficient scientific rigor to be used.

Within that constraint, any rate-setting model must focus on the value of the patent to the standardized technology, not on the end-user value of the product that technology is ultimately incorporated within. It is fundamentally inappropriate to look at, for example, end-user pricing of a vehicle to determine the value of a specific sub-function within cellular network functionality incorporated into the vehicle. Instead, the relevant product would be the cellular chip or module incorporating the relevant functionality, with the ultimate rate set as some portion of the value of that product.

In addition, some methodologies may produce valid estimates in only a subset of situations. Their use must thus be constrained to only those situations in which the necessary pre-conditions exist. For example, hedonic regression analysis (HRA) is only valid in situations in which purchasers have the option to choose the inclusion or exclusion of a specific feature and where purchasers have accurate ex ante knowledge of the value of the feature to them. If these preconditions do not exist, then the rate produced by HRA will be incorrect. HRA also makes assumptions on market conditions, such as pricing lag and feature separability, which will be inaccurate in many cases, rendering it an undesirable methodology in most situations.

Because of the need to ensure that any model is only applied in situations in which the necessary preconditions for accuracy exist, a critical role any tribunal must play is to ensure that evidence is not presented by experts using invalid damages models. The United States courts have experienced numerous instances of plaintiffs presenting models that lack sufficient rigor, wasting the time and resources of judges and litigants alike.

9. What factors should determine which calculation method is used, or be taken into consideration (e.g. license facts such as duration, scope, age, term, previous royalty rates, fee structure; and company specific data such as size, sales volume, products)?

Provide your answer in the box below:

10. Do certain sectors or technologies require their own specific methodology? Please provide examples.

Provide your answer in the box below:

There is no need for sector-specific methodology. While different sectors may have different background situations that could potentially affect an RDT decision, this is an appropriate consideration during a specific case, not one that requires procedural differences set out in advance.

11. Would publication of decisions be an enabler of transparency or discourage use of the RDT?

Provide your answer in the box below:

Publication of decisions is essential. Without publication of decisions, the RDT will fail to provide information that enterprises require in order to understand costs to enter a standardized product space. Those entities will thus be dissuaded from pursuing new standardized products, leading to fragmentation and reduced innovation by UK entities.

Further, the non-discriminatory prong of FRAND rates already suffers from a lack of sufficient information on rates seen by other market participants due to a trend of over-secrecy in SEP licensing. Publication of decisions would be a necessary and useful corrective to this issue.

12. What powers or procedural rules should be implemented to ensure the RDT operates effectively and facilitates accessible, quick and cost-effective rate determinations?

Provide your answer in the box below:

13. What powers and rules of procedures would be most useful to ensure the RDT can encourage its use by all parties in the SEP ecosystem?

Provide your answer in the box below:

Potential measure 2: Searchable standard related patent information

14. In your view, would this proposal meet the government's aims of increasing transparency and reducing information asymmetry? Please explain why.

Yes

Please explain your answer:

While this proposal might not address all transparency and asymmetry concerns, it would significantly improve upon the present situation in which there is a crippling lack of information and lack of a central location in which to find it.

At present, interested parties must battle with often poorly-designed systems to even obtain disclosure of what patents are declared essential to a standard. However, that information often lacks information about what provisions the patent is essential to, and may not be searchable on that basis at all. In situations in which a party plans to implement only a subset of a specification (e.g., if they will only implement non-voice cellular features), this can require reviewing every single disclosed patent to see if it is declared as essential to that portion of the standard, presuming that the declarant even disclosed information on what portion of the standard implicates the patent.

This is complicated by the potential need to review multiple distinct sources of information in order to fully cover potential standards issues. A centralized location to obtain declaration information would be helpful in increasing transparency.

15. How should the government provide legal certainty for users on what is in scope of this proposed mandatory requirement (e.g., specific provisions enshrined in law outlining when the requirement to provide information is triggered or what is excluded from the requirement)?

