



Fordham Intellectual Property Conference  
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# Standard-essential patents and competition

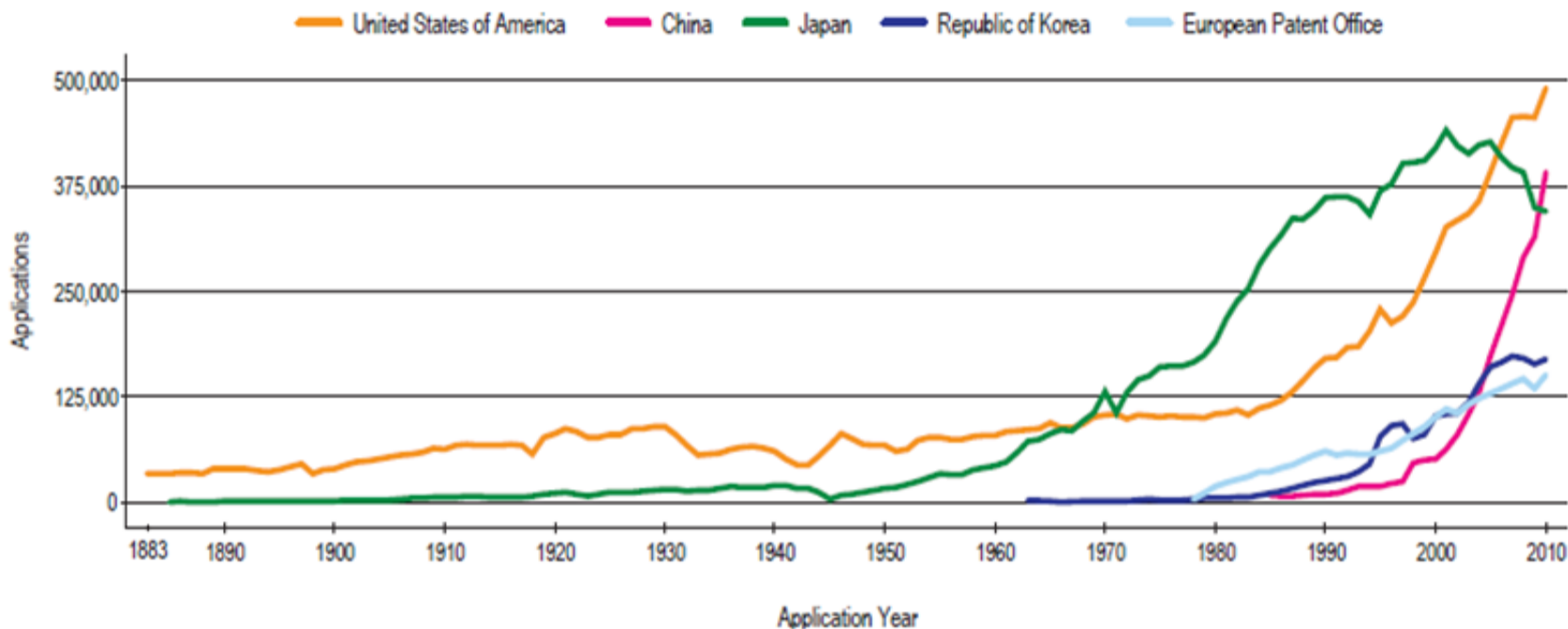
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*(speaking in a personal capacity - the views expressed are not  
necessarily those of the European Commission)*

# Trends in Patenting

- Steep increase in patent applications and granted patents (specifically in IT, Telecom and Pharma)
- Strategic patenting (Harhoff study 2007)
  - Bargaining chips
  - Blocking patents

