October 31, 2008

Mr. Philippe Baechtold
Head, Patent Law Section
Standing Committee on Patent Law (SCP)
World Intellectual Property Organization
34, chemin des Colombettes,
1211 Geneva, Switzerland

Re: ITSSD Response to the WIPO Report on the International Patent System (Document SCP/12/3)

Dear Mr. Baechtold,

The Institute for Trade, Standards and Sustainable Development (ITSSD), an internationally recognized nonprofit legal research and educational organization recently accredited as *ad hoc* observer to the WIPO Standing Committee on the Law of Patents (SCP), wishes to convey its sincere appreciation for the opportunity to comment on the *WIPO Report on the International Patent System* (document SCP/12/3) hereinafter "The WIPO Report". Please find our comments attached hereto.

As our comments reveal, the ITSSD has performed extensive research and analysis in the areas of international trade, investment and IP law, and international standards, and its Advisory Board possesses extensive experience in the healthcare, economics, legal, business, standards and scientific fields.

We look forward to receiving this Secretariat's response to our comments, and are eager to explore other issues of importance and mutual interest that remain on the SCP agenda.

In particular, the ITSSD and its Advisory Board are now discussing whether to prepare and submit future comments in regard to one, and perhaps, two of the four issues set forth in paragraph 8 of the SCP *Summary by the Chair* (document SCP/12/4). That document indicates that preliminary studies are now being prepared in anticipation of the next session of the SCP. Presumably, they will cover the following subject matter: "Exceptions from patentable subject matter and limitations to the rights, *inter alia* research exemption and compulsory licenses", and "patents and standards".

Thank you once again for your serious and thoughtful consideration.

Sincerely,

Lawrence A. Kogan

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ITSSD Response

To The

WIPO Report on the International Patent System
(Document SCP/12/3)

Submitted: October 31, 2008

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ITSSD Response to the WIPO Report on the International Patent System (Document SCP/12/3)

I. **Introduction**:

The Institute for Trade, Standards and Sustainable Development (ITSSD), an internationally recognized[1] nonprofit legal research and educational organization recently accredited as *ad hoc* observer to the WIPO Standing Committee on Patents (SCP) (document SCP/12/2, accessible at: http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_2.pdf),[2] wishes to convey its sincere appreciation for the opportunity to comment on the *WIPO Report on the International Patent System* (document SCP/12/3) hereinafter "The WIPO Report". Please find our comments set forth below.

II. **Comments**:

Paragraph 99 states that, *"Although there is not much hard evidence on the subject, research generally suggests that a functioning patent system, including adequate enforcement measures, does rather encourage technology transfer and foreign investment, but that it is only one among many other factors influencing such a transfer, which include the size of the market, the faculty to absorb the technology, financial incentives and the existing infrastructure, among others."*

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[1] For example, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) has designated the ITSSD's Website as a 'Selected Worldwide Website for 'Trade and Investment' and as an 'Information Source – Trade and Environment' See: http://www.itssd.org/References/Government/UNESCAP-ITSSDlistedas_SelectedWorldwideWebsite_[2].pdf ; http://www.itssd.org/References/Government/UNESCAPFeb2007Trade_InvestmentNewsletter-InformationSourcesforTradeandEnvironment[2].pdf . The work of the ITSSD and its staff have also been referenced by other agencies within the UN System, including the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s International Information Centre for Terminology (INFOTERM) http://www.itssd.org/References/Government/UNESCO-INFOTERMNewsletter[2].pdf ; the United Nations Conference on Trade and Development (UNCTAD) http://www.itssd.org/References/Think%20Tank/UNCTAD%20SE%20Asia%20Project%20-%20TBTs%20-%20Kogan%20-%20NFTC%20paper1%20highlighted.pdf ; the United Nations University - Institute of Advanced Studies http://itssd.org/References/Think%20Tank/UNU%20-%20Trading%20Precaution%20-%20Kogan%20cited.pdf ; and the World Bank http://www.itssd.org/References/Think%20Tank/World%20Bank%20website%20-%20Kogan%20reference%20-%20Ducking%20highlighted.pdf .

[2] The ITSSD has also been accredited as *ad hoc* observer to the WIPO Standing Committee on Copyrights and Related Works (SCCR) (document SCCR/15/3, accessible at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_3.pdf ; to the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) (document A/43/13 Rev., accessible at: http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_13_rev.pdf ; and to the WIPO Advisory Committee on Enforcement (ACE) (document WIPO/ACE/4/4, accessible at: http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_4/wipo_ace_4_4.pdf .) The work of the ITSSD has also been recognized by the World Health Organization. See *ITSSD Response to the Draft Global Strategy and Plan of Action* (September 30, 2007, at: http://www.who.int/phi/public_hearings/second/contributions_section1/Section1_ITSSD_Full%20Contribution.pdf .

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The ITSSD wishes to share with the SCP its peer-reviewed published research on this subject matter which reflects a stronger linkage than has been indicated.[3] ITSSD research also reflects that, within the US, the creation of a 'rule of law' enabling environment which emphasizes strong recognition and protection of private property rights, including IP, the importance of technology transfer from the public to those private hands most capable of disseminating know-how throughout society, the need for commercialization of basic research and development to achieve such end, and the need to enact laws that encourage and reward the creation of entrepreneurial risk-taking businesses, has resulted in the US becoming the world's innovation and technology leader. Therefore, the ITSSD concludes that emerging and developing country governments should carefully study and evaluate the US system to see which of those elements, individually, or collectively, can work best for their societies.[4]

Paragraph 101 states that, *"With the increase of globalization and transnational trade flows, the link between patents and technology transfer has been increasingly recognized at the national and international levels… This relationship is generally understood to have both positive aspects, namely where useful technology is indeed transferred to the recipient, and a negative component, namely where patent rights or an abusive use of such rights, may equally hinder a transfer of technology."*

The ITSSD wishes to share with the SCP its peer-reviewed published research on this subject matter. It reflects that national government inclinations against, and criticisms of, establishing national legislative/regulatory platforms to facilitate greater technology transfer of patented research between publicly-funded research institutions and privately capitalized entities is largely ideological and without empirical foundation. For this reason, some agencies within national governments and officials within national universities tend to focus on the negative aspects of such arrangements to justify their reticence in promoting them.[5]

Paragraph 102 states that, *"Beyond this international dimension to transfer of technology as*

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[3] *See* Lawrence A. Kogan, *Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Will Stimulate Domestic Innovation and Generate Economic Growth*, International Journal of Economic Development (IJED) Vol. 8, Nos. 1-2 (2006), particularly, Section III. The Tools of Innovation, A. Patent-Based Intellectual Property is Valuable: Intellectual Property is the Key to Innovation, at pp. 137-144 and accompanying endnotes; Section IV, Acquiring the Tools of Innovation, A. Brazil Should Adopt IPR Protections to Attract Foreign Direct Investment: IPR Protections are Important to Foreign Investors, at pp. 157-174 and accompanying endnotes; V. Benefiting From Foreign Direct Investment and IPR, at pp. 224-248, and accompanying endnotes, at: http://www.itssd.org/White%20Papers/ijed-8-1-2-kogan.pdf .

