Proposal for further Thought - AI call IPO

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Key Take Away

AI systems label a specific model of innovation that benefits from a wide range of contributors; be they inside or outside the firm. The role of patent law as an organizational principle of this type of 'networked innovation' remains yet to be adequately understood, managed and governed. In AI, business thrives because of the interconnected framework in which it is embedded in.

This new economic context asks for a structure that assures in particular the functioning interplay between patents and standards. Against this background, this proposal suggests that the role of the FRAND (fair, reasonable and non-discriminatory) commitment should be further studied.

The Novel Economic Framework Provided by Artificial Intelligence

AI is still at its early stage and the opportunities it can offer have not even been seized yet to its full extent. In AI it is not the single device that creates value, but the ability to connect a sheer infinite number of devices with each other. The worth relies in the continuous expansion of the connection. It is the interconnectivity that creates value, not just the simple ownership of a single device.

As such, Artificial Intelligence is a prototypical technology space, where Small and Medium Sized Enterprises (SMEs), universities and their spin-outs as well as big corporations alike could constitute a fruitful innovation ecosystem. All these players could thrive in the spirit of collaborative exchange, so to collectively re-invent the future of society, provided that adequate foundations are set for the role of patents within the context of AI.

The Need for Standards

Standard setting will be instrumental for the success of AI. It is only through a common language, the adoption of an interoperable and connected system that the wide spread use of AI can succeed. The process of standardisation will enhance innovation efficiency because it enhances compatibility and increases the credibility of technological solution. This standardisation process will likely be highly beneficial to the widespread dissemination of AI.

The success of a standard is based on its wide dissemination; its value derives from its vast usage. This stands in sharp contrast to patents, which are built around exclusivity. Contrary to a standard, the value of a patent derives from its strength to exclude to the best extent possible third parties from using it; unless obviously a third party is willing to pay for its usage.

This is why the inherent dilemma between patents and standards is hard to overcome. It is a tension between 'free access and tight control.' This tension is pronounced in the standard essential patents debate. A patent declared essential to a standard is a hybrid that combines patent law's negative right's aspect with a standard's capability to disseminate a technology as wide as possible. As this formula bears complications, the FRAND (fair, reasonable and non-discriminatory) promise was introduced. The FRAND commitment requires the licensing of standard essential patents on fair, reasonable and non-discriminatory terms.

Research Questions

In spite of the importance of the FRAND commitment, there remains ambiguity over what "fair, reasonable and non-discriminatory" means. The situation is furthermore complicated by clandestine licensing markets and the absence of publicly available royalty rates that could be used as benchmarks to determine the value of a royalty rate of a SEPs; at instances where the benchmark approach may even be deemed to be the appropriate valuation method.

Further issues pertain to a lack of clarity on ownership and distribution of patents that read on standards. Equally, there is lack of consistency as it pertains to the valuation of standard essential patents. Lack of clarity can also lead to other unresolved challenges, such as potential asymmetrical bargaining power between the owners of standard essential patents and downstream innovators.

Against this background, it is suggested to study the following issues further:

1. Valuation of standard essential patents
2. Clarity on ownership and numbers of standard essential patents (here AI can also play an important role in the verification process)
3. Exploring ways to enhance transparency in markets for standards essential patents
4. Further research into the legal remedies available for standard essential patents (injunctions and damage awards), accompanied by research on how to calculate patent damages

Key here is to find a balance through adequate public policy formulation.