UK's Promotion of Royalty-Free Government Procurement Standards
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By Lawrence A. Kogan*

The Kogan Law Group, P.C.

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FOSS pundits have made much ballyhoo of the recent Procurement Policy Action Note issued by the UK Cabinet Office of Government Commerce (OGC) during January 2011 that defines 'open standards' as including only those which "have intellectual property made irrevocably available on a *royalty-free* basis" (emphasis added).[1]

As an example, U.S. attorney Andy Updegrove, author of one recent article on the subject entitled, *United Kingdom: U.K. Comes out for Royalty-Free Standards for Government Procurement*, [2] waxed poetically about the UK government document's noteworthiness. To paraphrase the author's four main points, the UK government Procurement Policy Note is noteworthy because: 1) it includes informal regional as well as national standards consortia among the internationally recognized specification or standards organizations whose 'open' standards can and should be considered by the UK for government procurement purposes; 2) its definition of 'open' standards constitutes a legally acceptable "repudiation" (allegedly consistent with the policy space afforded EU Member State governments vis-à-vis the European regional lawmaking institutions) of and permissible derogation from the final, binding European Interoperability Framework adopted by the European Commission during December 2010, following many years of thoughtful deliberation and contentious debate; 3) it emulates and embraces a robust definition of 'open' standards that is very similar to that contained within the national interoperability framework adopted during November 2010 by the Indian Government; and 4) it proves that corporate lobbying and forum shopping undertaken at the EU Member State governmental level on behalf of the 'penguin' (open source) and 'software-as-a-service' (SaaS) industry communities can be successful, at least temporarily.

A closer examination of the UK Procurement Policy Action Note reveals that its ostensible noteworthiness and the author's observations relating to the legal and policy issues surrounding it are more nuanced than they have been depicted.

Consortia Reference Less Than Noteworthy

Attorney Updegrove begins by an overstatement of how the Action Note specifically referenced the consortium W3C "(as compared to a national or European standards body)...as being an acceptable source of open standards". However, he omits any discussion of how the final *European Interoperability Framework* (EIF)v2.0 adopted by the EU Commission during December 2010[3] already recommends that "technical interoperability should be ensured, whenever possible, via the use of formalized specifications, [which include] either standards [defined] pursuant to EU Directive 98/34 [4] [i.e., standard[s] adopted by an international standardisation organization...a European standardisation body...[or]...a national standardisation body"]...or *specifications issued by ICT industry fora and consortia*" (emphasis added).[5] Similarly, Mr. Updegrove seems to have overlooked how the final EIFv2.0 specifically identifies "the World Wide Web Consortium (W3C)" by name as one among several "fora and consortia initiatives for standardization" included within the definition of a "standards developing organization".[6] Apparently, the EU had already decided to permit consortia-developed standards to be specified in procurement by the time the UK government had released its proposal; this vital point seems to have escaped the attention of the author.

Incomplete and Misrepresentative Subsidiarity/Federalism Reference More Than Noteworthy

Attorney Updegrove next declaims how the UK Action Note "is a repudiation" at the national level of the European Commission's decision at the regional level to replace the definitional term 'open standards' with 'open specifications' and to prudently abandon the politically-induced notion that government procurement-related 'open specifications' *must* be 'royalty-free' or even proprietary-free in order to be considered as providing a 'level playing field' for European and EU Member State e-Government contracts.

In what appears to be an effort to put lipstick on a pig, author Updegrove portrays the relationship between the UK and EU governmental institutions as one of generally accepted implicit tension between national and regional sovereigns, and compares such dynamic to that "often seen in the U.S." as existing between U.S. federal and state governments concerning contentious legislative and/or regulatory matters, such as global warming, with potential cross-border and private rights impacts. He refers obviously to the multifaceted notion of constitutional federalism within the United States; yet, Mr. Updegrove discusses neither the legal significance of the many US constitutional issues implicated in his example, nor the established U.S. constitutional principles and mechanisms that can be deployed to evaluate and resolve those disputes, especially where the sanctity of states' rights and guaranteed individual rights (i.e., private property rights) is concerned.[7] Similarly, author Updegrove passes over, in that published article, the legal significance of the recently released final EIFv2.0, the still-evolving legal relationship between the EU regional institutions and individual EU Member States, and the possible EU and international law consequences of a legally binding UK government decision to circumvent the final EIF.

