NOKIA

Review of Intellectual Property and Growth
Call for Evidence

Scope

In this response Nokia addresses the following topics:

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About Nokia

Nokia is a world leader in mobility, driving the transformation and growth of the converging Internet and communications industries.

At Nokia, we are committed to connecting people. We combine advanced technology with personalized services that enable people to stay close to what matters to them. Every day, more than 1.3 billion people connect to one another with a Nokia device – from mobile phones to advanced smartphones and high-performance mobile computers. Today, Nokia is integrating its devices with innovative services through Ovi (www.ovi.com), including music, maps, apps, email and more. Nokia's NAVTEQ is a leader in comprehensive digital mapping and navigation services, while Nokia Siemens Networks provides equipment, services and solutions for communications networks globally.

In 2010 Nokia spent Euros 5.9bn (£5bn) on R&D globally representing 13.8% of net sales. Nokia's business is premised on innovation and Intellectual Property is a key asset of the company.

As of 31 December 2010, Nokia employs approximately 2,800 people in the UK of which approximately 1,750 are in R&D. Additionally Nokia Siemens Networks employs more than 950 people in the UK of which 130 are in R&D.

The UK environment is particularly conducive to new digital content services, and Nokia has chosen to launch some of its flagship music services first in the UK, as discussed in more detail below.

1. PATENTS

Patents and standards – barriers to access?

We have addressed this issue in section 4 below – IP & Competition

Proposals for an EU (unitary) Patent

In relation to the proposed European Patent, Nokia is broadly in support of the overall aims of an EU Patent. However, an EU patent remains a desirable, but not an essential goal. The close alignment of national patent laws and the European Patent Convention among Member States means that in practice today the European patent and national patent systems together broadly meet Nokia's needs.

Therefore, an EU (unitary) patent must offer significant cost, quality and efficiency advantages. In particular an EU patent system must be cost-competitive compared not only with EPC and national routes in Europe, but also with patent systems in the other major jurisdictions, especially the US and Japan, and also must be reliable, both in terms of award and enforcement.

As it is not necessary or even desirable in every case to have a patent for the whole of the EU, it is important that users should always have a choice of routes for obtaining patents in Europe, namely via the EPC, national patent systems, or the EU (unitary) Patent.

After the Council was unable to find a compromise on translation arrangements towards the end of last year, enhanced cooperation is now being invoked to avoid putting the whole EU Patent Reform project in jeopardy.

Enhanced cooperation is of course a compromise since it will create only a part-EU patent and, as such, must not be seen as an end in its own right. As many Member States as possible must be encouraged to join the process from the outset in order that a unitary patent has the maximum territorial reach across the EU. Enhanced cooperation must also be seen and presented as a stepping stone for more - and ideally all - Member States to join so that we may eventually attain a true EU patent.

There have been signals that the two implementing Regulations (for the unitary patent itself and for the translation arrangements respectively) may move ahead very rapidly once the enhanced cooperation procedure is formally approved (and this is expected during March) with the possibility that a unitary patent could be on the statute books possibly even within a matter of months.

While Nokia is broadly supportive of measures that will enable the creation of a unitary patent in Europe within a reasonable time frame, we are concerned that there are outstanding issues in the existing proposals (both fundamental aspects and in some of the details) that still need attention. We would be concerned if the proposals were to be pushed through on an accelerated timetable without the opportunity for further consultation and scrutiny of the proposed legislative texts, whether based on existing or new proposals.

The unitary patent will impact innovation and competitiveness of enterprises doing business in Europe for decades to come and it remains as vital as it has always been, to get a European patent system which is right for users, and not just to get the dossier concluded quickly for political expediency.

Importantly, Nokia does not see how a unitary patent can operate without a unified patents court. To this end, we would urge that both pillars of the EU patent reform project continue to be given equal priority. The current uncertainty about the fate and constitution of the litigation system is not helpful especially when the unitary patent proposal is being pushed ahead. In any case we certainly would not want to see the proposals for a unitary patent proceeding onto the statue book without a related unified litigation system, because it introduces

uncertainty about what the eventual litigation system would look like, and how it would legally be constituted. We discuss the EU litigation system proposals in more detail below in the section on Enforcement of Rights.

