ECIS comments on the Communication from the European Commission to the European Parliament, the European Council and the European Economic and Social Committee regarding "An Industrial Property Rights Strategy for Europe"

The European Committee for Interoperable Systems ("ECIS") welcomes the opportunity to comment on the Communication from the European Commission about "An Industrial Property Rights Strategy for Europe."

ECIS is an international, non-profit association of information technology companies founded in 1989 that endeavours to promote a favourable environment for interoperable ICT solutions. ECIS has for two decades actively represented its members regarding issues related to interoperability and competition before the EU and other fora such as WIPO. ECIS' membership includes companies that are important rightholders and that rely on industrial property rights in order to protect and exploit their innovations.

Summary

ECIS welcomes the development of a coherent industrial property rights strategy at Community level. It supports a balanced intellectual property system with appropriate means of enforcement. Overall, the Community industrial property rights strategy presented in the Communication is a positive development.

Nonetheless, there are a number of areas that merit greater attention and ECIS would favour a number of changes to the approach proposed in the Communication regarding:

(1) the balance between industrial property rights and the ability to innovate,
(2) the co-existence between open source software and proprietary models,
(3) the criteria on which an industrial property rights strategy should be based,
(4) the interplay between industrial property rights and competition rules, and
(5) the role of standard setting in the interplay between industrial property rights and competition rules.

I. "The economic and social benefits of industrial property rights":

The balance between industrial property rights and the ability to innovate

ECIS strongly agrees that an industrial property rights system should be balanced between "rewarding valuable intellectual creation" and "ensuring the easy circulation of ideas and innovation." The EC should guard against increasing intellectual property protection as a purpose in and of itself as opposed to a means to an end, namely increased innovation and greater welfare for society**.** The Communication indicates that it expects "the trade-off between offering an exclusive right and the diffusion of new products and processes in order for industrial property rights to continue to produce economic and social benefits in the future." (p. 4) It should be recognised, however, that there is no linear correlation between the scope of patent protection and incentives to innovate, and that there are circumstances in which patents can be harmful to innovation. The Commission should therefore acknowledge that measured limits and exceptions to patent rights play at least as important a role as patent rights in fostering innovation. Moreover, the Commission should consider that in different sectors of society the circumstances (*e.g.*, impact of patents, the duration of product cycles, the investment required for and market rewards obtainable through innovation) and thereby the incentives to innovate may be different. Therefore, within the limits imposed by international treaty obligations, differing approaches to patent law may be appropriate for different sectors (*e.g.*, pharmaceuticals, information technology), and theoretical considerations of uniformity should not stand in the way of focused sector-differentiated industrial property regulation that maximises the benefits to society as a whole.

Industrial property rights should not be allowed to be used to hamper interoperability and choice to the benefit of society. The Commission should provide for mechanisms in the patent system to ensure that other inventors are not prevented by patents on means of interconnection (in the broadest sense) from developing products that are able to interoperate with existing products to the benefit of consumers. The introduction of appropriate and measured interoperability exceptions to patentability and of a voluntary system of licenses of right (see, e.g., the system discussed by ECIS in the context of its paper on the Revised Proposal for a Council Regulation on the Community Patent) are two of the ways to help achieve the balance between the interests of rightholders and the ability to innovate.

II. "The changing innovation environment":

The co-existence between open source software and proprietary models

An industrial property rights strategy should provide for effective measures to protect the interests of both open source software and proprietary business models. ECIS agrees with the Commission that "in the ICT sector, open source software business models now co-exist alongside proprietary models." (p. 4) It urges the Commission to adopt effective ways to protect the co-existence of both models and prevent patent holders from abusively and unsubstantiatedly using their rights against open source/free software developers.

A recent development, which deserves the careful attention from the Commission, is the use of unsubstantiated threats of intellectual property rights infringements against those who attempt to develop interoperable software products. Microsoft is a prime example of a company that

has adopted this strategy. It has publicly stated that it believes Linux and other open source software infringes 235 Microsoft patents, but has never identified any of these patents.[1]

Vague claims by patent holders that open source software may infringe their patent rights should be subject to a "put up or shut up" requirement. This would prevent patents from being invoked to spread fear, uncertainty and doubt ("FUD") against open source software products in the minds of both developers and users. The behaviour of creating FUD against open source software solutions should not be tolerated, as it amounts to yet another anticompetitive strategy aimed at ensuring Linux does not emerge as an effective competitor to Windows.

The Commission should ensure that open source/free software developers and distributors enjoy adequate protection that allows them to implement standardised technologies protected by patents in a way compatible with open source/free software licences. The language of licensing terms and conditions for patents essential for the technical implementation of standardised technologies should be drafted in such a way as to ensure compatibility with open source/free software licences and to prevent the abusive exercise of patent rights against open source software developers.

III. "A strategy on industrial property rights for Europe":

The criteria on which an industrial property rights strategy should be based

A strategy on industrial property rights should be of high quality, consistent and balanced. ECIS agrees with the Commission that an intellectual property system should be high-quality, featuring tough examination standards; consistent, with a common interpretation of laws and unified court proceedings; and balanced, between rewarding valuable intellectual creation and ensuring the ready circulation of ideas and innovation.