[4] *See* Lawrence A. Kogan and Yelena Bakulina, *How Market-Based Policies Could Spur Biotechnology Growth in Russia*, Washington Legal Foundation Backgrounder (Vol. 23 No. 14, March 21, 2008) at: http://www.itssd.org/Publications/03-21-08balukina.pdf.

[5] *See, e.g.*: *Rediscovering the Value of Intellectual Property Rights* supra, Section IV. Acquiring the Tools of Innovation, B. Brazil Should Develop and Efficient National Innovation System, at pp. 174-187 and accompanying endnotes.

described above, there is a further aspect that needs to be looked into, namely the transfer from results of research institutions to real, tangible products for the market. One example is the Bayh-Dole Act in the United States of America, through which research institutions and universities can obtain patent protection for their inventions and thus enter into licensing agreements with industry…In view of these examples, a number of developing countries have also established patent and technology transfer systems in the public sector."

Paragraph 103 states that, *"One argument that is put forward in favor of technology licensing in developing countries claims that such policies would create incentives for building technical know-how and expertise in those countries, which could encourage the creation of local industries. On the other hand, some question whether licensing is sufficient to achieve this purpose, considering that the licensing agreements do not necessarily disclose all the know-how necessary to exploit the technology, and suggest that more should be invested in tuition and education, as well as in improved public-private partnerships…"*

The ITSSD wishes to share with the SCP its peer-reviewed published research on national technology transfer frameworks that promote the establishment of university licensing programs referred to in both paragraphs 102 and 103. Such research surveys the national innovation and technology transfer systems established by different developed and developing country governments and concludes that innovation and technology transfer has been most successful within those countries that provide for (*in law*) and enforce (*in practice*) strong protection of exclusive private property rights, including patents and licensing contracts. Such research discusses in detail the provisions of the Bayh-Dole Act and the overwhelmingly positive impact that it has had in the marketplace for innovation. It also compares and contrasts it to mechanisms developed in other countries.[6] At least two emerging/ developed economies have companies that are slowly gaining experience in cross-border licensing of technologies.[7]

Paragraph 102 also states that *"…a number of developing countries have also established patent and technology transfer systems in the public sector."*

Paragraph 103 also states that *"as developing countries are in the process of building and expanding their research ability, one of the major objectives to consider in those countries is to*

[6] *See, e.g.*: *Rediscovering the Value of Intellectual Property Rights* supra, Section IV. Acquiring the Tools of Innovation, B. Brazil Should Develop and Efficient National Innovation System, at pp. 187-224 and accompanying endnotes. *See also*, O. Lee Reed, *Exclusive Private Property is Indispensable to Brazil's Economic Development*, Introduction to *Rediscovering the Value of Intellectual Property Rights* supra, at pp. 5-10, at: http://www.itssd.org/White%20Papers/ijed-8-1-2-reed.pdf .

[7] *See* Lawrence A. Kogan, *Rediscovering the Value of Intellectual Property Rights/IP in the 21st Century*, Presentation at the XXth Annual Forum da Liberdade, Convened by the Instituto de Estudos Empresariais (IEE) in Porto Alegre, Brasil (April 17, 2007) at: http://www.itssd.org/ppt/IPinthe21stCentury.ppt ; Lawrence A. Kogan, *Harnessing Korea Biotech For the Markets: The Importance of IP Protection and Technology Transfer*, Presentation at the BIO Korea 2008 Osong Conference and Exhibition, Osong-Bio Technopolis, Chungbuk, South Korea (October 9, 2008), at: http://www.itssd.org/Harnessing%20Korean%20Biotech%20for%20the%20Markets%20-%20LKogan%20presentation%20-%20Track%208%20-%20Oct%209,%202008.ppt .

encourage incentives increasing that capacity. In this respect, a sensible use of the patent system, and of its use for both international transfer of technology and public-private partnerships at the different stages of research and development should be considered carefully, taking into account the flexibilities that the system offers in order to avoid abuses."

The ITSSD wishes to share with the SCP its peer-reviewed published research on developing country R&D and technology transfer efforts as reflected in paragraphs 102 and 103. Such research reflects how a number of developing country governments, despite political and internal government agency policy disagreements, are working overall to strengthen their national patent systems to secure greater innovative rather than adaptive FDI, to secure the spillover benefits that accompany greater innovative FDI, and to show how they are working to comply with their WTO TRIPS obligations. In addition, it reflects that where emerging and/or developing economies are working against such compliance, and are endeavoring to replace it with a new 'universal access to knowledge' (A2K) paradigm, they risk undermining their future by not creating the necessary "legal, political, and developmental environment in which" their citizens and "foreigners are inspired and rewarded for innovating."[8]

Furthermore, ITSSD research reflects that a national innovation system lacking adequate market-based incentives, particularly strong recognized and enforced private property rights, is likely not to provide the best results for least developed countries.[9] ITSSD research has most recently been seriously considered by the legal, business and intellectual communities within the country of India.[10]

Paragraph 104 states that, *"An issue which is different from the question of whether and which national licensing policies should be adopted by the various countries relates to making technologies from industrialized countries available to developing countries at affordable conditions, in order to increase flows of technology to developing countries. While many governments, sometimes for constitutional reasons, may not be in a position to dictate the conditions at which their companies have to give away their technologies, they may nevertheless provide various incentives, for example, of a fiscal nature, for such a transfer."*

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[8] *See, e.g.*: *Rediscovering the Value of Intellectual Property Rights* supra, Section VI. Conclusion - Brazil's Conduct Compromises its Ability to Acquire the Tools of Innovation, A. What Other Countries Are Doing to Strengthen IPRs and Their Ability to Innovate, at pp. 283-298 and accompanying endnotes. *See also* Pat Choate, *Brazil's 'Open and Universal Access' Agenda Undermines its Own Technological Future*, Foreword to *Rediscovering the Value of Intellectual Property Rights* supra, at pp. 1-4, at: http://www.itssd.org/White%20Papers/ijed-8-1-2-choate.pdf.

[9] *See* J. Kilama, *Incentive-**less** Innovation is Not a Viable Economic Development Model for LDCs*, Preface to, *Rediscovering the Value of Intellectual Property Rights* supra, at pp. 11-14, at: http://www.itssd.org/White%20Papers/ijed-8-1-2-kilama.pdf .

[10] *See* Lawrence A. Kogan, Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Will Stimulate Domestic Innovation and Generate Economic Growth, Executive Summary (http://www.itssd.org/pdf/ITSSD-BrazilPaper-ExecSummaryI.pdf) published in **Ideas, Innovation and Patents** ICFAI Law Books Division, ICFAI University Press, Andhra Pradesh, India, (C. Sri Krishna, Editor 2008), at pp. 103-133, Preview accessible at: http://www.itssd.org/Ideas,%20Innovations%20and%20Patents%20-%20ICFAI%20Law%20Books%20India%20-%20Red.pdf .