# Trends in Patenting

Figure A.2.1.1 Trend in patent applications at the top five offices



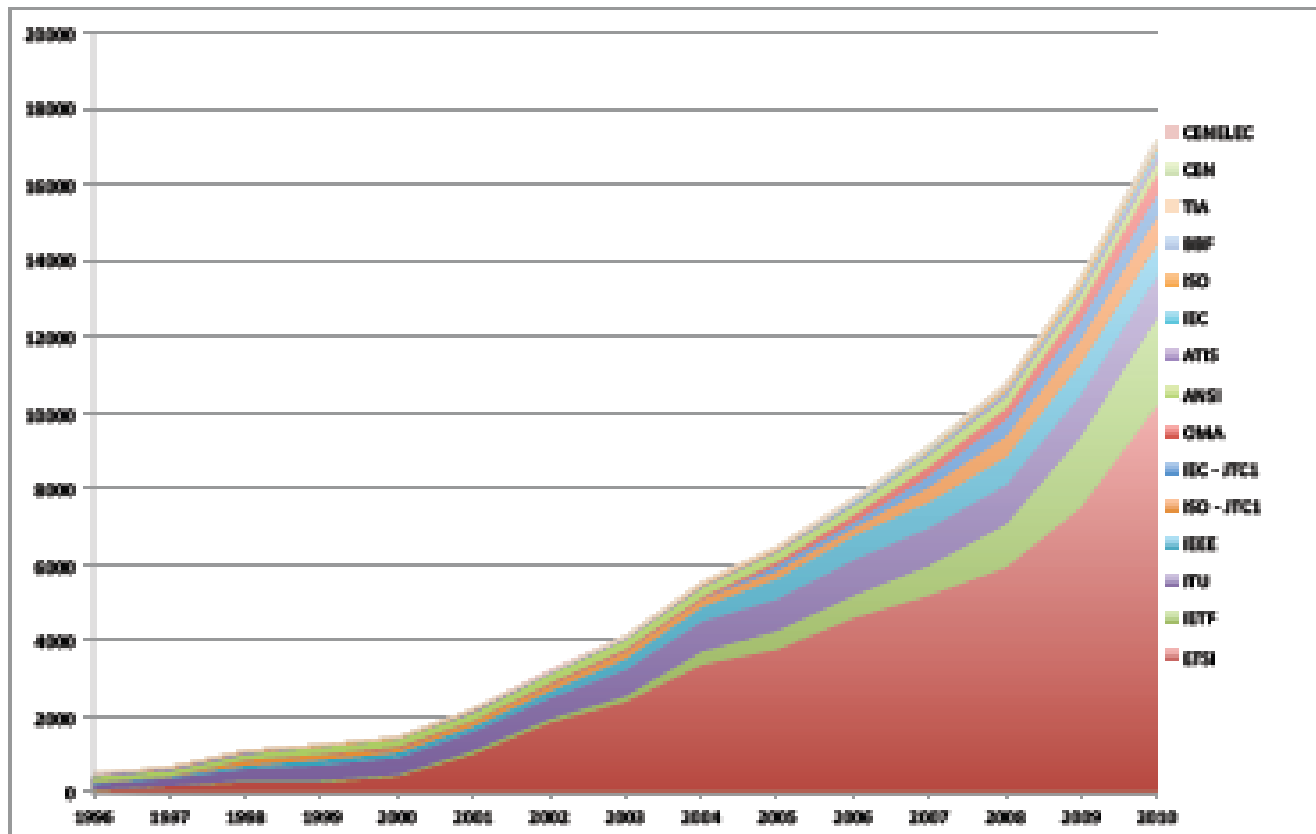
Source: WIPO Statistics Database, October 2011

# Standards and patents

- 251 interoperability standards in a modern laptop computer (Biddle, White, & Woods, *How Many Standards in a Laptop?* 2010)
- Claimed essential patents (ETSI database, 04/13)
  - 187403 patents equalling approximately 12635 Patent families have been declared as being essential to 384 ETSI Projects and/or 6144 ETSI Standards by 212 Declaring Companies through 1373 IPR licensing declaration

