

Patent and Licensing Policies Disregard Government Standards on Information Quality and Impact Assessment

U.S. and European government agencies are ignoring government standards on information quality and impact assessment in pursuit of politically-driven policy goals. This disregard is illustrated by the White House's adoption of wildly-exaggerated cost figures of \$83 billion in social costs and \$29 billion in direct costs to patent infringement defendants for the alleged "patent troll" problem. It is also manifest in DG GROW's recent [consultation on ICT standards and patents](#) in which it makes unreliable and inflated appraisal of alleged information barriers and harms in standard-essential patent licensing. For example, it bases its assessments on interviews with very few respondents, most of whom are not even from the communications sector which accounts for most SEPs. Responses are not available for public review: not even in anonymous form. The agency also neglects to make any impact assessment of its proposed "remedies" for these putative problems.

In these cases, the disregard is from politically-driven desires to undermine patents and the licence fees that are being derived from them.

Standards have been established to safeguard the quality of information and assessments presented to the public by governments in support of their policies. Governments are held to high quality standards because the public relies on information and assessments disseminated by governments and their agencies to a much greater extent than it does with other sources. These standards have been established over decades as elected administrations, and their political leanings and objectives have fluctuated.

Bluff and bluster

Theories of dysfunctionality in patent assertion and licensing with resulting harms abound; but information quality and supporting evidence for these are universally very poor. Doctrines including alleged royalty stacking, hold-up and the large, dead-weight costs from patent trolling are presented as fact; and yet these have not been verified with scientific and academic rigour including methodologically-robust data analysis and peer review. On the contrary, there is significant evidence to refute the extent or very existence of these phenomena, as I have shown in several of [my previous IP Finance postings](#). Furthermore, disproportionate "remedies" are being proposed or imposed without impact assessment, despite well-established official requirements for these.

Blogs and op-eds may assert opinions with piecemeal support such as anecdotes because opinions are personal and are recognised as such. Opportunities to comment and counter in public debate are readily available, immediate and transparent.

In contrast, government agencies are rightly obliged to uphold much more stringent standards and should not be disregarding their own rules. Their assessments must be objective, balanced, reasoned, evidence-based and rigorous. The public regard government agency pronouncements to be reliable; based on proven theories not conjecture, and upon facts with reliable empirical analysis, not cherry-picking data points to justify politically-driven policy positions in face of significant countervailing evidence.



Academics also benefit from the aura that their PhDs and university professorships afford their work because they are also assumed to work at elevated quality standards. However, some have avoided significant critical comment in peer review, for example on economic issues, by publishing in certain law journals rather than economic journals – even on topics which are primarily economic. As a result, theories and doctrines are defectively being adopted by judges as fact with inadequate intellectual scrutiny. For example, I noted in one of my previous IP Finance postings that the notion of “inherent value”, which is all an SEP owner is supposedly entitled to in FRAND licensing, has been adopted by faulty [dictum in court judgments](#). The highly-questionable “principle” of limiting financial returns for technology developers on successful commercial innovations in downstream product markets in this way undermines the incentive for standard-essential technology developers to invest in R&D and has no basis in law or economics.

The White House disregards the IQA

Patent reform rages on in the US, despite enactment of [America Invents Act](#) (AIA) in September 2011. Central in contentions with prospective new legislation is the alleged problem with so-called patent trolls, patent assertion entities (PAE) and non-practicing entities (NPE). According to “the literature” this is a major problem which is subjecting thousands to menacing demand letters and is costing \$83 billion in “social costs” and \$29 billion in direct cost to defendants from PAE litigation per year in the U.S.

However, these figures and various accusations are strongly disputed. Nevertheless, the White House has uncritically adopted these figures and various assertions, and presented them publicly as facts, in breach of its own rules.

In a [guest contribution to the Patently-O blog](#), Ron D. Katznelson, PhD notes that “the [U.S.] government has developed detailed criteria, requirements and standards for reliable empirical analysis and information quality. Because the public disproportionately relies on information disseminated by the government, the government holds itself to substantially higher standards than those used by private parties or non-government entities in disseminating information on the internet or in academic journals, with its high variability in accuracy and reliability. Congress enacted the Information Quality Act (“IQA”) in order to ensure that information disseminated by government agencies meet the standards of “quality, objectivity, utility, and integrity.” [44 U.S.C. § 3516](#), note. Information disseminated by the government for reliance by government and the public must be “presented in an accurate, clear, complete, and unbiased manner.” The IQA forbids agencies from endorsing or approvingly disseminating information of substandard quality from third-parties.

The Office of Management and Budget (“OMB”) promulgated [guidelines for agencies to comply with the IQA](#), including the [Bulletin for Peer Review](#) and the [Standards and Guidelines for Statistical Surveys](#). These quality standards are quite specific. For example, they set criteria for presentation and substantive balance and objectivity, transparency of data and methods, conditions under which peer-review is required, design of survey frames and sample coverage, minimum survey response rates below which specific bias analyses are required, etc. Virtually all government agencies, including the Executive Office of the President, are subject to these guidelines and standards. Under the IQA, agencies are required to establish administrative procedures enabling “affected persons” “to seek *and obtain* correction of information maintained and disseminated by the agency that does not comply with [the OMB IQA] guidelines;” agencies have established a 60-day period for their review and corrective action in response to such



requests. Agency responses to such petitions are not judicially reviewable because the IQA establishes no Article III standing for petitioners. However, the President and OMB regulations require agency compliance with the IQA.’

Katznelson argues that the White House has contravened the IQA by publishing its “patent troll” report known as the [PAE Report](#). In this it relies on many cited works, but without even having conducted an IQA pre-dissemination review—a basic first-level IQA requirement. Consequently, Katznelson has filed with the White House a [petition under the IQA](#), requesting correction and removal of this PAE Report from all government websites.

Katznelson believes the PAE Report contravenes the IQA because it expressly relies on third-party information that does not meet the IQA standards. The sources relied on by the PAE Report purport to document patent litigation rates, quantify the private and social costs of patent litigation, survey “victims” of PAE litigation, and show the purported adverse effects of PAE activities. This information includes studies that have undergone no peer review; that have relied on opaque or erroneous methods and surveys; that lack objectivity; and lack practical utility, he maintains.

To achieve agency compliance with identifiable IQA standards, the petition concludes with 21 specific requests for correction supported by evidence and arguments. The petition provides a compendium of detailed analyses of fundamental flaws surrounding data and methods used in eight commonly cited studies purported to document PAE harms, upon which the PAE Report relies. For example, the petition shows that the Bessen & Meurer research paper upon which the \$29 billion patent troll cost allegation relies, incorrectly defines “costs” and is based on a biased and opaque sample in a flawed survey that fails to meet the IQA Survey Standards. In response to allegations of a “dramatic rise” in PAE litigation and that PAEs brought 62% of all patent suits, the petition shows that the citation to Professor Colleen Chien (whom Katznelson also identifies as the PAE Report’s secret author), upon which the allegation relies, fails to meet the IQA because (i) it is irreproducible by independent qualified parties, since it is based on secret data and methods and is financially supported by parties that have an interest in the outcome of the study, and (ii) because it lacks objectivity by failing to even mention the effects of the AIA joinder provisions on the surge in the number of suits.

DG GROW relies on a defective study on patent licensing costs and barriers

[DG GROW’s public consultation on patents and standards](#) has relied heavily on a “[fact-finding study](#)” (the “Study”) it commissioned specifically for this consultation. It headlined the Study as “useful information” on the consultation web site which states that “[it] analyses the rules and practices developed to ensure efficient licensing of standard-related patents. It also covers barriers to efficient licensing and ideas discussed among stakeholders for dealing with these barriers.”

[My response](#) to the consultation questionnaire and rebuttal of the “Study” report covered a wide variety of issues. One of my key points there is that the data collected and analysed in surveys and from a patent database does not actually measure the alleged barriers including information costs. For example, the increase in patenting does not necessarily result in a harmful increase in transaction costs for implementers who benefit from an increasing base of technologies to



license and in larger portfolios in most cases. The Study did not show any such adverse effects or causation.

Here, as in previous sections of this article, I focus specifically on the agency's reliance on research which is of poor quality and does not meet the required standards in reliability and transparency. While the Study is purported to rely upon quantitative and qualitative data, the gathering and analysis of such data was defective and biased, including the manner in which interviewees were selected and with regard to the specific information sought from them. Where the methodology for obtaining data is defective, no amount of manipulation of the data can produce representative results.

The Study report is supposedly based on the results of interviews with "representatives" of stakeholders having an interest in the issue of SEP licensing. It states there were 33 or 37 interviewees (it is unclear which of these two figures is correct), but only 6-10 interviewees were putative stakeholder experts in communications technologies (e.g. mobile communications), which account for most SEPs. The remainder of respondents were from industries with completely different technologies, competitive landscapes and other characteristics. Regardless of their industry, the respondents are anonymous and the individual results of the interviews are not disclosed (Study, page 229).

In summary, from the outset the Study's approach was flawed and biased:

1. Questions and interview conduct were not compliant with [accepted EU standards](#), thereby undermining the value of the information gathered, and the creditability of the entire project.
2. Lack of disclosure of the interview results make it impossible to verify whether the information was properly analyzed and whether it even supports the conclusions and recommendations made in the Study.
3. Lack of sufficient identification of the interviewees makes it impossible to determine whether they represented an appropriate cross-section of views to provide the basis for objective conclusions.
4. The sample of interviewees overall was too small to provide any statistically significant information from which meaningful conclusions could be drawn.
5. Reliance on the views of stakeholders in disparate industries precludes the ability to draw generalized conclusions applicable to all industries.
6. Discussion and recommendations on SEP licensing in ICT standards is unwarranted because of the predominant input of stakeholders from other industries and the small number of questions directed towards marketplace activities involving ICT standards.
7. Specifically with respect to the small number of interviewees involved in the ICT sector, the lack of transparency of the interview process makes it impossible to discern if such a group was representative of all stakeholder interests - e.g., SEP owners; implementers; firms that are both licensors and licensees of SEP; or firms that are SEP licensors but whose business models do not involve royalty-based licensing. The nature of a firm's participation and market strategies in the ICT industry with respect to SEP licensing will significantly affect its views.