Taxation of Innovation and Intellectual Property (patents)

In connection with the ongoing consultation on the Taxation of Innovation and Intellectual Property we have the following observations:

Patent Box:

The government proposals for a Patent Box seem to sit more easily in sectors where patents map easily onto products, as is generally the case in the pharmaceutical sector, for example, but which is not at all the model that prevails in complex technology products like mobile phones which typically make use of hundreds, possibly even thousands, of patents.

We believe it would generally be prohibitively complex and costly to determine the profit attributable to specific patents in complex technology products, so that although the Patent Box may technically be open to all sectors in practice it may not be usable in the ICT product sector.

It would help address this concern if the proposals included a commitment to conduct a post-implementation review after say 2 or 3 years, to compare the extent to which the Patent Box has actually been taken up in different sectors, and to explore ways of modifying the scheme to redress the balance if any disparity is found.

R&D Tax Credits

R&D Tax Credits are an important tool to incentivize investment (including inward investment) in high value-added R&D in the UK. For this reason R&D Tax Credits should continue to apply at least as favorably as they do today. R&D Tax Credits should not be impacted to fund the Patent Box.

2. COPYRIGHT

2.1 Copyright in the digital environment

Nokia and Digital Music Services

In this section we take the opportunity to focus on the role of **copyright in the digital environment**, in particular in the context of music licensing, where Nokia has gained substantial experience as a leader and innovator.

The UK environment is particularly conducive to new digital content services, and **Comes With Music** is an example of an innovative service which Nokia chose to launch here first in 2009.

This service was later re-branded Ovi Music Unlimited. Relevant devices include unlimited downloads from the Nokia Ovi Music store for a defined period, typically one year. Downloaded music can be transferred between the registered Ovi Music Unlimited device and one registered personal computer. After the subscription period ends the consumer is entitled to keep and enjoy all the music downloaded.

Nokia has recently announced a change in the availability of devices bundled with an Ovi Music Unlimited subscription. In certain markets (including the UK) we have discontinued production of Ovi Music Unlimited-edition devices for the time being, while in some markets we are looking to continue production. Although licensing is a factor in such decisions, Nokia's decision in the EU was not primarily motivated by the complexities

of licensing. The Ovi Music a-la-carte store remains unaffected, and the Ovi Music Unlimited service shall continue to be accessible for consumers who obtain an Ovi Music Unlimited-edition device or whose subscription period has not yet ended.

This decision is part of Nokia's mission to continue to improve the Ovi experience for the millions of consumers who use it. **We are actively pursuing and planning new music and entertainment services for 2011** with our eco-system of partners and will make further announcements at a later date.

The digital copyright eco-system

The digital market place is going through an extremely vibrant phase of experimentation with new consumer propositions and business models, aiming to deliver a rich and flexible digital experience - benefiting UK and European consumers and rights holders alike. The UK environment is particularly conducive to new digital content offerings.

Nokia has published a White Paper in which we propose a more **holistic approach to copyright reform.**

Our key proposition is that access to legal digital content must be made easier and more attractive across a Digital Single Market in Europe. To this end, the highest priority of digital copyright policy should be to (i) foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where (ii) right holders are fairly compensated; and which (iii) is supportive of Europe's unique cultural wealth and diversity, but (iv) is intolerant of unauthorized copying.

Fair use vs. (private copy) exceptions

The Nokia White Paper specifically addresses the question of whether private copy exceptions (and indeed the other exceptions prescribed in European and UK copyright law) are appropriately circumscribed. Europe has developed a catalogue of precisely-defined exceptions, some of which are optional for Member States, including the private copy exception. Arguably, these exceptions are too precisely defined and too inflexible to accommodate technological, business and societal developments, particularly those impacting private copy behavior in the digital environment. Nokia would encourage the UK to take a lead in further exploring and conducting economic research into the comparative benefits of a 'fair use' system[1], or even an extended fair use system (possibly including some limited business usage), in Europe.

