

26 September 2013

To: Member States of the European Union  
Members of the European Parliament  
European Commission  
Preparatory Committee, Unified Patent Court

We, the undersigned organizations, are a group of global innovators and users of the European patent system. As innovators, we depend on effective patent systems worldwide.

We appreciate that Europe has long worked towards a unified patent system, and we hope the proposed new system will be a significant step forward with the potential to benefit both the creators and consumers of innovative products and technologies. An effective and balanced unitary patent system has the potential to decrease the costs of obtaining patent protection, increase European competitiveness, and support the long-term growth of innovative industries in Europe and abroad.

We are concerned, however, that two aspects of the 15<sup>th</sup> draft of the rules of procedure for the Unified Patent Court (UPC) may undermine these benefits by creating significant opportunities for abuse:

- 1. Bifurcation:** Patent cases often involve the related issues of whether a particular patent is valid and, if so, whether it has been infringed. The UPC Agreement allows these questions to be decided by different courts in the same case, but gives little guidance as to when or how this should or should not be done. This could, in some cases, allow plaintiffs to obtain a quick infringement ruling, along with an injunction barring products from most of the European market, before any determination of whether the patent in question is actually valid. Given the drastic impact of such an injunction on the defendant, unprincipled plaintiffs would be able to extract substantial royalties (through settlements or verdicts) from European and other companies based on low-quality, and potentially invalid patents.

By enabling this unbalanced patent system, the proposed new patent system could undermine, rather than promote, innovation in Europe, as producing companies could develop strategies to avoid European jurisdictions in fear of an unfair litigation system being too advantageous for patent proprietors. Such strategies could include divesting resources from Europe, thus driving genuine innovation elsewhere. And any significant increase in litigation costs would undoubtedly consume company resources which could be better spent on innovation and growth. Manufacturing companies in Europe should not be placed at a competitive disadvantage compared to companies that manufacture in other regions where patent jurisdiction is more balanced.

In order to mitigate the potential for such abuses before the UPC, procedural adjustments to the UPC rules of procedure are needed to provide clear guidance and predictability on how bifurcated proceedings where the validity of the patent is an issue should be handled and to permit defendants in bifurcated cases to more easily obtain a stay of infringement proceedings until a decision on patent validity has been reached.

- Injunctions:** Injunctions permit patent holders to bar unlicensed products containing their technology from the market. It is a powerful, and in some cases, appropriate tool for patent holders. However, rigid application of an injunction rule could enable unprincipled litigants to “hold up” manufacturers by making unreasonable royalty demands for even a single trivial patent on a complex product. A rule that does not offer sufficient guidelines on when to grant injunctions will create strong incentives for abusive behaviors and harm the innovation that the patent system is designed to promote.

This will be particularly true with injunctions under the UPC because the UPC injunction power will extend beyond a single country to most of Europe, and it could be used with the intended effect of impeding product sales across the region. This substantial bargaining power to force excessive settlements from companies would, in all likelihood, lead to a rise of abusive litigation before the UPC. Indeed, PAEs have already begun to set up shop in several European countries, drawn by the potential for siphoning more revenue from European companies.

The potential for these types of abuses is not only theoretical. In the United States, litigation brought by Patent Assertion Entities (PAEs), entities whose business model is based solely on extracting settlements through the assertion of often low-quality patents, reportedly cost U.S. businesses \$29 billion in 2011 alone and resulted in half a trillion dollars in lost wealth from 1990 to 2010.<sup>1</sup> PAEs’ infringement claims are often spurious or based on invalid patents, as demonstrated by the fact that they prevail in less than 9% of the cases in which their claims are fully adjudicated on the merits.<sup>2</sup> Despite the weakness of their legal claims, PAEs are often highly profitable due to their success in extracting settlements. The lucrative nature of PAEs has led to a rapid rise in U.S. patent litigation. Indeed, PAE litigation now accounts for the majority of all U.S. patent litigation.<sup>3</sup> The diversion of revenues from R&D and patenting activities to pay for escalating litigation costs and excessive royalties is staggering, with no resulting gain to innovation.

To mitigate the potential for abuses of such power, courts should be guided by principles set forth in the rules of procedure to assess proportionality prior to granting injunctions. And PAEs should not be allowed to use injunctions for the sole purpose of extracting excessive royalties from operating companies that fear business disruption.

We believe that these concerns can and should be addressed through targeted changes to the proposed UPC rules of procedure. Several of the undersigned organizations will recommend specific changes to the proposed rules to the Preparatory Committee, which is responsible for establishing and implementing the UPC. These changes will include guidance to the judiciary on how to handle bifurcated proceedings when validity is raised, when to issue a stay of an infringement action and when to issue injunctions. Adoption of these amendments will allow operating companies to focus on innovation instead of litigation, thereby fostering economic growth and prosperity in Europe.

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<sup>1</sup> See, e.g., John R. Allison, Mark A. Lemley, and Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011) (finding that – excluding default judgments – PAE plaintiffs win only 8% of cases that reach a judgment on the merits).

<sup>2</sup> See, e.g., John R. Allison, Mark A. Lemley, and Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011) (finding that – excluding default judgments – PAE plaintiffs win only 8% of cases that reach a judgment on the merits).

<sup>3</sup> In 2012, 58.7% of patent lawsuits in the U.S. were filed by patent monetization entities. See Robin Feldman, Tom Ewing, and Sara Jeruss, *The AIA 500 Expanded: The Effects of Patent Monetization Entities* (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247195](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247195)).

We look forward to working with European Signatories and the Preparatory Committee to achieve mutually beneficial reforms that build confidence in the new unified system and drives European economic and technological growth.

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<p>Cisco Systems Inc.</p> 	<p>Deutsche Post DHL</p> 
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