Indeed, in his foreword to a report entitled, *Achieving European Interoperability*,[8] released during February 2011 by Openforum Academy (the 'think tank' arm of lobby group Openforum Europe (OFE) whose

members include some rather large US companies championing the royalty-free FOSS-based Software as a Service ('Saas') business model), Mr. Updegrove, who is also an OFE Fellow,[9] is more revealing. Within that writing he seeks to both reassure and encourage EU Member States interested in retaining national government procurement interoperability framework preferences for royalty-free and/or proprietary-free 'open' ICT standards "modeled on EIFv1.0", despite the EU Commission's determination in final EIFv2.0 that government procurement ICT standards should be technology and business model-neutral.[10] In particular, author Updegrove emphasizes how EU Member State governments may take license in interpreting and implementing final EIFv2.0 consistent with their national needs and priorities because, in some respects, EIFv2.0's terms are *less* prescriptive than those contained within prior EIFv1.0.[11] Apparently, his statement comports with at least two views espoused in the OFE report.

One OFE view focuses on the complex European concept of subsidiarity.[12] Such view holds that since the two Annexes to the European Communication *Towards Interoperability for European Public Services*,[13] namely, the European Commission's *European Interoperability Strategy* (EIS)[14] and final EIFv2.0 are each essentially non-binding strategy and framework documents, as are the European Commission's related Communications on *A Digital Agenda For Europe*[15] and the European *eGovernment Action Plan 2011-2015*[16] (i.e., they are each merely legislative proposals (hortatory instruments) rather than legally binding EU directives or regulations), the issue of interoperability falls squarely within the European Union rule of subsidiarity. Accordingly, subsidiarity limits the European Commission's role to that of only making *recommendations* to Member States concerning how they are to implement such proposals.[17] Consequently, EU Member States which have already adopted government procurement-based national interoperability frameworks that go beyond the final EIFv2.0 – i.e., they include a definition of 'open standards' requiring royalty-free and/or proprietary-free standards-based ICTs - need not "stop or withdraw their NIFs".[18]

The other OFE view (premised on the previous view) holds that although the terms of Section 5.2.1 of final EIFv2.0 permit specification-related intellectual property right (IPR) licensing on either a FRAND[19] or a royalty-free basis "in a way that allows implementation in both proprietary and open source software",[20] the FRAND licensing model nevertheless inherently favors large software vendors at the expense of SMEs, perpetuates vendor lock-in, and effectively discriminates against all FOSS licenses.[21] According to the OFE, without the assurance of "royalty-free conditions" applying generally to the process of standards development, the effective placement of FRAND "on an equal footing to royalty-free licensing" would disadvantage SMEs which, by virtue of their limited resources, would be unable to guarantee their non-infringement of patents owned by companies participating in the development of a standard.[22] Consequently, in order to allegedly ensure a market environment under which both large vendors and SMEs could successfully compete, Mr. Updegrove and the OFE have essentially advised Member States governments that they are legally free (and even justified) to maintain or even adopt anew national interoperability frameworks that express a clear preference for royalty-free or nonproprietary ICT standards that goes beyond the scope and spirit of EIFv2.0 (i.e., EIFv2.0-*plus* initiatives).[23] However, are author Updegrove and the OFE aware that these representations fly in the face of the European Commission's considered determination that government procurement requirements calling for specification-related IPR licensing on either a FRAND or a royalty-free basis actually "foster competition since providers working under various business models may compete to deliver products, technologies and services based on such

specifications"?[24] And, if not, will author Updegrove and the OFE be prepared to present anecdotal or documentary evidence that proves the EU Commission's conclusion to be false?