For example, activities such as platform or format shifting as well as time shifting of legitimately acquired content by private individuals, which does not cause appreciable harm to rights holders, could fall under a 'fair use' doctrine. This repurposing of legally acquired content within the sphere of contemplated private use should not trigger levies because the use would be contained within a permissible sphere. This would be compatible with a system in which the consumer has acquired rights to licensed digital content - the 'fair use' provision would then merely "mop up" the reasonable private use of such content, excluding illicit copying, i.e. piracy. Of course the fair use doctrine would need to be carefully circumscribed.

However, without a full and proper economic impact analysis, "fair use" should not be assumed to be some kind of miracle cure to the issue of 'adaptability' of the copyright framework. Indeed it would have the serious disadvantage that it would take years, possibly decades, to establish a body of case law sufficient to impart any degree of legal certainty, and by definition this *ex-post* determination would not give any 'up-front' legal certainty – or any prospect of a speedy resolution – for new and evolving business models until the courts had the opportunity to opine perhaps many years later. This may itself chill experimentation in new business models,

[1] For example, the US has a broadly stated fair use defence, aimed at balancing the interests of the stakeholders and those of society.

perhaps more so than the “exceptions” environment we have today, where the scope is at least prescribed *ex ante*.

Format shifting and platform shifting

In any case, Nokia would be in favour of introducing an express, limited private copying exception for format shifting in order to reflect and regularise the reality of the situation we have today, where it is commonplace for consumers to copy digital content for playback on different devices, such as from a CD to a MP3 player or from a PC to a portable player or CD. We believe this will help provide clarity and restore credibility and confidence in the copyright regime in the UK, not only among consumers, but also among stakeholders including rights holders and technology providers.

As a matter of general principle the exception should, on the one hand, be drawn as broadly as possible to embrace all those acts of format shifting which everyone knows are happening as a matter of course, and that most reasonable people believe already are, or should be, permissible. On the other hand, it is imperative the exception remains narrow and sufficiently limited so that it causes no significant harm to rights holders2 and, as such does not give rise to a requirement for payment of compensation in accordance with the EU Copyright Directive 2001/29/EC. This is the critical balance that has to be struck.

The exception should fundamentally apply only to individual consumers for personal private use, so that the owner would be able to make the work accessible in another format for playback on a device in their legal possession. Having said that, however, we do believe that extension to the family circle is an important consideration. Importantly, the exception should not be place specific, to reflect the fact that devices may be portable or mobile (so taken out of the home) or located in a different place (e.g. in the car or even in a second home).

Private Copy Levies

It is an important economic advantage for the digital economy that the UK does not have private copy levies on digital equipment and media. It is no coincidence that the UK has one of the most vibrant, innovative and well-functioning markets for licensing digital content (see Economic Picture below). Rights holders receive their rewards fairly through market-based royalties, not from levies dictated unilaterally by national monopolies.

Introduced in some European countries as a crude remuneration model in a bygone analogue era as a quid pro quo for consumers being able - and permitted - to copy unlicensed content, notably from radio onto blank cassette tapes, private copy levies are no longer appropriate or fair in the world of digital content. And the whole private copy levy concept becomes even less appropriate and outdated as digital technology advances, e.g. towards cloud-based systems where end-users are actually replicating less on their personal local devices. Promoting consumer-friendly access to attractive legal offers of digital content means focusing on licensing not levies, following the stellar example of the UK.

Private copy levies should never be, or allowed to become, the primary or significant revenue source for digital content. This would serve only to discourage licensing at a time when service providers are making substantial investments in developing and launching new digital offers and UK rights holders seek to license new offers, often before rights holders in other territories do.

