A Human Right to Ever-Stronger Protection?

On April 27, 2023, the European Commission published the proposal for the Standard Essential Patents Regulation.[1] The Regulation aims to improve the licensing of patents that are declared by patent holders as essential to technical standards, and committed to be offered on fair, reasonable, and non-discriminatory (FRAND) terms to the implementers. The proposed mechanism envisages a new role for the European Intellectual Property Office which should register declared SEPs, undertake a review of their essentiality, and help in rate-setting.

To make the registration mechanism robust and credible, any failure of holders of relevant patents to register their SEPs on time is punished by their temporary inability to enforce such rights before the courts.[2] For the period of such failure, patent owners are not entitled to receive any compensation for infringements.[3] If they remedy the lack of registration, the patent holders regain their enforcement rights going forward.[4] Finally, if implementers and patent holders cannot agree on FRAND royalties, before enforcing the rights in courts, patent holders are obliged to attempt to sort their differences before EUIPO's conciliator.[5] If they cannot settle, the conciliator issues a non-binding determination of a FRAND rate.[6] During this procedure which must end within 9 months, the patent holders are barred from enforcing their patents in European courts.[7]

Some scholars, commentators, and institutions started questioning the constitutionality of the proposal. They deem the proposal unreasonable, especially the restrictions that are imposed on patent remedies.[8] Article 17(2) of the EU Charter, is argued to be violated because conditional unavailability of the remedy violates the very essence of rights or disproportionately limits the right to property.

I think the framing is mostly wrong.

Can a remedy regime into which a patent holder first needs to opt-in through a patent declaration made *after* the law enters into force[9] be in violation of Article 17(2)? Can the legislative redesign of the future framework be even unconstitutional due to the European property clause?

The question is fundamental. If the critics are correct, and purely prospective changes must be justified as "the least intrusive" policy interventions against the background of Article 17(2), then practically, any legislated IP right is truly only a one-way ticket to ever-stronger protection. It is an

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[1] Proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001 COM(2023)232.
[2] Article 24(1) of the Proposal.
[3] Article 24(2) of the Proposal.
[4] Article 24(2) of the Proposal.
[5] Article 34(1) of the Proposal.
[6] Article 56 of the Proposal.
[7] Article 37(2) of the Proposal.
[8] https://www.aipla.org/docs/default-source/advocacy/aipla-comments-to-eu-on-proposed-sep-regulation-8.10.23.pdf?sfvrsn=f5e8fe80_1 p. 8; https://ipeurope.org/press-release/ip-europe-regrets-european-commission-patents-proposal-calls-on-parliament-and-council-to-support-european-ip-leadership/; Mohammad Ataul Karim, The Proposed EU SEP Regulation: Checking Balancing Incentives, and compatibility with EU Fundamental Rights, and the TRIPS Regime, available at https://www.4ipcouncil.com/application/files/9816/8847/8735/2023.07.04_final_Draft_SEP_Regulation_paper_.pdf; https://www.aipla.org/docs/default-source/advocacy/aipla-comments-to-eu-on-proposed-sep-regulation-8.10.23.pdf?sfvrsn=f5e8fe80_1 p. 8; Florian Mueller, EU Commission contradicts itself in attempted justification of SEP regulation in light of EU Charter of Fundamental Rights: 'uniform and predictable outcome' but 'not ultimately binding'?, available at http://www.fosspatents.com/2023/04/eu-commission-contradicts-itself-in.html
[9] Article 1(2) and Article 72 of the Proposal.

evidentiary rachet. If the European legislature can cut back on its *future* IP promises only subject to high evidential thresholds, any reform, even on margins, can be torpedoed by those who oppose such policies before the judiciary. The law becomes even harder to reform.[10]

To be sure, critics are correct to require that *retrospective* changes require compliance with Article 17(2). If the legislature promised rewards for inventions, and individuals relied on such promises by obtaining patents, they must enjoy protection against arbitrary changes to those promises, including remedies. In such a case, proportionality is a key component of any reform. However, if the reform targets exclusively those who were not promised anything specific but only hoped for continuity with today's laws, no individual promises are affected. Article 17(2) protects *rights* and the *system*. It is not an immunity from legislative change.