Returning to the first OFE view, the Updegrove/OFE discussion of the European subsidiarity principles at play with respect to EIFv2.0 and the UK Procurement Policy Note is arguably an incomplete assessment of both the legal dynamic existing between these two instruments and the likelihood that the UK Procurement Policy Note will remain unchallenged at the EU regional level. An examination of the European Parliament and Council Joint Decision directing the European regional institutions to establish a pan-European program on interoperability solutions for the benefit of all European public authorities (a/k/a the 'ISA Program'),[25] which is legally binding upon all European regional and Member State public administrations,[26] reveals several important factors that should not be discounted or overlooked. First and foremost, the Parliament and Council have determined that the Decision's broad goals, which include the implementation of Community policies and activities throughout the European region, can better be achieved at the Community rather than at the Member State level, and that, consequently, the Community *shall* direct, oversee and monitor the establishment and implementation of the ISA program within the EU regional as well as the Member State national public administrations pursuant to the principle of subsidiarity.[27] Second, the objective of the ISA program is to support cooperation between European public administrations at the regional and national levels via facilitation of efficient and effective electronic *cross-border* and cross-sectoral interactions between them;[28] therefore, the ISA program *shall* support and promote the establishment and improvement of *common frameworks* that support *cross-border* and cross-sectoral interoperability.[29] Third, in view of the Community's cross-border and cross-sectoral ambitions the European Commission *shall* be charged with implementing the prescribed Community work program *in cooperation with* as many participating Member States as is possible.[30] Fourth, in order to avoid fragmentation and ensure a holistic approach, the Commission *shall* give due consideration to the EIS *and EIF* (final EIFv2.0) in its implementation of the ISA program.[31] Fifth, to ensure the establishment, improvement or operation of common solutions the ISA program should promote *compliance with the EIF and openness in standards and specifications*.[32]

As concerns the second OFE view, the OFE has plainly taken interpretational liberties by recommending to EU Member States, including the UK, that there is sufficient leeway, as a matter of European law, to circumvent the scope and spirit of EIFv2.0, ostensibly, to ensure that FRAND licenses do not discriminate against FOSS. National governments may be well within their bounds to promote universally available initiatives that support industry-wide development of open source software, open standards and/or more robust competition between proprietary and nonproprietary software vendors interested in bidding on lush government procurement contracts. However, national governments should not impose government procurement preferences that discriminate in favor of royalty-free and/or proprietary-free FOSS-based ICT standards or against proprietary ICT vendors operating pursuant to a FRAND licensing/royalty-based business model, just as they cannot discriminate in favor of particular vendors. Contrary to what has been implied by the OFE and attorney Updegrove, one recent study has revealed that "not only is the notion that FRAND discriminates against all [F]OSS wrong, it would perhaps even be fair to claim that it is the GPL that discriminates against FRAND," as the European Commission, as well, had previously concluded.[33]

It is not only the European Commission within EIFv2.0 that has clearly called upon national public administrations to assume a technology and business model-*neutral* position on this issue that does "not impose any specific technological solution"[34]; the European Parliament and Council have also done so within legally binding DECISION No 922/2009/EC. For example, the Parliament and Council have determined that all solutions established or operated, and all actions launched or continued, under the ISA program, as a matter of principle, *shall* be technologically neutral and adaptable.[35] In addition, the Parliament and Council have also determined that, in order to ensure interoperability between national and Community systems, common frameworks and services *shall* be specified with reference to *existing* (as opposed to draft) European standards or *publicly available* (as opposed to non-public or unavailable) open specifications.[36] In other words, national public administrations shall consider only open specifications or standards that are widely accepted and capable of covering functional needs, without regard to whether the underlying technologies are proprietary or nonproprietary in nature. This decision, in other words, is determinative of and consistent with the Commission's subsequently issued EIFv2.0, particularly, its 22nd recommendation that "[i]n all cases, specifications should be mature and sufficiently supported by the market..."[37]

In sum, it may certainly be true that national interoperability frameworks are generally "more detailed and often more prescriptive than the EIF", and that by virtue of the applicability of the subsidiarity principle, the EIF "does not impose specific choices or obligations on the Member States". Nevertheless, EIFv2.0's first recommendation, which implements key provisions of the legally binding DECISION No 922/2009/EC noted above, calls upon all participating national public administrations to align their national interoperability frameworks with the EIF "to take into account the European dimension of public service delivery".[38] Similarly, the strategy document introducing both the EIS and the EIF, states that "To help realise the full potential of the digital single market, Member States and the Commission must act together to implement the EIS, *taking into account the EIF*, in Digital Agenda actions."[39] When read together, these documents arguably preclude Member State public administrations from undertaking legally binding national initiatives that undermine such an overarching and all-encompassing public interest. While the UK Procurement Policy Action Note has been characterized by some FOSS advocates "as one of the stronger policies...seen from European governments"[40] or as "simply the best... new Policy statement of any European Government to date",[41] it currently remains, for legal purposes, no more than a *non-binding* executive office recommendation (exhortation) which at least one other FOSS commentator recently lamented "has no teeth".[42] Thus, there is ample reason to believe that author Updegrove and the OFE may have misspoken. If, however, the UK Government were to take the next step and implement in a legally binding manner certain of the proposals contained within the *Government ICT Strategy* it more recently released during March 2011,[43] a different result may obtain. For example, should the UK government be inclined to "create a level playing field for open source software" by actually imposing compulsory/mandatory open interoperability standards[44] that avoid the risk of vendor lock-in expressed in the UK Procurement Policy Note[45] by containing intellectual property made irrevocably available on a royalty-free basis, and by actually requiring public agencies to "procure[] where appropriate, open source solutions...used in conjunction with compulsory [royalty-free] open standards",[46] the UK government could very well likely face a legal challenge from a visibly frustrated European Union, and perhaps, even from the United States. It is positive that the U.S. government has reason to be monitoring not only the ongoing