Provide your answer in the box below:

16. What standard related patents information should rightsholders be required to submit to the IPO to build a useful data set (e.g. technical specification or standard the patent relates to, FRAND commitment, availability of licences)?

Provide your answer in the box below:

Rightsholders should, at minimum, be required to publicly provide the technical specification or other standards document to which the patent relates, the specific provisions within that document which the patent covers, the status of the FRAND commitment, and any license commitments made by the rightsholder. We would also suggest requiring that they disclose whether the patent has been licensed in the past and, subject to appropriate disclosure limitations, to whom it has been licensed.

17. Are there alternative mechanisms or routes that might more easily achieve the government's objectives of increasing transparency and reducing information asymmetry?

Provide your answer in the box below:

No.

18. What, if any, sanctions should the government consider introducing to deal with non-compliance issues (e.g. invalidity, enforceability, public listing of non-compliant patent owners, fines, administrative fees)?

Provide your answer in the box below:

Non-compliance should be penalized by rendering the non-compliant patents unenforceable, without any possibility of past damages, until the compliance issue has been addressed.

Fundamentally, if a patent owner cannot meet the basic requirement of disclosing to the public its belief that its patent is essential to a given standard, the portions of the standard to which it believes it applies, and the information needed for licensing purposes, there is no reason to provide it with a legal remedy if it later asserts that the patent is essential.

Further, in the FRAND context, standards participants commit to non-discrimination between licensees. Absent knowledge that a patent has been licensed and to whom, it is impossible to effectively enforce this requirement of the FRAND commitment.

To avoid the risk of a patentee failing to comply until immediately before filing a lawsuit, as is frequently seen in registries such as the USPTO assignments database, this requirement should be paired with a fixed timeframe. This could be linked to some fixed time after the inclusion of the patented technology in the relevant standard. For example, if the relevant standards text was adopted in a meeting on December 19, 2020, patent owners could be required to comply with the registry's requirements by no later than December 18, 2021. If a patent owner fails to comply by such a deadline, then the temporary penalty of unenforceability with the ability to cure via compliance could be converted into a permanent, non-curable status of unenforceability.

19. How should the IPO ensure information is supplied accurately by the rightsholder (e.g. penalties, incentives such as reduced fees)?

Provide your answer in the box below:

See Question 18 above.

Potential measure 4: Assessing market provision of essentiality checking services

24. Have you used commercial essentiality services?

Yes

25. If you have used commercial services to assess essentiality, what are your views on:

Provide your answer in the box below:

Our experience, and the experience of member companies, has been that essentiality checks often provide incorrect results when compared to court determinations with respect to the identical patents. As such, we have not found commercial services to be useful.

This may in part be due to the typical situation in which the essentiality check is commissioned by the rightsholder. Services which regularly determine patents to be non-essential are less likely to receive repeat business, leading to a system in which essentiality determining services are effectively captured by rightsholders.

26. Are you a provider of commercial services?

Not Answered

27. If you are a service provider, can you provide details on:

Provide your answer in the box below:

28. Do you think there is value in a government-led essentiality review mechanism at the IPO?

Provide your answer in the box below:

While there may be value in a government-led essentiality review process, CCIA would prioritize other transparency measures such as the aggregate royalty rate guidance process discussed with respect to Question 8. Essentiality-check mechanisms already exist and are available, but no source of aggregate royalty rate information exists. Putting in place an aggregate royalty process would fill this critical information gap. Further, while private industry is capable of providing essentiality guidance, it is far less capable of providing aggregate royalty rate guidance. As such, UKIPO should prioritize the role for which government is far better suited over the one which private enterprise can fill.

29. How could the government provide value for money, so affordable essentiality assessments are available?

Provide your answer in the box below:

30. What do you anticipate the primary use of an IPO led essentiality checking service would be? Who would primarily make use of it and for what purpose?