The reality is that the levy system is an impediment to the development of effective licensing models because licences can be structured to carve out activities where private copy levies are regarded as potentially more lucrative than direct licensing. Full-scope licensing is critical. To this end it must remain possible to include

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2 And of course remaining compliant with the Three Step Test.

within a licence all uses embraced within the so-called private copy exception, which as a matter of policy should not be accorded 'imperative' status.

The more digital content and authorised usage that consumers are able to acquire as part of a fully licensed service, the less need there is for private copy levies by way of compensation. Furthermore, direct licensing means financial returns are closely correlated to actual use of content. By contrast, levies systems are regarded as "rough justice" even for artists and creators because, notoriously, they do not always see their just rewards. In particular less money is distributed to rights holders than is collected because of administration and management overheads, and cultural subsidies.

Also, the more that content is made easily accessible through services that appeal to the consumer, the less incentive there is for consumers to indulge in piracy by acquiring unauthorised copies. By contrast, the private copy levy system is inherently serving to perpetuate piracy because it tends to give rise to the misconception that the device owner can download content indiscriminately whether authorised or not.

There is indicative empirical evidence that, on average, better music industry performance (measured by growth in sales) coincides with a low ratio of copyright levy revenue to overall revenue from music sales.

The UK should recognise these success factors and continue to foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, based on direct licensing.

To maintain a dynamic market-based commercial licensing environment, it would be a damaging and retrograde step if ever the UK were to consider introducing copyright levies.

At European level there needs to be a fundamental reform of the private copy levy system. Private copy levies should be phased out for all digital products in favour of alternative licensing-based approaches which ensure rights holders and creators are properly and fairly rewarded. We would encourage the UK to become a thought-leader and champion of this cause in the EU political and legislative arenas.

2.2 The Economic Picture

EU comparative performance

Based on a sample benchmark of the US digital music market in 2009 and per capita spending on digital music in the US and Japan, a conservative extrapolation suggests that the European digital music sector could have reached a value in 2009 of €1-3 bn greater (i.e. over 100-330% larger) than the estimated actual value.

In our view two prominent reasons for the EU shortfall are: (1) the lack of a true Digital Single Market and (2) the inflexibility of a collecting society-led licensing regime to accommodate new services and innovation through bespoke, bilaterally negotiated, licensing arrangements. Copyright levies are also a factor.

COMPARISON BETWEEN THE EUROPEAN DIGITAL MUSIC MARKET AND THE USA

	EU	US	EU as percent of US
Population	501 million	310 million	162%
GDP	EUR 12,8 trillion	EUR 11,1 trillion	115%
Digital Music Market	EUR 900 million	EUR 2,7 billion	33%
Digital percentage of the Recorded Music Market	13%	43%	30%

- The EU market is substantially larger than the US market in terms of population and overall economic output, whereas we estimate the EU digital music market, in our estimate, is approximately one-third of the US market.
- This deficit, in our view, cannot be explained by levels of broadband penetration or other technical factors including piracy.

UK Comparative performance

Upon examination and comparison of larger EU markets, the faster growth and the larger size of the UK digital music market stands out. We would like to see other EU Member States learning from the UK example of critical success factors. We encourage the UK to take a lead in EU policy in this area, because the European creative and cultural industries as a whole should benefit from increased innovation and accelerated growth in the digital sector.

COMPARISON OF PER CAPITA SPEND ON DIGITAL MUSIC IN KEY TERRITORIES

	EU	USA	JAPAN	UK	FRANCE	GERMANY	SPAIN	ITALY
2009 per capita spend on digital music	€1,80	€8,60	€8,05	€5,15	€2,30	€2,05	€0,70	€0,57

The disparities in per capita spend on digital music also highlight that developed markets which also do not have market-distorting private copy levies have higher digital music spends (USA, Japan, UK), as well as robust creative industries (e.g. the UK Government estimates that 2 million persons are employed by the UK creative industries[3]).