debate surrounding the EU EIF,[47] but also similar initiatives proposed and/or enacted within Brazil, Russia, India, China and South Africa which could potentially violate a host of WTO treaties.[48]

UK-India ICT Policy/Strategy Comparison More Than Noteworthy

Without sufficient explanation, author Updegrove has drawn an interesting comparison between the controversial UK definition of open standards and that contained within the ICT interoperability framework adopted by the Government of India during November 2010. In so doing, he implied that although Britain "has [long] been part of the high tech intellectual property business regime since its inception," its recent actions reflect that it has changed course and apparently learned from India, "a comparative newcomer to the practice of automatically patenting everything in ICT that can be patented".[49] Author Updegrove would have the proprietary industry believe that "the bandwagon already sent rolling by India and the U.K"... may simply be too" much for traditional ICT companies to stop or derail it.[50]

Two questions immediately present themselves to the cognizant reader: Were the UK's actions predictable? And, will the UK government's recent 'enlightenment' ultimately result in the relegation of British technology and innovation to a level of a 'BRICS' nation? Though presently indeterminate, the answer to both of these questions may evolve to be YES.

With respect to the first question, it is arguable that the UK Procurement Policy Note reflects the logical extension of the UK government's prior procurement policy initiatives which have served to steadily undermine the private property basis of patents. Since 2004, the UK government had endeavored to use open source software for procurement purposes based on the belief and subsequent demonstration that "it [provided] the best value for money to the taxpayer in delivering public services" in a particular case.[51] And, between 2004 and 2009, UK federal government departments had deployed open source software in connection with "web services, the NHS [National Health Services] and other vital public services."[52] In addition, since 1977, Section 46 of the UK Patent Act (as amended)[53] has provided for the registering of 'licenses of right', which historically functioned and currently remain closely related to compulsory licenses, such that legal commentators have likened them to *defacto* compulsory licenses.[54] Furthermore, the principles underlying the UK Procurement Policy Note can also be traced back to the famed but controversial 2002 UK IPR Commission Report.[55] This report concluded that an inverse relationship exists between strong IP protection and rapid economic growth in developing countries, and that IP protection becomes important and useful to developing countries only after they are "well into the category of upper middle income countries."[56] The report also found that because developing country software industries "even in India are [and remain] mostly absent from the off-the-shelf, packaged computer programs sector"[57] it behooved developing country governments to "review [their] policies for procurement of computer software, with a view to ensuring that options for using low-cost and/or open-source software products are properly considered".[58] In this regard, the report recommended that "copyright laws [be adjusted to] permit the reverse engineering of computer software program[]s beyond the requirements for inter-operability, consistent with the relevant IP treaties they have joined."[59]

If, as in the case of true journalism, it takes three noted examples of any phenomenon to characterize and subsequently report it as a trend, then one might confidently conclude that the UK government's recent

ICT interoperability initiatives officially mark the existence of a long-term *negative* trend within the UK of effectively undermining the private property basis for patent and trade secret rights through national legislative, regulatory and policy means. It is therefore, none too soon, that the results of an important new study on UK intellectual property awareness were released. The findings of the study entitled, *UK Intellectual Property Awareness Survey – 2010* [60] betray a distinct pattern of *under*-appreciation of the use and value of IP by UK businesses, which would seem to partly explain why the UK government has demonstrated apathy, and at times, ill-will towards royalty-based ICT standards. Tellingly, the study reveals that *less than half* of all large, small and medium-sized UK businesses are "IP aware and have sufficient resources to both find out about IP and do something about it."[61] According to the survey's author, 'IP awareness' was measured with reference to three main issues: i) IP knowledge and understanding; ii) IP management practices; and iii) awareness and use of IP information and advice.[62] To say the least, the figures[63] are quite surprising for such a highly developed nation as the UK which author Updegrove has billed as having "been part of the high tech intellectual property business regime since its inception."[64] Surveys have shown overwhelmingly that positive market signals are conveyed by strong patent and related trade secret protections which redound to the benefit of inventors and patent registrants, scientists performing highly risky and uncertain technology R&D, investors and entrepreneurs pursuing economically risky and uncertain patent commercialization efforts, and the public at large which enjoys everyday use of numerous innovative information and communications technology-based products in the marketplace.[65] Why then, would the UK government undertake actions that could possibly be interpreted by the markets as presaging an ignominious end to this era?