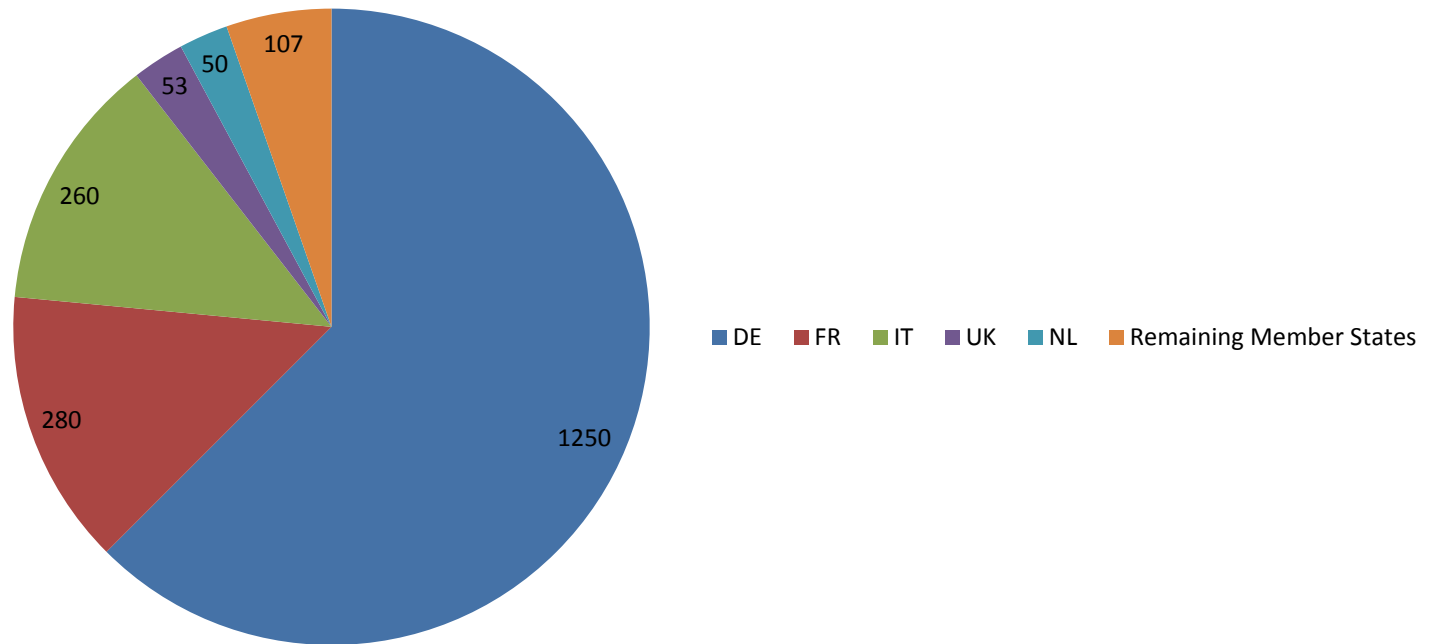
# Standards and Patents

Figure 8: The number of statements by SSOs over time



# Overview of EU patent litigation

## Patent infringement suits in the EU in 2011 per Member State



Source: Kühnen & Claessen, Die Durchsetzung von Patenten in der EU, GRUR 2013, 592

# Invalidity/infringement (I)

Table AIII-2: Overall outcome of infringement and invalidity actions by jurisdiction  
(Source: Van Zeebroeck, Graham 2010)

| Country         | Decisions on Infringement |             | Decisions on validity |              |
|-----------------|---------------------------|-------------|-----------------------|--------------|
|                 | Infringement found        | Ambiguous   | Patent invalid        | Ambiguous    |
| France          | 41.8%                     | 8.7%        | 23.4%                 | 20.9%        |
| Germany         | 52.3%                     | 4.0%        | 37.0%                 | 20.4%        |
| Spain           | 41.3%                     | 1.3%        | 48.3%                 | 3.5%         |
| The Netherlands | 31.0%                     | 1.1%        | 50.7%                 | 11.3%        |
| United Kingdoms | 44.9%                     | 11.8%       | 32.8%                 | 31.9%        |
| <b>Total</b>    | <b>44.8%</b>              | <b>6.7%</b> | <b>30.7%</b>          | <b>20.3%</b> |