COMPARISON OF DIGITAL TRADE VALUE OF RECORDED MUSIC INDUSTRY IN KEY EU TERRITORIES

	2007	2008	2009
UK	€ 106,9 million	€ 155,8 million (+45,7%)	€230,1 million (+47,7%)
FRANCE	€ 75,4 million	€ 104,6 million (+38,7%)	€ 102,6 million (- 1,9%)
GERMANY	€ 72,3 million	€ 98,7 million (+36,5%)	€ 121,3 million (+22,9%)

- The UK digital music market exceeds other large EU markets both in value and in speed of growth, supported by a relatively favourable copyright licensing framework and business environment for innovation.
- The German digital music market is smaller than the UK market and is growing at a slower pace.
- The French digital music market actually shows a decline, compared with 47,7% growth in the UK.

[3] The UK Government's Department for Culture, Media and Sport also states "**Employment in the sector [of the creative industries] has grown at double the rate of the economy as a whole**" (http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx).

Music Licensing

Pan-European Licensing

A Digital Single Market[4] embracing a pan-European licensing framework based on market principles is critical to the success and growth of the EU digital music market. We see the preferred option for growth will be through the implementation of a market-orientated system as follows:

- Licensing must move to true pan-European, repertoire-specific licensing (meaning pan-European commercially-negotiated royalties and service accessibility across all Member States to all EU consumers)
- Freedom to negotiate with principal rights holders
- Avoid a single EU one-stop shop
- Allow a reasonable number (e.g. 6-10) of licensing entities offering different, competitive repertoires on a pan-EU basis (limiting the amount of aggregation to avoid/limit monopolistic distortions); currently the EU/EEA region has 30+ licensors, which is many and discourages service providers from entering many territories, hurting UK and EU rights holders and the UK's and EU's creative and cultural industries
- No more "Territory-of-destination licenses": one Europe means creating a Digital Single Market and facilitating commercial negotiations for pan-European royalties
- Each license for a given repertoire must grant any and all rights and authorisations in such repertoire (e.g. mechanical/reproduction and performance/communication rights for all uses authorised by a service) to create a functioning system
- Licences should be "full-scope" covering all legitimate consumer uses specified within the terms of the service (exhausting additional claims for private copy levies)

Subject to the above, if the EU societies wish to pool their remaining repertoires (i.e. those not licensed directly by publishers) in several "hubs", we would see that as a positive step forward:

- PRS For Music offers pan-European licenses on behalf of several music publishers
- The societies of France, Italy and Spain announced a hub called ARMONIA several years ago
- There is talk of a Northern Hub including the societies of the 8 Nordic and Baltic countries
- This would mean the number of licenses in the EU/EEA could fall from 30+ to 7+ (PRS For Music, CELAS EMIMP, WCM PEDL, SATV, UMPI DEAL, ARMONIA, Northern Hub), which facilitates licensing and lessens the existing monopolistic distortions

Rights Clearance

It would be an important step forward to develop sufficient transparency as to the repertoire of musical works controlled by each licensor. This would not only aid front-end licensing from the point of view of rights clearance (as a commercial licensee we must know what we are licensing) but also back-end payment processing and administration of licenses.

In the case of musical works, we propose including metadata identifying the author/composer(s), ISWC code, music publisher(s), licensor(s) and splits (of rights) of each musical work. There are benefits to rights holders if digital service providers also had access to such metadata, as we could provide more detailed reports, enabling rights holders to make faster and more accurate distributions. Significantly, having insight into the repertoire available for licensing from a rights holder enables a service provider to make better and more informed

[4] A report published by the European Policy Centre indicates that a Digital Single Market in the EU presents economic growth potential of **€500 billion or over 4% of EU GDP** over ten years, part of which would benefit the creative and cultural industries: http://www.epc.eu/dsm/ & http://www.epc.eu/dsm/1/

commercial decisions in licensing discussions, thus facilitating the entire licensing process for the ultimate benefit of the consumer.