Provide your answer in the box below:

We anticipate that the most regular users would be rightsholders. Potential licensees are likely to either already have been sued, in which case they would conduct their own essentiality checks through counsel, or else to be interested in a portfolio license, in which case single-patent essentiality checks have limited value.

31. What other options could you suggest to provide cost-effective essentiality assessments for SMEs and startups?

Provide your answer in the box below:

Potential measure 5a: Remedies and dispute resolution

32. Does the current patent framework provide adequate remedies for SEP litigation?

Provide your answer in the box below:

As the sole appropriate remedy in the vast majority of circumstances is a damages-based remedy, which is already available under the current framework, the current patent framework provides adequate remedies for SEP litigation. In almost all circumstances, an injunction over a SEP is inappropriate. In those few circumstances where an injunction might prove appropriate, it is sufficient to apply it as a remedy to a failure to comply with court-ordered damages rather than as a remedy to patent infringement.

33. How can bad behaviours in licensing negotiations be addressed or prevented?

Provide your answer in the box below:

Enhancement of damages for licensee misbehavior, or unenforceability of the patent for licensor misbehavior, are remedies sufficient to dissuade bad behavior. However, ordinary negotiation tactics such as counter-offers and taking sufficient time to conduct diligence should not be treated as bad behaviors.

34. Has the threat of injunctions ever played a part in your SEP negotiations?

Yes

35. If you believe the threat of injunctions had an impact on your SEP negotiations, please explain what that impact was, providing appropriate data and evidence.

Provide your answer in the box below:

CCIA's members regularly face the threat of injunctions during SEP negotiations.

The in terrore threat of injunctions, based on the risk the entire product will be enjoined, allows patent owners to extract a reward far in excess of the value of their patents, even in the majority of cases where the defendant infringed innocently and without knowledge of the patent. Particularly in complex, multi-component products such as semiconductors, smartphones, computers, and other high-tech products, a patent will typically only cover a small portion of the product. However, an injunction allows the patent owner to block the entire product from the market. Given the choice between an injunction that takes its product off the market or over-paying the patent owner for a license, a product manufacturer will be willing to significantly over-pay for even a minor feature, allowing the patent owner to confiscate value that the product manufacturer created independently of the patent.

Manufacturers do so in order to avoid the complete loss of value that would ensue from an injunction. These windfall settlements, where a patent owner obtains far more than its contribution, in turn incentivize additional patent litigation, particularly from non-practicing entities.

The difficulty in identifying relevant patents *ex ante* in turn illustrates a key economic point. An innocent infringer (one who was not aware of the patent before creating their product) is also an inventor of the patented technology. If the patent owner had not made their invention, the product manufacturer would still have done so. In such a circumstance, providing a reward to the patent owner in excess of the technical value of the shared invention is particularly inappropriate. If the invention would have occurred regardless of the availability of an injunction—which, definitionally, it will have, as the infringing product exists—then the propriety of an injunction is questionable at best

In other words, the threat of an injunction provides the patent owner with leverage that will allow them to acquire not just the value of their technology to the product, but the entire profitable value of the product regardless of its connection to the patent.

More formally, injunctions can be understood as additional leverage in licensing negotiations. A full economic analysis of this situation can be found in Lemley and Shapiro, *Patent Holdup and Royalty Stacking*, 85 *Tex. L. Rev.* 1991 (2007). The authors there conclude that “threatening to enjoin products that are predominantly non-infringing ... can easily enable a patent holder to negotiate a settlement for an amount of money significantly exceeding the amount that the patent holder could expect to earn in damages based on reasonable royalties.” *Id.* at 2008. In general, no one would license a patent for a rate that would make the sale of their product unprofitable. The corollary to this is that an injunction allows a patent holder to obtain any amount of money from the enjoined party right up to that point.

However, the value of a patent to a product is better assessed as a combination of the value of the patented technology over the next best alternative and the cost of designing the product to use that next best alternative. This is the surplus created by the patented technology, which—in the absence of an injunction—the parties would bargain to divide. The presence or threat of an injunction allows the patent owner to obtain not just all of the surplus value created by its patent—an amount that would be captured as a reasonable royalty in court—but also to capture the cost of redesign and the value contributed by other aspects of the product unless the total rate would make the product unprofitable.