The ITSSD wishes to share with the SCP its peer-reviewed published research and public presentation materials on this subject matter. ITSSD research reflects that depending on how national constitutions define the role of government vis-à-vis individuals and society at large, as well as, the character ('negative' versus 'positive') and scope (exclusive versus nonexclusive) of private property rights, will determine the level of legal recognitioni and protection afforded rights in private tangible and intangible (IP) property. ITSSD research has focused, in part, on the constitutions of the United States,[11] Brazil,[12] Russia[13] and South Korea.[14]

Paragraph 105 states that, *"In the past decades, the discussions on transfer of technology have gone through different phases: while in the 1970s, countries focused on the differences among countries in respect of technology development, the weakness of companies in developing countries compared to those in industrialized countries and the effects of the patent system, in the 1990s, the accent was placed more on capacity-building and a better understanding and assimilation of technology. Today, while at least some of the concerns just mentioned are still valid, the focus is more on how to bridge the still existing technological divide, on how to have all countries participate in norm-setting, and how to best make use of existing flexibilities."*

The ITSSD wishes to share with the SCP its peer-reviewed published research showing that, although during both the past and present eras, various countries created and pursued industrial and innovation policies in a less than transparent, open and inclusive manner, in the hope of securing for themselves and their citizens a more economically prosperous and socially productive future, the political ends did not and still do not justify the illicit means. Such research leaves policymakers, national and regional government executives and legislators, industry participants and the WIPO secretariat to query whether, considering human nature, the many bold proposals proffered by the various stakeholders involved in the production of WIPO Report and those yet to be released, anything much can be expected to change, especially in the near future.[15]

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[11] *See* Lawrence A. Kogan, Brazil's *IP Opportunism Threatens US Private Property Rights*, Section III, C. Brazil Aims to 'Take' U.S. Private Property for Brazilian 'Public Use' Without 'Just Compensation', at pp. 102-118 (especially pp.114-118) and accompanying footnotes, at: http://www.itssd.org/Publications/IAL105-II(frompublisher)[2].pdf .

[12] *See* Lawrence A. Kogan, *Forced Licensing of Drug Patents Reflects 'IP Counterfeiting Efforts On World Stage*, Washington Legal Foundation Legal Backgrounder (Vol. 22 No. 22, June 27, 2007) at: http://www.itssd.org/Publications/ForcedLicensingofDrugPatentsReflectsIPCounterfeitingEffortsonWorldStage-WLF06-22-07kogan.pdf .

[13] *See* Lawrence A. Kogan, *Taking Advantage of IP Protection to Advance Russian Biotech*, Presentation at the First EurasiaBIO International Congress for Biotechnology, of the Yu.A. Ovchinnikov Russian Society of Biotechnologists, (April 25, 2008) at: http://www.itssd.org/Programs/KoganPresentationEurasiaBIOMoscowConferenceApril2008.ppt .

[14] *See* Lawrence A. Kogan, *Harnessing Korea Biotech For the Markets: The Importance of IP Protection and Technology Transfer*, Presentation at the BIO Korea 2008 Osong Conference and Exhibition, Osong-Bio Technopolis, Chungbuk, South Korea, *supra*.

[15] *See, e.g.*: *Rediscovering the Value of Intellectual Property Rights* supra, Section II. Brazil Challenges the Established Global IPR Framework, D. Brazil Should Not Rely Upon the History of Industrial Opportunism to Justify its Current Behavior, at pp. 120-136 and accompanying endnotes.

Paragraph 111 states that *"Interoperability is the key to the interplay of different technological components, in particular in, but not limited to, the field of information and communication technologies (ICT). More and more products need to be compatible and to interoperate, and this is often achieved by so-called technical standards, which are technical specifications allowing the replacement of one part of a given product with another part, or the assembly of such parts."*

The ITSSD agrees that interoperability is a critically important feature of all technologies that can be promoted through carefully drafted technical standards. However, we do not agree that the aim of *all* technical standards is to ensure replacement of particular parts or assemblies of parts. Rather than promote cloning or substitutability, the primary objective of technical standards related to information and communications technologies (ICT) is *to promote data exchange*. In other words, through the exchange and mutual use of data, ICT standards enable different products to work together while still allowing differentiation that facilitates competition and innovation.

Paragraph 111 states that, *"Standards **create** predictability, interoperability and competition between implementations, without imposing homogeneity."*

Paragraph 112 states that, *"Beyond **ensuring** interoperability, standards can also contain information…"*

The ITSSD is concerned that these two paragraph excerpts when read together convey the impression that technical standards can *guarantee* interoperability. No standard is perfect. In fact, a standard may be ambiguous in places, or have gaps, leading implementers to consider different technical options to best implement a particular element of the standard. Experience shows that the use of different technological approaches to implementing particular elements can and often does lead to subtle (or not so subtle) conflicts ('bugs') between different and within even individual implementations. And, aside from making choices based purely on technical/technological considerations, an implementer may choose to implement different parts of a standard based on his or her views regarding what is likely to be most appropriate in the marketplace. Needless to say, such choices can lead to interoperability gaps between implementing products. After all, there is often asynchronous evolution of standards and the products that implement them. The point here is not that standards are not useful in achieving interoperability – they are. But they should not be seen as a panacea. The ITSSD wishes to emphasize that there exist other means of achieving interoperability. They include, for example, 'plugfests' and vendors working together, which should not be discounted.

Paragraph 113 states that, *"Generally speaking, there are two categories of technical standards: **de facto** standards and **de jure** (or "formal") standards. A **de facto** standard exists when a particular technology is widely implemented and deployed in the market. **De jure** standards are set up by*

standard setting organizations, which are often under some governmental influence. The standard setting organizations may be international…regional…or national. [They] are independent and coordinate and facilitate a voluntary standard-setting process through the involvement of technology suppliers. In certain cases, companies form a consortium to establish technical standards in a particular field, mainly in the telecommunication and computer technologies."

The ITSSD observes that the definition of 'de facto' standards may be overly narrow and should take into account the broader context in which industry standards arise. At least one commentator has noted that, "A *de facto* standard describes something that the market has overwhelmingly decided that it wants to use in order to achieve the same result as an official standard. Such a de facto standard can deliver a degree of interoperability that is far superior to that achieved by 'de jure' standards, but at a cost: with a *de facto* standard, everything is controlled by a single vendor (or group of vendors)."[16] The ITSSD questions whether the narrowness of the definition within paragraph 113 was intentional or merely an oversight. The ITSSD is aware of certain WIPO member countries' longstanding preference for creating standards in a "'de jure' sphere" in which "the strength of…national votes are able to exert considerable leverage" in the development and harmonization of publicly funded regional standards.[17] In fact, government officials in at least one region of the world have publicly expressed how: 1) "To have one applied standard and one accepted test for each product, process or service is a trade-facilitating objective"; 2) "[T]he success of [their regional] standardisation system is]related to and] depend[ent] on the commitment of the public authorities to use voluntary standards in support of their [governmental] policies…embodying a high level of consumer, health and environmental protection"; 3) "Co-operative arrangements with international standards bodies offer a systematic framework to take over international standards and/or to contribute to the international standards making process"; and 4) "Public authorities can make use of public procurement as a powerful tool to promote the usage of accessibility standards."[18]

The ITSSD is also aware that for such countries, 'de jure' standards, were, at first, unable to keep up and compete with consortium-based 'de facto' standards in the realm of internet-related ICT. However, this situation eventually changed as a result of the dotcom bubble of 2000, the creation of pan-regional standards organizations that "have become powerful en bloc actors within their international counterparts", the growing use by such organizations of the OSI (open systems interconnection protocol), and the extensive infighting that had taken place among competing de

[16] See *Microsoft, Adobe and the Murky of World of 'RAND'*, Standards Blog in Consortium Standards Bulletin, Vol V, No. 6 (June 2006) at: http://www.consortiuminfo.org/bulletins/jun06.php#considerthis .