# Invalidity/infringement (II)

## Invalidity rates before the BPatG

| Year                      | 2010 | 2010 | 2011 | 2011 |
|---------------------------|------|------|------|------|
| Originating patent office | EP   | DE   | EP   | DE   |
| Patent invalidity in %    | 50%  | 41%  | 46%  | 53%  |
| Partial invalidity in %   | 24%  | 24%  | 31%  | 40%  |
| Actions rejected, total   | 22   | 10   | 18   | 2    |
| Actions rejected in %     | 26%  | 34%  | 23%  | 7%   |
| Total                     | 86   | 29   | 78   | 30   |

Source: Kühnen & Claessen, Die Durchsetzung von Patenten in der EU, GRUR 2013, 592



# IP and competition law have the same goals

- No inherent conflict between IP and competition law
  - Both share the same objectives
  - Consumer welfare and promotion of innovation
- Standardisation creates a specific context
  - Creates benefits: interoperability/innovation
  - But there is an antitrust risk
    - Choice of one technology to the exclusion of others
    - May lead to market power which can be exploited

# SEPs and market power

- SEPs may mean market power
  - Commercial indispensability of standard
  - Lock-in to standard
- May mean market power which would not have existed absent the standard
  - Depends on *ex ante* alternatives
  - *Ex ante* price - good indication of FRAND

# How do you keep the benefits but protect against the risks?

- *Ex ante* disclosure of essential patents
  - Allows informed decision by participants
  - Protects against "patent ambush"
- Commitment to license on FRAND terms
  - Access to standard for all
  - *Quid pro quo* for being included in the standard
  - Designed to constrain *ex post* exercise of market power resulting from standard (pricing, other terms)

# SEP-based injunctions

## ■ SEP-based injunctions

- Seeking to exclude from the market based on SEP

## ■ Potential negative effects

- May exclude products from the market
- May lead licensees to accept harmful terms that they would otherwise have not (e.g. royalty level, other clauses)
- Seeking of injunctions is potentially anti-competitive (i.e. not only enforcement)

## Google/MMI merger decision (para 107)

*"Depending on the circumstances, it may be that the threat of injunction, the seeking of an injunction or indeed the actual enforcement of an injunction granted against a good faith potential licensee may significantly impede effective competition by, for example, forcing the potential licensee into agreeing to potentially onerous licensing terms which it would otherwise not have agreed to. These onerous terms may include, for example, a higher royalty than would otherwise have been agreed."*

# Framework for analysis

- Injunctions are generally a legitimate remedy
- SEP-based injunctions potentially anti-competitive
  - Standardisation creates a specific antitrust context
  - Commitment to license on FRAND terms
  - *Quid pro quo* for the patent to be included in the standard
  - The company has chosen to provide access to all in exchange for monetisation - not to exclude
- There should be a willing licensee

## Google/MMI merger decision (para 126)

*"The seeking or enforcement of injunctions on the basis of SEPs is also not, of itself, anti-competitive. In particular, and depending on the circumstances, it may be legitimate for the holder of SEPs to seek an injunction against a potential licensee which is not willing to negotiate in good faith on FRAND terms."*

# What is a willing licensee?

- Case-by-case analysis
- Is there a generally applicable concept?
- Motorola Statement of Objections (May 2013)
  - Preliminary view
  - Third-party (Court) royalty determination
  - Should not mean giving up rights to challenge validity, infringement and essentiality
  - Interplay with Orange Book



# Vice-President Almunia (Sep 2012)

*"The fact that we have received many complaints related to standards-essential patents also shows that there is a great need for guidance. I want to tell you that I am willing to provide clarity to the market through our enforcement. Having said that, I am also convinced that the industry needs to do its homework too. I expect the leading companies in the sector not to misuse their intellectual property rights."*