At the initiative of EU Commissioner Neelie Kroes a group of stakeholders was brought together as the Global Repertoire Database Working Group ("GRD WG") to look at how a Global Rights Database ("GRD") for musical works might be created and deployed. Nokia has been an active participant in the GRD WG, which in November 2010 published several specific recommendations as to how the concept of a GRD for musical works can be moved forward in the context of wider stakeholder commitment and involvement, see:
http://globalrepertoiredatabase.com/GRD-077-GRDRecommendations(Finalv1.0).pdf

Audiovisual works

The discussion above focuses on digital music where Nokia has most experience. However, it is also important to accelerate development of a Digital Single Market also for audiovisual works, including films, television productions, music videos and podcasts. Licensing of audiovisual works can be extremely complicated and burdensome (even more so than for music), as the number of rights holders with rights requiring licenses in any single audiovisual work can vary considerably (and differently in different countries), and all rights holders may not even be identifiable by the licensee. Similarly, operational duties relating to audiovisual works can be complex and costly. It is vital to simplify the rights regime for audiovisual works in order to continue the digital evolution of goods and services in Europe.

ENFORCEMENT

The UK is an attractive and competitive litigation forum for intellectual property as illustrated by the amount of patent litigation in which Nokia is involved in the UK. The table below shows the comparative incidence of patent litigation in which Nokia is involved in Europe. It can be seen that the UK is the second most prolific country (with 20 cases) after Germany (105 cases) since 2005. The German figures are significantly inflated by the split system in Germany, where the defendant in an infringement case must bring his invalidity defence as a separate revocation proceeding for each patent asserted in the infringement proceedings, unlike other countries where these are heard together with the infringement action. All of the 54 revocation actions started by Nokia in Germany are in defence to an infringement claim. When this is taken into account, it is notable that generally in Europe Nokia is much more frequently a defendant, especially in infringement cases, whereas in the UK Nokia is more frequently the plaintiff, particularly in revocation actions. One of the cases in the UK broke new ground, when the Court of Appeal confirmed for the first time that English courts have jurisdiction over declarations of non-essentiality for standard-related patents.

(see table on next page)

NOKIA Patent Lawsuits in EU 2005-2010

	TOTAL	*Plaintiff*				*Defendant*			
		Infringement	Revocation	Other*	Total	Infringement	Revocation	Other*	Total
Germany	**105**	**12**	**54**	**2**	**68**	**37**	**-**	**-**	**37**
UK	**20**	**1**	**12**	**2**	**15**	**3**	**1**	**1**	**5**
Italy	**11**	**-**	**-**	**-**	**0**	**11**	**-**	**-**	**11**
France	**2**	**-**	**-**	**-**	**0**	**2**	**-**	**-**	**2**
Netherlands	**1**	**-**	**-**	**-**	**0**	**1**	**-**	**-**	**1**
Austria	**1**	**-**	**-**	**-**	**0**	**1**	**-**	**-**	**1**
Total	**140**	**13**	**66**	**4**	**83**	**55**	**1**	**1**	**57**

**declaration of non-infringement, declaration of non-essentiality, etc*

One reason Nokia is involved in so much UK litigation is because the UK is Nokia's largest market in Europe, so when people sue Nokia, they often include the UK.

When Nokia chooses jurisdictions, we often choose the UK because:

- It is quicker than most other countries (only Mannheim in Germany is faster)
- It gives better reasoned and more reliable decisions (because we have experienced, specialist, very high quality judges concentrated in a single court in London)
- It has discovery, where that is needed (eg Cartel claims)
- It does not have the split system of Germany, so for patents infringement and validity issues are heard together
- It has active case management (judges rule on what steps are needed, by when, and can be flexible in determining what order things should happen in)
- It is substantially cheaper than the US. Contrary to popular belief, it is about the same cost as Germany
- Damages awards are compensatory and reasonable, not punitive

Small Claims track needed for IP Cases

In the UK all litigation claims are treated on one of three tracks: small claims, fast or multi track. Small claims are for cases up to £5,000; fast track up to £25,000 or 1 day trial; and all claims over these limits are multi track. This is significant because of costs awards. Small claims cases as a rule have no costs awards. Fast track cases have more limited costs awards, and a cut down procedure. Multi track cases have no limits.