[17] *See* Greg FitzPatrick, *The failure of European ITC standards policy And a possible future?* (Report 65/2003), The Swedish ICT Commission (2003) at: http://www.itkommissionen.se/dynamaster/file_archive/030523/ded7728140c38980efb4e5a0f645fcb3/The%20failure%20of%20European%20ITC%20standards%20policy.pdf .

[18] See *European Policy Principles For International Standardisation*, EU Commission, Enterprise and Industry, at: http://ec.europa.eu/enterprise/standards_policy/international/eur_policy_principles/index.htm ; *European policy principles for international standardisation - informal summary*, (referring to the full text SEC (2001) 1296, EU Commission, Enterprise Directorate General, at : http://ec.europa.eu/enterprise/standards_policy/international/eur_policy_principles/doc/index.pdf ; Commission Staff Working Paper – European Policy Principles on International Standardization", SEC (2001) 1296, (7/26/01), par. 26, at p. 10, at : http://ec.europa.eu/enterprise/standards_policy/international/eur_policy_principles/doc/sec2001_1296_en.pdf .

facto standards organizations mostly based in other countries that were "not prepared to give up potential market lock-in and product leverage by abiding by the dictums of 'impartial' consortiums". The ITSSD observes that, in the eyes of certain experts, "There are signs that the informal standards consortia who saw the light of day with the emergence of the Internet and the World Wide Web, will eventually be absorbed into the de jure process they once rebelled against."[19]

In addition, the ITSSD has observed how governments within one region of the world have become steadily involved in promoting the greater use of 'de jure' ICT standards to meet the region's stated public policy goals of providing consumers with greater accessibility to the internet while strengthening the competitiveness of regional and/or national ICT industries.[20] The ITSSD has also observed how the standards models of large developing economies appear to be similarly favoring the use of 'de jure' over 'de facto' standards with the ultimate purpose of "play[ing] an increasingly important role in setting global standards."[21] It is with this research in mind that the ITSSD questions the extent of the role that governments should play in defining national, regional and international ICT standards.[22] Is it possible that a greater role carved out by governments in this area of standardization will result in the greater use of 'de jure' rather than 'de facto' ICT standards such that the former will eventually overtake and subsume the latter? Therefore, is it not possible that governments will increasingly rely on (and 'from behind the scenes' direct) ostensibly private SSOs and industry members to implement 'de jure' ICT standards consistent with national and/or regional

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[19] *See* Greg FitzPatrick, *The failure of European ITC standards policy And a possible future?*, supra.

[20] *See* Erkki Liikanen, *Accessibility for All in EU perspective*, Speech Delivered at the Accessibility for All Conference, Nice, France (Speech 03/161, March 28, 2003), Europa Rapid Press Release at : http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/161&format=HTML&aged=0&language=EN&guiLanguage=en ; *World Standards Day, 14 October: Global standards for the Global Information Society*, Europa Rapid Press Release (IP/03/1374 , Oct. 13, 2003), at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1374&format=HTML&aged=0&language=EN&guiLanguage=en . *See also* Sherry Bolin, The Standards Edge, The Bolin Group (© 2002), Table of Contents, Introduction and Chapter Summaries at: http://www.thebolingroup.com/book_contents/TOC_and_summaries-standards_edge.pdf .

[21] *See* Richard P. Suttmeier, Xiangkui Yao, and Alex Zixiang Tan, *Standards of Power? Technology, Institutions, and Politics in the Development of China's National Standards Strategy*, The National Bureau of Asian Research (2006) at: http://www.nbr.org/publications/specialreport/pdf/SR10.pdf ("China is attempting to develop a national standards strategy that will modernize the Chinese domestic standards regime and bring it into conformity with China's WTO obligations. At the same time China is seeking to utilize its growing technological capabilities and market power to develop technical standards that will enhance the competitiveness of Chinese firms.") *Id*., at p. 1. Arguably, China has learned a great deal about product standardization from the European Union and likely shares with Europe a preference for 'top-down', state-directed economic activity and formal international institutions. *See* Richard P. Suttmeier, and Yao Xiangkui, *China's Post-WTO Technology Policy: Standards, Software and the Changing Nature of Techno-Nationalism*, The National Bureau of Asian Research (2004) at p. 25, at: http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN026775.pdf . It is also likely for this reason that China submitted comments to the WTO Technical Barriers to Trade Committee seeking clarification of the relationship between standards and intellectual property. See *Background paper for Chinese Submission to WTO on Intellectual Property Right Issues in Standardization*, Communication from the People's Republic of China, Addendum (G/TBT/W/251/Add.1) (Nov. 9, 2006) at: http://chinawto.mofcom.gov.cn/accessory/200702/1171346578955.doc ; *Intellectual Property Right (IPR) Issues in Standardization*, Communication from the People's Republic of China (G/TBT/W/251) (May 25, 2005) at: http://sms.mofcom.gov.cn/table/0527_wto_en.doc .

[22] *See, e.g.*, Sherry Bolin, *The Nature and Future of ICT Standardization*, Presented at the Nature and Future Conference (Dec. 12-13, 2002) at: http://www.thebolingroup.com/nature_and_future_Conference.pdf .

legislation for the purpose of erecting new disguised technical barriers to trade[23] that appear at first glance *not* to have the imprimatur of government involvement?[24]

Paragraph 119 states that, *"From a policy standpoint, the most essential objective appears to be, while keeping in mind the encouragement of innovation, to strike a* ***balance*** *between the interest of patent holders in exploiting their patents, the producers who want to license and produce the goods covered by the standard at a reasonable price, and the public which seeks the widest possible choice among interoperable products. Some of the main concerns that have been put forward as possibly* ***threatening this balance*** *are… Secondly, some competition issues are at the heart of the debate, such as the situation where the patent holder requires a level of royalties that makes it very difficult to produce the standard or leads to a significant impact on the price of the standardized technology…"*

Paragraph 106 states that, *"****Licensing*** *is important for economic development and consumer welfare, as it helps disseminate innovation. But equally important is competition as one of the main driving forces of innovation, and it is thus important to find* ***the right balance*** *between protecting competition and protecting intellectual property rights."*

Paragraph 37 states that, *"Patent holders are given exclusive rights to prevent others from exploiting the patented inventions and****,*** *in return for the exclusive rights, patent holders are required to disclose information relating to the invention. The disclosure of information is an essential element of the patent system. It is the basis of* ***the balance*** *between inventor's interests and those of society."*