Concerning the second question, it is most difficult to dismiss all of the UK initiatives and reports previously discussed as *not* strongly suggesting that the UK is *not* on the path to relegating itself to 'BRICS' nation status. Were this *not* true, then it would be more difficult (than it presently is) to distinguish the rationale behind the UK government's recent ICT interoperability pronouncements from the general views espoused by the Development Agenda Group (DAG) at the World Intellectual Property Organization (WIPO) and by Cambridge University Professor Lionel Bentley,[66] a noted IP 'expert' commissioned by the WIPO's Standing Committee on the Law of Patents, at the request of the DAG, to conduct an external study of the history and use of exclusions, exceptions and limitations to the patent right.[67] Indeed, it would be more difficult (than it presently is) to distinguish the specific terms of the emerging UK ICT interoperability strategy and framework from those already proposed and/or enacted by the national governments of Brazil, Russia, India, China and South Africa![68] Consequently, if it is true, as author Updegrove suggests, that Indian thinking on IP has 'enlightened' the UK government and pervaded its policymaking, may one dare to speculate that the UK will one day be thought of as a 'BRICS'-equivalent nation in respect to its treatment of intellectual property rights such as patents and trade secrets, and will that time come sooner than desired?

Lobbying Less Than Noteworthy

Author Updegrove, a know representative of the open source software development community, presents evidence that he has adeptly engaged in forum shopping within the governmental institutions of the European Union, the UK and other EU Member States to ensure that, at the least, in some venues, regional and national government procurement interoperability specifications treat royalty-free and/or proprietary-

free ICT technologies considered for inclusion within e-Government systems *more favorably* than competing products with comparable functionality and availability features offered by proprietary vendors that operate pursuant to a FRAND-based royalty business model. Apparently, Mr. Updegrove, in concert with Openforum Europe (OFE), Software & Information Industry Association SIIA), European Committee for Interoperable Systems (ECIS) and Free Software Federation Europe (FSFE), each of which promote the FOSS-driven 'software-as-a-service' (SaaS) business model, has thus far been successful in persuading some within the European Commission[69] and many within the UK Cabinet Office to reconsider their previous stance on technology and business model-neutrality, by promoting the notion that their desired solution promotes 'sound public policy' and is consistent with the 'public interest'.

It is common knowledge that lobbying has become a necessary, if not, unremarkable fact of economic and political life. For many companies either engaged in international trade and/or disruptive innovation or those endeavoring to interrupt it, policy arbitrage has become an effective tool to address intentional and other governmental activities that threaten to increase the level of legal and economic risk and corrosive uncertainty, thereby raising the costs of doing business. It may be regrettable that the agendas and tactics of cognizant NGO pressure groups [70] were blended into the lobbying activities evidenced by author Updegrove's commentary.

Efforts and tactics previously employed by subsidy-seeking European agricultural industry interests, green groups and some government officials to persuade EU regional and EU Member State governments to block the importation of U.S., Canadian, Argentine and Mexican genetically modified food, feed and seed, chemicals and other products and processes alleged to have been 'unsafe' for the environment and human consumption and thereby deserving of stringent regulatory protections grounded on Europe's precautionary principle evidence one such dynamic in action.[71] Similar efforts were undertaken jointly within both Europe and the United States during the past decade by subsidy-seeking renewable energy industry interests, green groups and some government officials, to persuade the EU and US governments of the necessity to impose expensive carbon caps, renewable portfolio standards and strict environmental regulations. These lobbied initiatives and regulations were premised on Europe's precautionary principle as an absolute necessity to slow and ultimately reverse land, water and air-based carbon emissions from all sources of economic activity, to impede terrestrial and offshore oil & gas drilling, and to block all other undesirable behaviors that could possibly pose a threat to the environment and human health, now or in an uncertain distant future. This agenda was also intended to bolster the competitiveness and the ability of renewable energy investors to successfully proceed through the 'valley of death', and reflect but another example of this dynamic in action.[72] One is led to pose the following question: In what way are Mr. Updegrove's lobbying efforts any different?