The SEP Regulation's general mechanism is *not* a retrospective change of remedies, i.e., where legislature cuts back on its pre-existing promises to the peril of those who relied on them. On the contrary, affected SEP holders are proposed to have two years after the adoption of the law to consider if they really want to include their patents in standardisation efforts and continue to commit them under the FRAND regime. They have a clear and free choice. Article 17(2) is thus not even engaged. The change might affect companies' business plans or profit margins but those are not constitutionally protected as property.

The only provision that could theoretically lead to retrospective changes concerns pre-existing technical standards.[11] However, the Commission's proposal does not explicitly state whether pre-existing standards can be made subject to similar limits on remedies. It only envisages a future delegate act that would select existing standards and specify extent to which they are to be treated as future standards. *If* the Commissions treats the pre-existing standards the same way as future standards, *then* with respect to them, it must justify its actions against Article 17(2). In those cases, the Commission must adopt new law, and prove that "the functioning of the internal market is severely distorted due to inefficiencies in the licensing of SEPs". Thus, again, there is nothing in the SEP Regulation itself that would already engage the property clause.

Accepting the argument that any prospective changes to IP policy must be measured against the tenets of Article 17(2) is only designed to discourage legislatures from doing anything. Thus, let me be clear. The European legislature can make prospective changes to IP policies *as it sees fit*. It can re-design, narrow and shorten such rights, and even abolish them in the democratic process. No single case of the CJEU to date suggests otherwise.[12] Even the Court's ambiguous use of the "essence" of rights offers no break on prospective changes like those in the SEP Proposal. The Court does not conceptualise the essence as an inviolable core that the legislator cannot take away.[13]

The proposed SEP Regulation appears to be a reasonable policy, but this is legally irrelevant because Article 17(2) is not even engaged. For prospective, as opposed to retrospective changes, legislatures are not constitutionally compelled to pick the most proportionate interventions; they can be unreasonable, and even wrong on the underlying policy. If legislatures change future systems of

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[10] See on the general institutional problems, Martin Husovec, The Fundamental Right to Property and the Protection of Investment: How Difficult Is It to Repeal New Intellectual Property Rights? (May 21, 2019). Forthcoming, in Christophe Geiger (eds), Research Handbook on Intellectual Property and Investment Law (Edward Elgar 2019).

[11] See Article 66(4), however, it is unclear whether the envisaged delegated act could include the limitation on remedies (Articles 24 and 37) regarding such pre-existing standards ("The delegated act shall also determine which procedures, notification and publication requirements set out in this Regulation apply to those existing standards.").

[12] See for extensive discussion, Martin Husovec, Essence of Intellectual Property Rights under Art 17(2) of the EU Charter (2019) 20(6) German Law Journal, pp. 840 - 863

[13] Ibid, p. 855-856.

protection without touching individual rights, it is only politics. Of course, ideally, legislatures are always reasonable and evidence-driven representatives of people. However, this political obligation is also a constitutional obligation only if legislatures decide to undertake retrospective changes, such as when they shorten or shrink the rights of existing patent owners.

The patent holders who are complaining about the state meddling in control of prices conveniently forget to mention that they talk about changes to an elaborate state-sponsored control of prices called patents. IP rights, as a form of state protection against competition, allow patent holders to temporarily increase their prices to reap the benefits of their pro-social investments. If the state decides to redesign such state controls, it is not meddling, but fine-tuning. The system that the government gives, it can also take away. Thus, if the government thinks that standardisation does not work well due to various patent enforcement dynamics, it can adjust the system going forward.

Ultimately, the discussion about the shape of the reform of future intellectual property systems does not belong before the judiciary but the court of public opinion. Legislators are elected by people to change the law if needed. If they can be trusted to create IP rights, they should be also trusted to change them. Make no mistake, Article 17(2) is not a human right to ever-stronger protection.