Because the threat of an injunction allows a patent holder to obtain not just the value of their technology, but also this unrelated value, the threat of an injunction allows patent holders to unfairly and improperly obtain value that their patent had no part in creating, even in the absence of a court case, due to the *in terrore* threat of an injunction shadowing the bargaining between the parties.

This is exemplified by the experience of companies in German courts, where injunctions are a near-automatic remedy. In a case study focused on a German patent lawsuit, Hendrik Fügemann & Neil Gallagher, *Economic Implications of Automatic Injunctions in German Patent Litigation*, Copenhagen Economics (Aug. 13, 2019), <https://copenhageneconomics.com/publication/economic-implications-of-automatic-injunctions-in-german-patent-litigation/>, “the estimated settlement payment exceed[ed] the value of the invention by more than ten thousand.” Further, when negotiating in the shadow of an automatic injunction rule, “the expected settlement payment will be dependent on the value of the defendant’s accused product” and “may surpass the economic value of a patented invention by far.” *Id.* Settlements “may even approach the value of the defendant’s products” while “the plaintiff receives significant leverage in bargaining over terms and conditions that deviate significantly from what would otherwise be expected.” *Id.*

Another study examines the impact on revenue, supply chain, jobs, and effective royalty rate from two other German patent lawsuits. In particular, the report found that the threat of injunction causes a monetary burden far higher than the amount sought by SEP holders, providing them with unseen leverage over the defendant. Henrik Fügemann et al., *Economic Impact Assessment of Automatic Injunctions*, Copenhagen Economics (Dec. 17, 2024), <https://static1.squarespace.com/static/60e5457fb89be21d705fa914/t/68641e5183d84e7bacd821be/1751391827190/PIPLI-EUInjunctionStudy.pdf>.

36. Could the other proposals presented by the government in this consultation help deal with ‘bad faith’ behaviours, including the threat of injunctions?

Provide your answer in the box below:

The most effective remedy to the use of the threat of injunction is to make clear that injunctions are generally unavailable in SEP cases. Other proposals may somewhat mitigate the impact of that threat, but cannot fully or even mostly address it. As noted with respect to Question 35 above, studies show that the impact of even the threat of injunction can far exceed the damages sought by, much less awarded to, rightsholders.

Current non-regulatory measures

42. Do you think these non-regulatory measures are the right ones?

Provide your answer in the box below:

While there might be additional non-regulatory measures, the ones already pursued are helpful. Collaboration with other governments and with SDOs to ensure transparency and try to present a more uniform regulatory environment are both helpful. And while the SEPs Resource Hub is of somewhat limited utility to more sophisticated firms, it is a useful resource for SMEs.

43. Do you think there is more government can do in its non-regulatory work?

Provide your answer in the box below:

Assessment of Impacts

44. Do you agree with the assumptions we have used in our assessment of the impacts?

No

If not, please explain why you did not agree with the assessment.:

The hourly rate presented for internal familiarisation is an underestimate. Familiarisation is likely to be conducted by in-house counsel and more senior engineering staff, for whom a 51,000 p/a rate is likely to underestimate their cost to the business.

The hourly rate presented for attorney fees represents a significant underestimate in CCIA member experience.

45. Are there any other significant costs or benefits that should be included?

Yes

If yes, what are they?:

In addition to the direct and indirect impacts on firms of the change in legal risk and licensing costs that SEP proposals include, these changes are also likely to affect prices paid by UK consumers for goods and services. This could likely be treated as a multiplier for any economic impact determined for the direct and indirect effects of proposed changes.

46. Are you aware of any data or other information that could help us to quantify:

Not Answered

If yes, what are they?:

47. Please supply any other information which you consider would be useful to help us assess the impacts of the options.

Provide your answer in the box below: