**PUBLIC PATENT FOUNDATION**
*Representing the Public's Interests in the Patent System*

PUBPAT

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VIA ELECTRONIC MAIL

Mr. Erik Nooteboom
Head of Unit, Industrial Property Unit
Internal Market and Services Directorate General
European Commission
1049 Brussels
Belgium
Email: Markt-D2-patentstrategy@cec.eu.int

**Re: Questionnaire: On The Patent System In Europe**

Dear Mr. Nooteboom or To Whom it May Concern:

The Public Patent Foundation ("PUBPAT") is a United States based not-for-profit legal services organization that represents the public's interests in the patent system, and most particularly the public's interests against the harms caused by wrongly issued patents and unsound patent policy. As PUBPAT's Executive Director and a registered patent attorney in the United States, I respectfully make the following comments in response to the Commission's Questionnaire On The Patent System in Europe. Specifically, these comments focus on issues raised in Sections 1 and 3 of the Questionnaire.

Despite what the public is led to believe, patent systems have extremely far reaching effects on all people. Specifically, wrongly issued patents and unsound patent policy harm the public by making products and services more expensive, if not completely unavailable, by preventing scientists from advancing technology, by unfairly prejudicing small businesses, and by restraining civil liberties and individual freedoms. Although the public can indeed benefit from a properly functioning patent system, since patents are government sanctioned restraints on freedom and competition, the public can also be severely harmed by errors within patent systems. For that reason, patent policy should be crafted with full knowledge of all of the effects, both positive and negative, patent systems have on all people.

Unfortunately, however, it is too often the case that not all of the interests affected by patent systems are adequately represented in patent policy discussions. Specifically, the interests of the non-patent holding public are almost always absent from any meaningful

participation in decision making about patent systems, despite the fact that they bear the brunt of their burdens. This lack of representation of the public's interests is due in part to the fact that the patent community culture tends to dismiss the opinions of those it sees as outsiders, but it is mostly a result of the public not fully realizing how patent systems affect them.

Regardless, patent policy should always be made with consideration of all of the public's interests, not just the specific interests of patent offices, patent holders, patent practitioners, and large commercial actors. As such, PUBPAT is pleased to provide these comments in order to represent those otherwise unrepresented interests. We strongly urge you to continue to ensure that all affected interests are always adequately represented in patent policy discussions in the future. It is critically important to the success of any patent system that it take into account all of the effects it has on all citizens and that it have sufficient oversight structure built in to ensure that it remains fair and democratic.

Patent systems should not trump fundamental human rights nor be used to impede their own goal of advancing technology. Unlike copyright and trademark law, under most current patent systems there is no exemption from infringement liability for exercising basic human rights. Although perhaps previously not as relevant to the exercise of individual freedoms as copyright and trademark law, patent law today impacts many, if not most, of our most sacred rights, including speech, privacy, religious expression, assembly, and voting. This is partly because patent eligibility has been expanded and partly because everyday life is becoming increasingly dependent upon technology. As such, there should always be an exemption from patent infringement for the exercise of human rights. Further, since the mission of the patent system is to advance technology, it seems improvident to subject to infringement liability technological research. As such, there should also always be an exemption from patent infringement for research.

Section 3 of the Questionnaire addresses the European Patent Litigation Agreement (“EPLA”), which proposes to establish a specialized judicial system for the resolution of patent disputes. We have significant experience with specialized patent courts in the United States, due the establishment of the Court of Appeals for the Federal Circuit (“CAFC”) in 1982 to be the exclusive Court of Appeals for all patent cases. Our experience with the CAFC has shown that by removing patent law from the traditional judicial system, patent system advocates receive the benefit of having a more receptive judicial setting for accomplishing their goals of advancing their own private interests over the interests of the general public.

As a result, the CAFC has expanded U.S. patent rights in every conceivable direction, by enlarging the subject matter eligible for patent protection to include anything, by increasing the remedies provided to patent holders and by eliminating or significantly curtailing many of the requirements placed on patents, such as that they be non-obvious. This excessive bloating of the system by the specialized patent court has had significant detrimental effects on the public because it skews the system too much in favor of rights holders. See Jaffe, A.E. & Lerner, J., *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It*, Princeton University Press (2004). Making things worse is the fact that many patent system participants are hesitant to express their reservations about the CAFC for fear of reprisal when they next appears before it. We are deeply concerned that a specialized patent court in Europe would have a similarly detrimental effect of Europeans and, as such, we urge you great caution in proceeding with the EPLA.

We hope these comments are helpful in ensuring that all of the public's interests are adequately represented and considered by Europe's patent systems.

Sincerely,

Daniel B. Ravicher