The Bottom Line

Author Updegrove and his allies within FOSS-based industry, NGO communities, and the UK government may have won the first round in the ICT interoperability battle in what apparently will become a multistage and multi-theatre performance. However, this contest remains undecided, with many battles yet to come and many hearts and minds not yet won.

* Lawrence A. Kogan Esq., is founder and Managing Attorney of The Kogan Law Group, PC, a New York City-based multidisciplinary professional services firm, and co-founder and President and CEO of the Institute for Trade, Standards and Sustainable Development (ITSSD), a Princeton, NJ-based non-profit legal research and educational organization

[1] See *Procurement Policy Note – Use of Open Standards when specifying ICT requirements*, Action Note 3/11 UK Cabinet Office (31 January 2011), at Para. 6, available online at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPN%203_11%20Open%20Standards.pdf.

[2] See Andy Updegrove, *United Kingdom: U.K. Comes out for Royalty-Free Standards for Government Procurement*, Mondaq (April 6, 2011) available online at: http://www.mondaq.com/article.asp?articleid=126448 ; Andy Updegrove, *U.K. Comes out for Royalty-Free Standards for Government Procurement*, The Standards Blog (Feb. 25, 2011) available online at: http://www.consortiuminfo.org/standardsblog/article.php?story=20110225075112254 . See also Jochen Friedrich, *UK government issues modern procurement policy statement focussing on openness and interoperability*, Jochen Friedrich's Open Blog (March 4, 2011), available online at: http://jfopen.blogspot.com/2011/03/uk-government-issues-modern-procurement.html .

[3] See *European Interoperability Framework (EIF) for European public services, Annex 2* to *'Towards interoperability for European public services'*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2010) 744-2 final, (12/16/2010), available online at: http://ec.europa.eu/isa/strategy/doc/annex_ii_eif_en.pdf .

[4] See Article 1(5) and Annexes I and II of DIRECTIVE 98/34/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 June 1998, Laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 24, 21.7.1998, p. 37), available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:en:PDF, as amended by DIRECTIVE 98/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 July 1998, amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998L0034:20070101:EN:PDF .

[5] See COM(2010) 744-2 final, (12/16/2010) supra at pp. 24, 31.

[6] Id., at p. 34.

[7] See, e.g., Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 521-532 (2008), available online at: www.itssd.org/Kogan%2017%5B1%5D.2.pdf .

[8] See *Achieving European Interoperability*, Report based on an Openforum Academy Roundtable discussion, Openforum Europe (Feb. 4, 2011), available online at: http://www.openforumacademy.org/insights/1102ofa%20insights_report%20interoperability_final.pdf .

[9] See *Andrew Updegrove, OFA Fellows*, Openforum Academy website at: http://www.openforumacademy.org/fellows/fellows/biog/andrew-updegrove

[10] See COM(2010) 744-2 final, (12/16/2010) supra at p. 20 and fn 26.

[11] See Andy Updegrove, Foreword, *Achieving European Interoperability*, Report based on an Openforum Academy Roundtable discussion, supra.

[12] See, e.g.: Éva Bóka, *The Idea of Subsidiarity in the European Federalist Thought (A historical survey)*, Grotius (2007) available online at: http://www.grotius.hu/publ/displ.asp?id=ECICWF; http://www.grotius.hu/publ/displ.asp?id=ECICWF.

[13] See *Towards interoperability for European public services*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2010) 744 final (12/16/10), available online at: http://ec.europa.eu/isa/strategy/doc/iop_communication_en.pdf .

[14] See *European Interoperability Strategy (EIS) for European public services, Annex 1 to* '*Towards interoperability for European public services'*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2010) 744-1 final (12/16/2010), available online at: http://ec.europa.eu/isa/strategy/doc/annex_i_eis_en.pdf .