At present all IP claims proceed on a multi-track basis.

As Jackson LJ proposed, Nokia agrees that a small claims track is needed in the Intellectual Property Court for IP cases. Otherwise even a £2,000 claim for copyright infringement (e.g. the current case in the PCC about one architect copying another's plan) can run up costs of £20-30K, which dissuades people from enforcing IP at low levels.

EU Patent Litigation System

Nokia broadly supports proposals for a unified patent litigation system in Europe. However, any new European litigation system must bring real improvements for users compared with the system we have today, and not just offer a politically expedient solution. It must be accessible, cost-competitive, efficient, and reliable. It must employ technically literate judges and be optional, not mandatory, for litigants at least until the new court has a proven track record.

Any patent litigation regime has ramifications far beyond actual litigation. It impacts the risk of doing business in Europe for all innovative companies. Even the most minor nuance of a litigation system can significantly affect the behaviour of the industry. Designing a brand new patent litigation system from scratch has the potential dramatically to change the competitive landscape around innovation.

In order for Europe to maintain a pro-competitive climate conducive to innovation, it is imperative that any new European patent litigation system delivers the highest quality, cost-effectiveness, efficiency, legal certainty and reliability. In particular, these are imperative to strike a fair balance between the parties in litigation, namely the patent owner and those accused (rightly or wrongly) of infringement.

In fact, the current patent litigation system in Europe is functioning reasonably well and so Nokia does not see the creation of an EU-wide patent litigation system as an end in itself. There is no need to make progress at any price, and we would certainly not want to see any kind of compromise solution which would be less favourable for litigants or introduce more business risk or legal uncertainty than the current system. In other words, we would prefer “no change”, i.e. maintain the current nationally-based litigation system, to a bad pan-European regime.

A cost-effective solution demands a realistic and workable language regime, ideally English only.

Of particular concern with the current proposals is the possibility of bi-furcation, where jurisdiction for infringement and validity is split between the local/regional and central divisions respectively, along the lines of the German model. This means a decision on infringement may be reached in the local/regional division before validity is decided in the central division, with the consequence that patent owners may be able to secure pan-European injunctions, even on dubious patents, before their validity is determined and demand unjustifiably high payments to lift these injunctions. This may encourage what has come to be known as “troll behaviour” in Europe. It would chill innovation and competitive risk taking in Europe.

Until very recently, the proposals for an EU patent and a unified patent court had been treated as a package deal. More recently, the unitary patent seems to have been given political precedence over the litigation system. This is worrying because we certainly would not want to see the proposals for a unitary patent proceeding onto the statue book without a related unified litigation system, because it introduces uncertainty about what the eventual litigation system would look like, and how it would legally be constituted.