Paragraph 2 states that, *"****The fundamental role*** *of the patent system from an economist's perspective is to address market failure and restore the incentives to invest in production of knowledge. The patent system is intended to correct market failure and under-provision of innovative activities by providing innovators with exclusive rights to prevent others from exploiting their inventions without the patentee's consent. To correct the potential inefficiencies of the market power which may be created through exclusive rights, the patent system provides for, among other mechanisms embedded in the system,* ***public disclosure*** *of the patented matter. The disclosure of the*

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[23] At least one international standards expert has concluded that the Chinese government may have this in mind. "[In] in the fast growing ICT market in China, led by the indigenous innovation strategy, there is a growing risk in the ICT market that Chinese leadership will adopt mandatory Chinese IPR based-standards and over-stringent conformity assessment procedures, which may erect barriers to international trade and raise costs for foreign ICT companies." *See* Xiaomeng Lu, *Standards-Related Barriers to Trade in Chinese ICT Market*, (Sept. 30, 2008), available at: http://ssrn.com/abstract=1271343 . *See also* Prepared Statement of Richard P. Suttmeier, *China's Technology Trap and the Reconstruction of the Chinese National Innovation System*, Presented at the Hearing of China's High Technology US-China Economic and Security Review Commission (April 21-25, 2005) at p. 6, at: http://www.uscc.gov/hearings/2005hearings/hr05_04_21_22.php .

[24] *See* Lawrence A. Kogan, *Discerning the Forest From the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability*, 2 Global Trade and Customs Journal 9 (2007) at pp. 319-337, at: http://www.itssd.org/GTCJ_03-offprints%20KOGAN%20-%20Discerning%20the%20Forest%20from%20the%20Trees.pdf .

technical details of the invention through the patent system expands the public stocks of technical knowledge and creates competition among innovators. A third function of the patent system is to ***encourage technology transfer*** *by creating tradable property rights to improve the efficiency of knowledge flows."*

The ITSSD would like to share with the SCP its concerns that the reading together of these excerpts from paragraphs 2, 37, 106 and 119 leave the impression that the overall objective of patents and standards is to offset competing interests rather than to ensure the provision of a 'public good'. First, the ITSSD is concerned that this WIPO Report's use of the word 'balance' creates a universal presumption that each of the 'interests' identified above (those of patent holders, producers who want to license, and consumers who seek product choices) are somehow equal in significance and that the satisfaction of such interests equally is somehow necessary to achieve the ultimate *public good*: knowledge that generates economic and social progress, self-sufficiency and wellbeing for 'the many'. Clearly these paragraphs reflect a 'hierarchy of interests' in descending importance: 1) knowledge production; 2) knowledge disclosure/dissemination; and 3) knowledge-embedded technology transfer via licensing and commercialization. They also recognize that knowledge production, knowledge dissemination and technology transfer are dependent upon the establishment of adequate economic incentives for those engaging in costly and risky undertakings. Individuals (both natural and legal) must be encouraged to engage in the costly and risky production and public dissemination of knowledge. The same and/or different individuals must also be rewarded for engaging in costly and risky activities that result in the transfer of technologies incorporating such knowledge (inventions and innovations) to those 'hands' most capable of reducing them to useful manufactured products, processes and/or services that satisfy consumers needs and demands. Consequently, it is quite clear that the economic rights of the patent holder(s) are broader and more extensive than those of the licensee(s) concerned with maximizing its individual contract rights to sell as many of the products/services that it produces as is possible. And, both of these interests are more extensive than those of an individual consumer, who holds the ultimate right to purchase or not to purchase the final product or service made available to him/her.

Second, the ITSSD is concerned about how this WIPO Report is effectively positing that the maintenance of such a universally recognizable 'balance' is a justifiable end-in-itself. Arguably, these paragraphs create a second presumption: that any phenomenon or competing 'interest' that disturbs or possibly threatens the initial presumption of a 'balance' must be eliminated or reduced. These and later paragraphs seem to imply that this can occur through various legal or administrative means, including imposition of government-directed pecuniary as well as equitable remedies, and perhaps even penalties, that could lead to the potential loss of otherwise exclusive private property ownership rights, including patents and contract/licensing rights. However, the terms 'balance' and 'right balance', as used above, are subjective terms that are defined differently by different societies. The ultimate question that all national governments should therefore ask themselves is not, how to ensure against a 'threat' to the 'balance' as set forth below, but rather, how to ensure that their societies can acquire the ultimate public good described above.

Third, the ITSSD is concerned about how paragraph 119 concludes that such a 'balance' could be threatened by a situation where the patent holder requires a level of royalties that makes it very difficult to produce the standard or leads to a significant impact on the price of the standardized

technology is one that possibly threatening such a 'balance'. This determination is not conditioned, nor the potential remedies triggered, on a finding of illegality and/or otherwise improper (unfair, deceitful or immoral) conduct, such as breach of an SSO policy and agreement to disclose IP before industry lock-in, followed by exploitation of the IP against SSO members[25] Rather, the 'balance' is deemed threatened merely because an arbitrarily determined threshold level of difficulty has been reached in private contract negotiations undertaken by two or more private parties. Is this a realistic presumption? How does one ascertain the precise 'level of royalties that makes it very difficult to produce the standard' or that 'significantly impacts the price of the standardized technology'? And, which party should be held responsible for making these determinations? SSOs?

It is no wonder why SSO's strive to retain their objectivity and independence. As a result, SSO policies usually instruct members to negotiate among themselves the terms of prospective licenses outside the walls of the SSOs. In addition, SSOs (including consortia) and their members typically agree to employ a flexible RAND/FRAND licensing model that permits each licensor and licensee to negotiate specific terms that are mutually and uniquely suited for their specific situation. For example, some parties will entire into broad cross-licenses while others might enter much more limited cross-licenses. And, other parties will negotiate portfolio licenses, while still others may negotiate patent licenses as part of a larger business transaction. In the standards context, a license is rarely limited to the essential patents associated with a single standard. Rather, such licenses generally encompass a larger portfolio of rights, some of which are not needed to implement the standard, but are viewed as important to the licensee's commercialization plans. Since RAND/FRAND is not rigidly defined it supports all of these different types of negotiations among different parties with different business models. After all, as the jurisprudence reflects, it would be quite difficult to reduce RAND/FRAND to a single universal definition that satisfies all parties.

And, would it even be desirable for SSOs to work towards reducing RAND/FRAND to a uniform definition? According to one standards expert, the answer is no. In his opinion, it is "the diversity of IPR approaches within standard setting bodies [that] allows these bodies to 'compete' for the business of developing standards based on (among many factors) the power of the applicable IPR policy to attract and hold the interest of key stakeholder participants."[26]

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[25] *See, e.g.,*: *In the Matter of Negotiated Data Solutions LLC* referenced in WIPO Report footnote #40.

