

January 23, 2024

Chairman Adrián Vázquez Lázara
Parlement européen
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To the attention of Honorable Member of the European Parliament Mr. Vázquez Lázara:

As former U.S. federal judges and Patent and Trademark Office leaders with backgrounds in trade, technology, and innovation policy, we write to urge you to consider the detrimental effects that the proposed regulation on standard-essential patents (SEP) would have on Western innovation in vital areas of technology. We believe these proposed changes would jeopardize critical incentives supporting European and American companies' ongoing ability to contribute to global technology standards such as wireless telecommunication, while simultaneously emboldening China's long-term aspirations to reconfigure intellectual property and other market-based tools to provide significant advantages to its domestic industries.

The changes being considered by Parliament seek to solve a problem that does not exist: The current consensus-based system of SEP licensing -- which arose in significant part because of well-reasoned decisions from European courts -- has fueled tremendous technological progress. We believe it strikes the right balance between safeguarding incentives to innovate through legitimate patent protections while ensuring broad access to standardized technologies on "fair, reasonable, and non-discriminatory" (FRAND) licensing terms.¹ For decades since the creation of various global standards bodies, joint U.S. and European leadership has successfully championed this balanced, consensus-based framework.

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<https://www.concurrences.com/en/dictionary/frand#:~:text=The%20acronym%20FRAND%20%2D%20which%20stands,and%20industry%2Dled%20standardization%20process.>

Reforming this well-functioning framework should not be pursued without considerable empirical evidence of market failure. Yet the exhaustive study commissioned by the European Commission found no such evidence to merit such an urgent, drastic policy intervention.²

The proposed regulation, as currently written, would create an entirely new centralized regulatory regime to unilaterally decide SEP licensing terms.³ This dramatically new approach would replace private negotiations between patent holders and manufacturers with bureaucratic fiat.

We are especially troubled that this proposal, although perhaps well intended, might implicitly endorse China's long-standing priority of increasing government control over intellectual property. After the Commission's SEP plans became public knowledge last April, China moved swiftly to issue aggressive draft rules empowering its own regulatory agencies to intervene deeply in dictating SEP licensing terms.^{4,5}

This synchronicity was no accident. Over the past decade and more, in numerous high-level international engagements, China's leaders have pressed for greater regulatory supervision over IP licensing, compulsory disclosure of confidential business information, and other measures allowing state intervention into private transactions.⁶

Given China's track record in wielding IP rules as an economic weapon against foreign rights holders, we had no doubt Beijing would exploit its own version of an EU-style interventionist regime to advantage Chinese companies across the board.⁷ And that is exactly what has happened.

² <https://www.lexisnexisip.com/resources/empirical-assessment-of-potential-challenges-in-sep-licensing/>, page 185

³ https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/standard-essential-patents_en

⁴ https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/standard-essential-patents_en

⁵ <https://www.chinaiplawupdate.com/2023/07/chinas-state-administration-for-market-regulation-releases-draft-anti-monopoly-guidelines-in-the-field-of-standard-essential-patents-for-comment/>

⁶ <https://carnegieendowment.org/2022/04/25/countering-unfair-chinese-economic-practices-and-intellectual-property-theft-pub-86925>

⁷ <https://carnegieendowment.org/2022/04/25/countering-unfair-chinese-economic-practices-and-intellectual-property-theft-pub-86925>

In December 2023, a court in Chongqing took the audacious step of setting global licensing rates for Nokia's patents filed and granted outside China.⁸ This verdict represents more than theft from Nokia's R&D budgets alone. In using unilateral authority to dictate terms for intellectual property not under its jurisdiction, China is reshaping the global innovation landscape solely for its own benefit, following its previous playbook of using its domestic market as leverage. But the Chongqing case escalates that coercion to an international level.⁹ This unfolding overreach by China should alarm anyone who cares about innovation thriving across borders.

However, both the United States and Europe will be hard-pressed to challenge this case and others like it if we engage in our own version of SEP protectionism. If Europe enacts its proposed SEP approach, it would validate China's governmental model of top-down, unilateral global IP regulation. This will place European and American industries at an overwhelming disadvantage in emerging fields vital to future economic leadership and jobs, including 5G and 6G, artificial intelligence, quantum information systems, robotics, green technologies, biotech, and advanced semiconductors.¹⁰

Europe needs to join the United States in condemning the Chongqing court decision and demanding its recession. Unfortunately, the proposed regulation would only provide China with a justification to continue its willful devaluation of European and American IP.

Please feel free to contact us with any questions regarding perspectives from the U.S. innovation policy community's standpoint.

Sincerely,

Andrei Iancu, C4IP Board Co-Chair, Former Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (2018-2021)

⁸ <https://www.chinaiplawupdate.com/2023/12/chongqing-no-1-intermediate-peoples-court-sets-global-frand-rate-for-5g-seps-at-0-707-unit-in-nokia-oppo-case/>

⁹ <https://urgentcomm.com/2023/12/19/nokia-to-appeal-chinese-courts-global-5g-ruling/>

¹⁰ <https://brie.berkeley.edu/sites/default/files/wp116.pdf>

David Kappos, C4IP Board Co-Chair, Former Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (2009-2013)

Judge Paul Michel, C4IP Board Member, Former Judge of the U.S. Court of Appeals for the Federal Circuit (1988-2010)

Judge Kathleen O'Malley, C4IP Board Member, Former Judge of the U.S. Court of Appeals for the Federal Circuit (2010-2022)

Frank Cullen, C4IP Executive Director