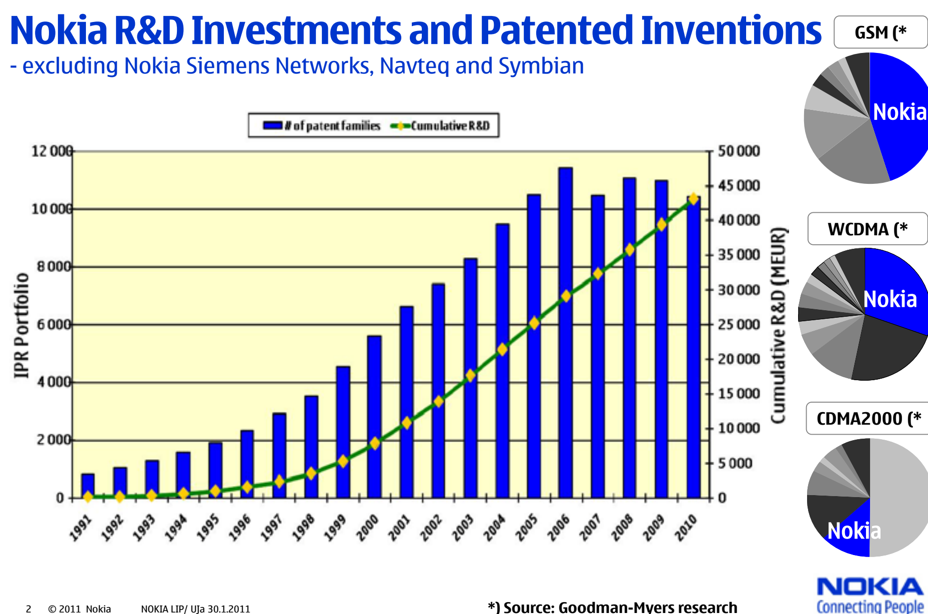
IP & COMPETITION

The IP and competition law frameworks in the UK broadly complement each other well in the UK. We are not aware of competition being hindered by a lack of transparency in some areas. In particular, discovery in litigation allows access to all relevant documentation.

Patents and standards – barriers to access?

In the ICT sector there is the special consideration of standardisation and interoperability with implications for accessing third party patents on so-called FRAND (fair reasonable and non-discriminatory) terms. Standardisation bodies generally develop their own IP rules in line with competition law and guidelines from competition authorities, which on the whole work well, and when they do not there are established mechanisms though the national court systems for resolving disputes between parties. Indeed, the UK courts have become an important and respected venue for standards and FRAND-related patent litigation.

It should be emphasized that patents play a pivotal role in standardisation. This is because patents enable participants in the standard setting process openly to share their knowledge and make technical contributions to the standard, early in the process, confident that their technology is protected by a patent application. Indeed, Nokia has invested in building one of one of the world's largest cellular patent portfolios, illustrated as follows:



Interoperability of devices and systems means it is common practice to use standardized technology developed by others and, consequently, technology licensing or cross-licensing patents between companies is the norm and on the whole works very well to balance the interests of rights holders and implementers. Indeed many ICT companies – like Nokia - are both licensors (patent owners) and licensees (users of third party technology) and this tends to create a natural balancing effect.

However, sometimes there are disagreements as to whether certain patents are infringed, if they are valid, or what are appropriate FRAND terms, and this may lead to litigation.

"Non-practising entities"

A particular challenge arises when the patent holder is a so-called "non-practising entity" (NPEs), i.e. a patent holding company whose business model is premised solely on patent licensing, because then the natural balancing effect is absent. There are fewer constraints on NPEs seeking royalties for access to their patents because an NPE does not itself need to negotiate licenses to operate, and this can open the possibility of patent abuse (e.g. charging unrealistically high (non-FRAND) royalties.

In Nokia's own experience with such patent abuse cases there have been more problems under the German enforcement system, for example, where loopholes can be exploited, whereas the UK enforcement system, by comparison, has shown itself to be well-adapted to deal effectively with these kinds of cases.

For example, Nokia has recently been litigating in the UK against IPCom that has acquired a cellular patent portfolio which allegedly includes patents essential to GSM and UMTS standards. The parties have been litigating in Germany, Italy and UK. In UK alone the parties have had 12 patent litigations. Nokia has so far won all of the cases in the UK where judgments have been given. In 2009 the EU Commission also intervened, which resulted in IPCom giving a public declaration that it is bound to the FRAND commitment given by the previous owner of the patents.

Avoidance of royalty payments due

From a totally different perspective, another challenge is that there is a tendency for some companies (especially from certain countries or regions of the world) to resist taking licenses and avoid paying royalties altogether even though they are using standardized technology legitimately covered by patents.

This puts other companies at a competitive disadvantage for two reasons. First, companies who do take licenses are at an unfair competitive disadvantage because their costs are higher. Second, companies who own patents lose licensing income intended to compensate their R&D investments incurred in helping to create the standards.

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