[26] *See* George T. Willingmyre, Cover Letter to Donald S. Clark, Office of the Secretary, Federal Trade Commission, accompanying Public Comments Prepared by GTW Associates, Inc. in Response to FTC Study entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, (June 14, 2002) accessible at: http://www.ftc.gov/os/comments/intelpropertycomments/index.shtm . *See also Considerations in Assessing a Standards Developing Organization's Intellectual Property Rights Policies in Advance of Participation*, Public Comments Prepared by GTW Associates, Inc., in Response to FTC Study entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, supra, at: http://www.ftc.gov/os/comments/intelpropertycomments/gtwiprarticle1.htm ; *Intellectual Property Rights Policies of Selected Standards Developers* (May 2002), Submission Prepared by GTW Associates, Inc. in Response to FTC Study entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, supra, at: http://www.ftc.gov/os/comments/intelpropertycomments/gtwiprarticle3.htm ; *Intellectual Property Rights Policies of Selected Standards Developers* (Updated Oct. 2004), GTW Associates website, at: http://www.gtwassociates.com/answers/IPRpolicies.html ; *Criteria for the Evaluation of a patent policy for a Standards Setting Organization*, GTW Associates website, at:: http://www.gtwassociates.com/answers/draftIPRcriteria.htm .

Most importantly, the maintenance by most SSOs of a flexible RAND/FRAND model, in effect, reflects recognition and protection of *the fundamental right of every SSO member to freedom of contract*. Freedom of contract rights are especially important to small and medium-sized businesses that file fewer patents on core technologies, for it is they which are most dependent on the exercise of strong IP rights in the marketplace in order to secure a competitive advantage. If they are unable to freely enter into royalty-based licenses with other SSO members on a RAND basis, it is more than possible that they would choose not to participate in the standardization process at all.

In the end, SSOs and consortia should clearly define whatever IPR policies they adopt, and they should be "no less rigorous than those of the ISO, since most consortia operate in the international arena."[27]

Paragraph 120 states that, *"With the growing importance of standards, several avenues are being pursued to prevent conflicts from arising: one is to improve the self-regulatory mechanisms of SSOs…A second avenue which is being looked into involves the application of legal mechanisms either internal or external to the patent system. The latter relates, in particular, to competition law that allows addressing certain aspects of the problem…The former legislative approach addresses the issues from within the patent system, and may cover options such as limited exceptions, compulsory licensing or limitations on the enforcement of the patent rights."*

The ITSSD agrees that self-regulatory SSO mechanisms such as voluntary patent searches can help to reduce conflicts around IPRs and standards. However, they can be quite expensive, and if mandated by SSOs as a matter of policy, they might even drive down participation in standards bodies. And, if an SSO were to adopt such a policy, how would it, practically speaking, determine, and could it be held legally responsible if it determined wrongly, exactly when a patent search should be run, given that the technical scope of a specification often changes over the course of its development?

Furthermore, the ITSSD is concerned that the application of competition law would be available as an option to address alleged member violations of private standards bodies' IPR policies and/or RAND/FRAND commitments. Although legal regimes vary worldwide, in general, a failure to comply with a RAND/FRAND commitment, or a standards body's IPR policy, is actionable under *contract* law. The ITSSD would appreciate greater clarification of the need to employ competition law in such cases where contract remedies are plainly sufficient and the threat of treble damages

[27] "ISO [P]atent [P]olicy 22 mandates, as a minimum, commitment to reasonable and non-discriminatory (RAND) licensing by participants. How RAND is implemented is a matter left to the organization, as are any other rules governing IPR. However, the rules must be complete, spelling out the requirements of members, the penalties for non-compliance, and remedies available to members for such non-compliance. Basically, there must be clear assurance that the holder of IPR will not attempt to treat other consortia participants and users of the standard unfairly." *See* George T. Willingmyre, *Approaches to Influence the IPR Policies and Practices in US and Global Standards Setting* (June 14, 2002), Submission Prepared by GTW Associates, Inc. in Response to FTC Study entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, supra,at: http://www.ftc.gov/os/comments/intelpropertycomments/gtwiprarticle2.htm .

(common in antitrust statutes) is clearly unnecessary to deter less than egregious conduct. What particular scenarios / instances are the Report's authors troubled by? Conflicts between parties over IPRs and standards most often entail disputes surrounding competing commercial /economic interests in the standard, and nothing more. While competition law may be used by national governments in rare instances to prevent the 'carving up of markets by predatory standards body members (i.e., egregious market conduct), the Report's implied suggestion that competition law could be utilized more generally to resolve purely contractual disputes raises serious concerns. In particular, it would appear that there are WIPO stakeholders who believe that the right to freedom of contract must be constrained at all costs, as could be gleaned from the discussion in Paragraphs 107-108.

Paragraph 121 states that, *"Among technology standards, there is particular interest for "open standards"*, and then sets forth two different definitions of the term 'open standards' that revolve around their *economic character*. They emphasize the economically 'reasonable' cost or cost-free terms for acquiring the standards, as well as, the RAND-based royalty or (sometimes mandatory) royalty-free licensing terms for acquiring IP rights necessary to implement the standard.

The ITSSD is concerned about how these new definitions promoted by certain organizations have already confused standards developers and implementers as well as the licensing public about a well known concept that has historically been defined and practiced instead in terms of *process*. There are at least two reasons why it is misleading to define an 'open standard' "as a specification whose sole quality is that it is unconditionally and freely available to those who wish to implement it. First, such a definition ignores the right of essential patent holders to decide how they will license their intellectual property. Second, fees may be charged to obtain a copy of an open standard in order to defray standards development costs." [28] In other words, "open does not imply free."[29]

"Historically, ANSI and many U.S.-based developers of voluntary consensus standards have used the terms "open" or "openness" to characterize a process that has certain important features. These include: 1) consensus by a group or "consensus body" that includes representatives from materially affected and interested parties; 2) broad-based public review and comment on draft standards; 3) consideration of and response to comments submitted by voting members of the relevant consensus body as well as by the public; 4) incorporation of approved changes into a draft standard; and 5) availability of an appeal by any participant alleging that due process principles were not respected during the standards-development process."[30] While these same features [at least, traditionally, have

[28] *See* Patricia Griffin, *Current Attempts to Change Established Definition of "Open" Standards*, ANSI Standardization Activities Critical Issues Paper (May 2005) at: http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/Critical%20Issues%20Papers/Griffin%20-%20Open%20Standards%20-%2005-05.doc ; http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/Critical%20Issues%20Papers/Open-Stds.pdf .

[29] *See* George W. Arnold, *Views on Open Standards and Interoperability* ETSI Conference (May 26, 2005) at: http://www.etsi.org/website/document/Workshop/SOSInterop/SOSinteropIpresentation04.pdf .