ECIS emphasises the need to ensure the application of indisputably high quality standards in the process of granting patent protection. ECIS agrees with the Commission that "large numbers of overlapping patent rights can create additional barriers to commercialise new technologies that already exist in 'patent thickets'." "Poor quality rights can also contribute to problems with 'patent trolls' that have arisen in the US judicial system," as the Communication indicates (p. 6). Patent protection should only be granted to technologies innovative enough to be protected by exclusive rights. Therefore, the Commission should take adequate measures to that effect.

The Commission should consider measures that discourage intellectual property rights from being used as a means to hamper innovation for purely financial gain, e.g., by patent trolls. ECIS recognises that the identification of such measures and their exact formulation may not be easy. Care should obviously be taken not to adopt measures that undermine the incentives patents may provide to legitimate innovators. However, far reaching solutions may be needed to avoid patents being employed purely as an obstacle to welfare-enhancing innovation. Such solutions might include exploitation requirements and prohibitions on the accumulation and exploitation of patents by companies limited purely to these activities.

The formulation of an industrial property rights strategy for Europe must be considered in an international context. In that regard, the Commission should not only examine its own

[1] See Fortune, *Microsoft Takes on the Free World*, http://money.cnn.com/magazines/fortune/fortune_archive/2007/05/28/100033867/

legislation and initiatives, but also conduct a review of the efficacy and appropriateness of existing international obligations and, where appropriate, initiate a review at an international level.

IV. "Industrial property rights and competition":

(i) The interplay between industrial property rights and competition rules

As noted in the Communication "strong protection of industrial property rights should be accompanied by rigorous application of competition rules." (p. 9) The application of competition rules is a key means to maintain the balance in an industrial property rights system between rewarding innovation and facilitating the ready circulation of ideas and innovation. As a corrective mechanism for the benefit of society, competition law must be unambiguously recognised as playing a legitimate role in curbing market behaviour that actually hinders innovation, but is claimed to be justified by intellectual property law. The exercise of industrial property rights must be subject to the discipline imposed by competition law.

(ii) The role of standard setting in the interplay between IPRs and competition rules

ECIS agrees with the Commission that "an area of growing prominence in the interface between industrial property and competition law is standard-setting." (p. 9) ECIS considers the adoption and use of open standards as an essential means for achieving interoperability. An EU industrial property strategy should include legislative initiatives that foster the easy adoption of and facilitate access to technological standards.

To that effect, the Commission should ensure that Open Standards are truly open. ECIS agrees with the Commission that "in order to avoid potential distortions of competition, standard-setting should be carried out in an open and transparent manner." (p. 9) In particular, the Commission should ensure that European standards organisations adopt and implement effective IPR policies adopting open standards. In fact, ideally, those IPR policies should be short, simple, and easily understandable for individuals without formal legal background since most participants in standard setting committees are not members of the legal profession.

An Open Standard should have the following characteristics:

- Collaborative and democratic development and management process;
- Transparent evolution and management process open to all interested parties;
- Approved through due process by consensus among participants;
- Faithful implementations of the standard must interoperate;
- Platform-independent, vendor-neutral, and usable by an unrestricted number of competing implementations;
- Openly published including specifications and documentation sufficient for fully independent implementations; and
- Available royalty-free or on a FRAND basis that does not discriminate against the open source software development or licensing model.

The Commission should also urge standard-setting organisations to require ex ante disclosure of both the existence of essential patents and of maximum royalty rates. ECIS supports the notion that "rules within standard-setting organisations" *should* "specify an *ex ante* (*i.e.,* before the standard is set) duty to disclose essential patent applications and/or issued patents" *and* "a duty to offer commitments to license the essential patents on fair, reasonable and non-discriminatory (FRAND) terms." (p. 9)

ECIS supports recent statements made by Commissioner Kroes that the *ex ante* disclosure of the existence of essential patents, as well as the *ex ante* disclosure of maximum royalty rates can constitute means to improve the effectiveness of the standard setting process. Increased effectiveness of the standard setting process can "lead to more competitive solutions and reduce the risk of later antitrust problems."

Finally, the licensing of essential patents should be subject to fair, reasonable and non-discriminatory (FRAND) terms that do not discriminate against the open source model. The Commission should ensure that the meaning of FRAND licensing obligations is set out clearly, so as to avoid the implementation and development of a standard being hindered by potentially unreasonable claims from rights-holders.

V. Conclusion

ECIS strongly supports the Commission's proposal to "launch a fact-finding study to analyse the interplay between intellectual property rights and standards in the promotion of innovation" and also to "adopt a consultative document on standardisation in information and communications technologies (ICT) in the first quarter of 2009 which will include how standards relate to industrial property rights in the sector." (p.10). ECIS looks forward to providing input to these initiatives and assisting the Commission in any other way it can to achieve a strong and balanced industrial property rights regime that takes into account a) the interests of all stakeholders and b) the different means by which innovation can be accomplished.