

25 February 2014

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

Last year, we, the undersigned organizations, wrote in support of Europe's effort to create a unitary patent and a Unified Patent Court (UPC) system. The decision to move in this direction was a direct result of the recognition "that the fragmented market for patents and the significant variations between national court systems are detrimental for innovation."<sup>1</sup>

As we previously noted, an effective and balanced unified 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. Importantly, if done right, it also has the ability to reduce the negative impact of Patent Assertion Entities (PAEs), or "patent trolls", thereby preempting the problems that continue to plague innovators.

In early October, we submitted responses to the Preparatory Committee's consultation on the rules of procedure for the UPC. Our responses recommended that the Preparatory Committee incorporate guidance to the judiciary from the outset on the issues of bifurcation and injunctions when validity is raised, including when to issue a stay of an infringement action and when to issue injunctions. We noted that, without this guidance, the potential exists for a court to order an injunction prohibiting the importation and sale of goods even though the patent may ultimately be found invalid. This result unduly reduces competition, can increase the cost of products in the market and reduce product choices, all negatively impacting consumers. Many other stakeholders, ranging from telecommunications operators to pharmaceutical companies and patent practitioners, raised similar concerns and made similar recommendations.

As the Preparatory Committee prepares its revised draft of the UPC rules of procedure, it is imperative that these changes are incorporated in a meaningful way. Adoption of these recommendations will allow operating companies to focus on innovation instead of litigation, thereby fostering economic prosperity in Europe for the benefit of innovators and consumers. This, in turn, will help Europe achieve the stated purpose of the UPC to defend "against unfounded claims and patents," "enhance legal certainty," strike "a fair balance between the interests of right holders and other parties," and allow for "proportionality and flexibility."<sup>2</sup>

Europe has a unique opportunity to avoid the abuses of PAEs that reportedly cost U.S. businesses \$29 billion for cases filed in 2011 alone and caused economic damage of approximately half a trillion dollars from 1990 to 2010.<sup>3</sup> The stakes of leaving these issues unaddressed are high and unfortunately well-known by the undersigned organizations. Recent press reports suggesting that some PAEs welcome bifurcation within the UPC further show that a system with perceived loopholes has the potential to open the floodgates to a detrimental form of patent litigation.<sup>4</sup>

We continue to look forward to working with the Preparatory Committee to help ensure a system that is fair and balanced and allows for European innovation and competitiveness to thrive.

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<sup>1</sup> Agreement on a Unified Patent Court, Council doc. 16351/12, January 11, 2013.

<sup>2</sup> *Ibid.*

<sup>3</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>4</sup> Joff Wild, "Why the US's most litigious NPE is a huge fan of the German patent system," *IAM Magazine*, December 2013.

Signatories:

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Apple Inc.	
ARM Holdings plc	
BlackBerry Limited	
Broadcom Corporation	
Bull SAS	
Cisco Systems Inc.	

Dell Inc.	
Deutsche Post AG	Deutsche Post DHL
European Semiconductor Industry Association (ESIA)	
Google Inc.	
Hewlett-Packard Company	
Huawei Technologies Co.,Ltd.	
Microsoft Corporation	
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