[30] *See* Patricia Griffin, *Current Attempts to Change Established Definition of "Open" Standards*, *supra.* Indeed, even Philippe Baechtold, the Head of the WIPO Patent Law Section has noted the historic definition of 'open standards':

been] central to the policies of well-recognized regional and international standards bodies" such as the International Telecommunication Union (ITU), International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) and the European Telecommunications Standards Institute (ETSI), the ITSSD observes that the definition of 'open standards' has continued to evolve, at least among the international 'de jure' organizations,[31] and even within ANSI.[32] Industry consortia such as the World Wide Web (WC3) Consortium,[33] the Organization for the Advancement of Structured Information Standards (OASIS)[34] and the Internet Engineering Task Force (IETF), [35] on the other hand, have seemed to prefer that their members employ royalty-free patent licensing terms or that they contribute non-patented technologies (or agree to non-assertion of patent claims) to promote such organizations' development of 'open standards'.[36] [37] [38]

"Open standards are technical specifications that meet criteria of openness in their creation, implementation and use, as defined by SSOs (e.g., under Resolution GSC-10/04)." See Richard Owens and Philippe Baechtold, *IPRs and Standards: Some Issues*, SOS InteropII, Sophia Antipolis (Sept. 20-21, 2005), at: http://www.etsi.org/website/document/workshop/sosinterop/sosinteropiipresentation11.pdf

[31] For example, during July 2008, the Global Standards Collaboration (GSC) revised its definition of 'open standards' to include the following fundamental elements: "…a standard is subject to RAND/FRAND Intellectual Property Right (IPR) policies which do not mandate, but may permit, at the option of the IPR holder, licensing essential intellectual property without compensation, and the standard is published and made available to the general public under reasonable terms (including for reasonable fee or for free)." See *GSC Resolution 13/24 – 'Open Standards'* (document GSC13-CL-31), 13th Global Standards Collaboration (July 17, 2008) at: http://www.itu.int/dms_pub/itu-t/oth/21/04/T21040000040038MSWE.doc . The GSC is a "venue for the leaders of the Participating Standards Organizations and the ITU to: Freely exchange information on the progress of standards development in the different regions and the state of the global standards development environment; and Collaborate in planning future standards development to gain synergy and to reduce duplication". See *2.0 Scope and Mandate of GSC* - Global Standards Collaboration (GSC) Governing Principles Version 1.4, (Approved Oct. 15, 2007) at: http://www.itu.int/dms_pub/itu-t/oth/21/02/T21020000010001MSWE.doc . *See also* Dan Bart, *GSC: Standardization Advancing Global Communications*, Summary of Issues and Results From GSC-11 IPR WG (GSC11(06) (Closing _08_IPR WG Rpt), at pp. 12-13.

[32] ANSI's definition seems to have expanded to include a RAND royalty component - "Promotes access to essential IPR by implementers without undue financial burden while permitting reasonable license fees and/or other reasonable and non-discriminatory terms". *See* George W. Arnold, *Views on Open Standards and Interoperability*, supra, at slide 12.

[33] See *About the World Wide Web Consortium (W3C)*, W3C website at: http://www.w3.org/Consortium .

[34] See *About OASIS*, OASIS website at: http://www.oasis-open.org/who .

[35] See *Overview of the IETF*, IETF website at: http://www.ietf.org/overview.html .

[36] "The W3C Patent Policy governs the handling of patents in the process of producing Web standards. The goal of this policy is to assure that Recommendations produced under this policy can be implemented on a Royalty-Free (RF) basis. W3C Patent Policy (Feb. 5, 2004) at: http://www.w3.org/Consortium/Patent-Policy-20040205/#sec-Requirements . "As a condition of participating in a Working Group, each participant (W3C Members, W3C Team members, invited experts, and members of the public) shall agree to make available under W3C RF licensing requirements any Essential Claims related to the work of that particular Working Group." *Id*., at *3.1. W3C RF Licensing Requirements for All Working Group Participants*. "With respect to a Recommendation developed under this policy, a W3C Royalty-Free license shall mean a non-assignable, non-sublicensable license to make, have made, use, sell, have sold, offer to sell, import, and distribute and dispose of implementations of the Recommendation that: 1. shall be available to all, worldwide, whether or not they are W3C Members; 2. shall extend to all Essential Claims owned or controlled by the licensor…4. may be conditioned on a grant of a reciprocal RF license (as defined in this policy) to all Essential Claims owned or controlled by the licensee. A reciprocal license may be required to be available to all, and a reciprocal license may itself be conditioned on a further reciprocal license from all. 5. may not be conditioned on payment of royalties, fees or other consideration…" *Id*., at *5. W3C Royalty-Free (RF) Licensing Requirements.*

[37] "The OASIS Intellectual Property Rights (IPR) Policy governs the treatment of intellectual property in the production of deliverables by OASIS Open (hereafter referred to as OASIS). This Policy applies to all members of OASIS and their Affiliates (as defined below)…To the extent that a Contributor holds a copyright interest in its Contribution, such

The ITSSD questions the rationales set forth in paragraph 121 to justify defining open standards as those with royalty-free access to patent-rich standards. In particular the ITSSD is skeptical that *"society as a whole would benefit from the open and royalty-free access to standards…this model would best ensure interoperability, greater innovation and consumer welfare…where a royalty-free policy is adopted, the benefit of standardization may outweigh the loss of royalty income in certain technologies, simply through greater quantities of a certain product being sold."* The ITSSD is admittedly biased in favor of preserving the rights of IP holders in an open standards environment. As previously discussed, no standards, open or otherwise, can ensure interoperability, given the opportunity for engineering and other conflicts. And it is quite difficult to ensure that higher volume sales of standards-embedded ICT products will always compensate for the loss of royalty income forsaken as the result of a royalty-free RAND contract term or an agreement not to assert patent claims, especially in lean economic times.

Paragraph 122 states that, *"In this context, the notion of "open source" is often mentioned, but it should not be confused with open standards…While open source software has been used to implement some ICT standards, other standards are implemented through proprietary software or, as is increasingly the case, through the use of mixed platforms that combine both open source and proprietary software."*

The ITSSD is concerned that the open source software and royalty-free open standards movements, in part, funded by multinational corporations the business models of which have evolved from one based on ICT 'products' to one based on ICT 'services',[39] and certain opportunistic national

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Contributor grants to OASIS a perpetual, irrevocable, non-exclusive, royalty-free, worldwide copyright license, with the right to directly and indirectly sublicense, to copy, publish, and distribute the Contribution in any way…" See Section 1 Introduction; 5.2 Contributions - Copyright Licenses, OASIS Intellectual Property Rights (IPR) Policy at: http://www.oasis-open.org/who/intellectualproperty.php; http://www.oasis-open.org/who/intellectualproperty-2008-05-02.php . "To permit TC Members and their TC Parties to develop implementations of OASIS Draft Deliverables being developed by a TC, each TC Party represented by a TC Member in a TC, at such time that the TC Member joins the TC, grants to each other TC Party in that TC automatically and without further action on its part, and on an ongoing basis, a limited covenant not to assert any Essential Claims required to implement such OASIS Draft Deliverable and covering making or using (but not selling or otherwise distributing) Licensed Products that implement such OASIS Draft Deliverable…" Id., at *6 Limited Patent Covenant for Deliverable Development*.

[38] "Specifically, it is helpful to indicate whether, upon approval by the IESG for publication as RFCs of the relevant IETF specification(s), all persons will be able to obtain the right to implement, use, distribute and exercise other rights with respect to an Implementing Technology a) under a royalty-free and otherwise reasonable and non-discriminatory license, or b) under a license that contains reasonable and non-discriminatory terms and conditions, including a reasonable royalty or other payment, or c) without the need to obtain a license from the IPR holder." *See* S. Bradner, *6.5. What Licensing Information to Detail in a Disclosure*, RFC 3979 -Intellectual Property Rights in IETF Technology: Best Current Practice, at: http://tools.ietf.org/html/rfc3979 ("This document specifies an Internet Best Current Practices for the Internet Community…") *Id*.