The Study's reliance on the OEIDD database for patent disclosures does not cure the Study's methodological flaws. Indeed, the database was created by the authors themselves in 2011, suggesting at least the potential for non-objectivity, and the dataset covers many industries, with



information relating to the ICT industry comprising only a small subset. Furthermore, the authors themselves note the inherent weaknesses of the database, including with respect to its limitations, accuracy and reliability (e.g. Study Annex III, page 255).

Impact assessment and proportionality of proposed remedies

The Study offers numerous proposed “solutions” to the assumed “problems,” but it does not, however, offer any impact assessment for such proposed “solutions.” In fact, it gives no consideration to the increased costs, impracticability and inefficiencies that will arise from the proposed “solutions.”

Such excessive use of assumptions rather than facts is a clear breach of best practice which can lead to disastrous effects. See e.g. [“Common Methodological Flaws in Economic Evaluations”](#). Rather than making a full and balanced assessment of relevant and available information, the Study’s authors started with a preconceived notion that SEP licensing was problematic, and then selected the evidence they thought useful to support their hypotheses. But, as [renowned economists and statisticians warn](#): “[i]t is important to test the predictions of any . . . model against the observed facts; simply positing a theoretical possibility can lead to disaster.”

Impact assessment is a necessary tool to ensure that policy initiatives are undertaken on the basis of transparent, comprehensive and balanced evidence. [EC-issued guidelines](#) state that “[i]mpact assessment is a set of logical steps to be followed when you prepare policy proposals. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts.” The EC has made clear that “all policy decisions should be based on sound analysis supported by the best data available.” At a minimum, non-legislative initiatives should describe “the most significant potential impacts of different approaches”. Furthermore, “good quality data - facts as well as figures - are an essential.” As the [EU’s former Chief Scientist, Anne Glover, stated in August 2014](#), market impact assessments should be transparent and all stakeholders should have the ability of weighing evidence against evidence. Evidence relied upon that is to meet a political or policy agenda, rather than full and good quality data, is not reliable, she maintained.

The Study does not meet these standards. Although there are many recommendations for addressing the problems assumed to exist with respect to SEP licensing, the commentary on impacts of the suggested solutions is, at best, superficial. Some administrative cost impacts are discussed, but for the most part little or no consideration is given to the impact the suggested solutions will have on the incentives for stakeholders to continue their participation in standardization efforts while subject to the constraints that are, at a minimum, inherent in the such solutions.

More specifically, the Study proposes 15 suggested solutions to perceived, yet unverified, problems (Study, pages 135-141). For example, as solutions to the problem of standards implementers suffering as “actual or potential victims of patent hold-up and patent ambush,” the Study proposes solutions of: clarifying FRAND conditions by developing principles for determination of royalty rates and royalty principles; developing dispute resolutions as alternatives to courts; providing more transparency on actual SEP ownership; having SSOs state more clearly the objectives of their IPR policies; conducting IPR landscaping; defining rules when patent owners can seek or obtain injunctive relief; requiring patent owners to make a “cash-only” offer; and creating a database for royalty rates to allow benchmarking.



Similarly, to address the perceived, yet unproven, problem that cumulative payable royalties for SEPs will be above some level of undefined “*reasonableness*” - *i.e.*, royalty stacking - the Study suggests that patent pools should be required; FRAND terms should be clarified; and a coordination mechanism should be promoted and maintained among licensors that would in effect cap the aggregate royalties that could be charged.

The proposals are unjustified and, at best, disproportionate to the aims to be achieved, which means that the EC is obliged to discount them. The fundamental EC principle of proportionality provides that any Community action should not go beyond what is necessary to achieve satisfactorily the objectives which have been set. The Court of Justice of the EU and other authorities regularly strike down actions for being disproportionate. Further consistent with the EC Impact Assessment Guidelines, the option of “*no EU action*” must be included as a viable question (page 30).

No short cuts: government agencies must be held to the highest evidentiary standards

Principles and practices in science, academia and the law have helped establish standards for empirical research including impact assessment on government policy initiatives. These are being flouted in pursuit of political objectives in patents and standards including desires to undermine patent rights and limit royalty fees. Significant policy changes and “remedies” for alleged problems and harms must only be applied where supporting evidence is applicable, reliable and transparent for public scrutiny, and where benefits are proportionate to the costs and risks in making changes.

About this article, the author and WiseHarbor

This article was written by Keith Mallinson and initially published by [IP Finance](#) on 1st May 2015.

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