[39] New ICT sector business models have emerged pursuant to which companies sell 'business solutions' that include open source software (OSS) and/or services for OSS. The OSS is given away for free so that other components of an IT solution, *i.e.*, hardware, custom software, and services, can be sold for profit. For example, for-profit services may include solutions consulting, maintenance, support, or system integration.

governments,[40] are working together to obscure the differences between these two concepts, in an effort to 'change' (arguably weaken) the longstanding international IP law paradigm from one based on private property rights (patents and copyrights) to one based on 'universal access to knowledge' (A2K)/free know-how. ITSSD research has revealed that such protagonists have employed both utilitarian arguments and moral suasion to persuade national and international governments and policymakers that collaboratively produced and widely shared knowledge is more likely to lead to innovation and technology transfer than under the current patent and copyright systems. Given the extent of such efforts, the ITSSD believes that paragraph 122 should more extensively address the issues underlying why, in the context of ICT, "the notion of "open source"…should not be confused with open standards."[41] Indeed, it is possible that royalty-free copyrighted OSS can operate at the same time as and not conflict with royalty-based patents that may underlie the OSS.[42]

Paragraph 252 draws the general conclusion that computer software innovation has *"special characteristics"* and is actually *not* innovative in nature, that consumers need for and depend on information and communication technologies to remain 'inherently connected' with each other, and that, *"In order to communicate and share information and files, interoperability needs to be preserved among programs, systems and network components"* (presumably at all costs). In other words, this paragraph emphasizes the consumer interests as being *the* most important of those in the 'hierarchy of interests' previously discussed in connection with the concept of 'interest balancing' identified in paragraphs 2, 37, 106 and 119. Thus, it is implied that the grant of exclusive private patent rights can only get in the way of promoting interoperability, consumer interconnectivity and competition within society at large.

The ITSSD believes that the making of these statements in the absence of a definition of 'special characteristics' may lead stakeholders to reach unproven conclusions. Indeed, one could argue that there are certain 'special' characteristics' of computer software which are equally, or perhaps, more applicable to digital engineering relating to computer and electronics hardware.

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[40] See *Rediscovering the Value of Intellectual Property Rights*, supra, at II. Brazil Challenges the Established IPR Framework, B. Brazil Actively Promotes a New International Paradigm of 'Open Source'/ 'Universal Access to Knowledge (A2K'), at pp. 72-101 and accompanying endnotes. These companies include IBM, SUN, Linux, Red Hat and Novell.

[41] "Open ICT standards can be implemented using OS, but …"Open source"and "open standards"are NOT the same thing." See Richard Owens and Philippe Baechtold, *IPRs and Standards: Some Issues*, supra at Slide 4.

[42] The contracts entered into between companies and customers cover solutions and services that often include the OSS or require the customer to download certain OSS (free of charge) from the internet. *Although no royalty is charged for use of the copyrighted OSS, such free use is circumscribed by a license with enforceable terms and conditions* that is usually embedded as a file within the software itself.

Yet, it should also be pointed that, although the authors of the OSS do not charge the companies which give away the OSS to sell services any royalties for the use of the OSS, it does not preclude other 3rd parties entities that might have patents infringed by the OSS from requiring the OSS authors and their recipients of OSS to take a patent license. Patent licenses offered by parties other than the OSS's authors or distributors do not conflict with OSS licenses. As a result many standards developed under a RAND/FRAND regime are implemented in OSS today. There are notable examples in which commercial implementations of RAND/FRAND-based standards have been widely adopted despite a well-known need to accept third party patent licenses. (See for example Open SSL.) Solutions and service providers can be expected to compensate patent holders when OSS including patented technology is required by the solutions or service contract.

Paragraph 252 also states that, "*In other words, the value of a good or service depends on the number of users of that good or service (network effect).*" This is clearly a reference to an antitrust concept that has been used to address the theoretical impact (a market failure that could occur as the result of) that the exercise of a patent could have on competition in 'network industries'. The ITSSD wishes to share with the SCP its preliminary research on 'network effect'. First, network industries include not only computer software, but also "communications, the Internet, computer hardware, commercial intermediaries, payment systems, and financial markets."[43] Second, according to at least one expert, [n]etwork effects derive from benefits that consumers receive when other consumers consume network goods" (i.e., they derive mutual benefits).[44] "To obtain mutual benefits from consumption, it is necessary for there to be coordination between consumer decisions."[45] "The network effects argument predicts that market failure will occur if consumers cannot coordinate their consumption decisions. Advocates of regulatory intervention believe that consumers may not be able to capture the full benefits of networks. The problem with this argument [however,] is that it *assumes* that there is an absence of consumer coordination."[46] The pessimistic view is that transaction costs [e.g., patent monopoly costs] prevent consumers from coordination, thus leading to externalities and market failure." [47] "In [such an] environment, firms [can] gain competitive advantage that provides extra incentives for anticompetitive behavior, including monopolization and exclusion."[48] Notwithstanding this view, which many experts seem to hold, this commentator believes that such conclusions are invalid. In fact, he argues that by employing antitrust (anti-competition) policies to correct 'network externalities' regulators will adversely impact both competition and innovation.[49]

Third, in order for the network effects argument in favor of governmental intervention to be persuasive in the context of patents, one must assume that only dominant firms are able to obtain patents in the relevant field of technology (which is emphatically not the case in the area of software). While it is true that patents held by the dominant firm may enhance its market power, other patents held by would-be competitors will constrain the options available to a dominant firm, tending to its diminish market power. Thus, the competitive effect of patentability in the field may either increase or decrease the contestability of the market.

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[43] *See* Daniel F. Spulber, *Consumer Coordination in the Small and in the Large: Implications For Antitrust in Markets with Network Effects*, 4 Journal of Competition Law and Economics (2008), pp. 1-56, 2, available at SSRN: http://ssrn.com/abstract=1146442 .
[44] *Id*., at p. 2.
[45] *Id*., at p. 5.
[46] *Id*., at p. 3.
[47] *Id*., at p. 5.
[48] *Id*., at p. 4.
[49] "Some antitrust scholars and policy makers call for additional antitrust enforcement in markets with network effects. In particular, the presence of network effects is said to restrain innovation by incumbent firms and to lead to exclusionary behavior. Also, it is alleged that network effects create conditions for natural monopoly and that as a consequence incumbent firms may be able to deter entry and monopolize markets. I demonstrate that these arguments are based on flawed economic analysis. Network effects do not constitute a major market failure. Antitrust policy that is based on correcting "network externalities" is likely to impact adversely both competition and innovation. There is no economic basis for heightened antitrust scrutiny in markets with network effects." *Id*., at p. 8.

Fourth, the "natural monopoly" and "network effects" arguments are neither unique to software nor particularly relevant to the question of patentability. If the SCP insists on retaining a reference to network effects within the WIPO Report, the ITSSD requests that a more detailed explanation of their relevance to patentability and computer software be prepared.

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