[15] See *A Digital Agenda for Europe*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2010) 245 (5/19/2010), Sec. 2.2 at pp. 14-16, available online at: http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf .
[16] See *The European eGovernment Action Plan 2011-2015: Harnessing ICT to promote smart, sustainable & innovative Government*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2010) 743 (12/15/2010), Sec. 2.4.1 at p. 13, available online at: http://ec.europa.eu/information_society/activities/egovernment/action_plan_2011_2015/docs/action_plan_en_act_part1_v2.pdf .
[17] See *Achieving European Interoperability*, Report based on an Openforum Academy Roundtable discussion, Open Forum Europe (Feb. 4, 2011), supra.
[18] Id.
[19] "The principle of FRAND is that all parties agree to license their intellectual property present in the respective standards on fair, reasonable and non-discriminatory terms to everyone who wishes to implement the standard. The actual licensing agreement is made between the respective owners of the IP and those who wish to implement the standard." See *Modernising ICT Standardisation in the EU - The Way Forward*, WHITE PAPER OF THE COMMISSION OF THE EUROPEAN COMMUNITIES COM(2009) 324 final (July 3, 2009), at fn 8, p. 6, available online at: http://ec.europa.eu/enterprise/policies/european-standards/files/ict/policy/standards/whitepaper_en.pdf .
[20] COM(2010) 744-2 final, (12/16/2010), supra at p. 26.
[21] See *Achieving European Interoperability*, Report based on an Openforum Academy Roundtable discussion, supra at Chap. 2.
[22] Id., at Chap. 5.
[23] Id, at Chap. 4-5; Andy Updegrove, Foreword, *Achieving European Interoperability*, Report based on an Openforum Academy Roundtable discussion, supra.
[24] COM(2010) 744-2 final, (12/16/2010), supra at p. 26 and fn 20.
[25] See DECISION No 922/2009/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 on interoperability solutions for European public administrations (ISA) OJ L 260 (3.10.2009), available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:260:0020:0027:EN:PDF .
[26] See Nicholas Moussis, *Access to the European Union*, Europedia at Sec. 3.3 – The Legal System of the European Union, available online at: http://europedia.moussis.eu/books/Book_2/2/3/3/?all=1 .
[27] DECISION No 922/2009/EC, supra, at Preambular Para. 33 and Art. 13.1.
[28] Id., at Art. 1.2.
[29] Id., at Art. 3(a).
[30] Id., at Arts. 5.1 and 8.2.
[31] Id., at Preambular Para. 13 and Art. 8.1.
[32] Id., at Preambular Para. 20 and Art. 4(b).
[33] See Jay P. Kesan, *The Fallacy of OSS Discrimination by FRAND Licensing: An Empirical Analysis*, Illinois Public Law and Legal Theory Research Papers Series No. 10-14 (Feb. 2011), at pp. 15-16, available at SSRN: http://ssrn.com/abstract=1767083 .
[34] COM(2010) 744-2 final, (12/16/2010), supra at Sec. 2.12 at p. 12.
[35] DECISION No 922/2009/EC, supra, at Preambular Para. 21 and Art. 4(a).
[36] Id., at Art. 8.3.
[37] COM(2010) 744-2 final, (12/16/2010), supra at p. 26.
[38] See COM(2010) 744-2 final, (12/16/2010), supra at Sec. 1.5.2 and Recommendation 1.
[39] See COM(2010) 744 final, supra at Sec. 3.1 at p. 8.
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[44] See *Government ICT Strategy*, UK Cabinet Office (March 2011), Foreword at p. 5 and Sec. 10 at p. 7, available online at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/uk-government-government-ict-strategy_0.pdf .
[45] See *Procurement Policy Note – Use of Open Standards when specifying ICT requirements*, Action Note 3/11, supra at Para. 4.
[46] Id., at Para. 16, p. 9 and Para. 36 at p. 16.
[47] See Lawrence A. Kogan, *Emerging Risks For U.S. High Tech: How Foreign "Public Interest" Regulation Threatens Property Rights And Innovation*, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 175 (Dec. 2010), at pp. 32-48, (hereinafter referred to as 'Kogan WLF'), available online at: http://www.wlf.org/Upload/legalstudies/workingpaper/KoganWP.pdf ; Lawrence A. Kogan, *Growing Foreign Investment and Regulatory/Policy Risks Facing High Technology Innovations*, Global Customs & Trade Journal, Vol. 6, No. 2 (Feb. 2011), at pp. 97-105, (hereinafter referred to as 'Kogan GTCJ') available at SSRN: http://ssrn.com/abstract=1721267 ; Lawrence A. Kogan, *Commercial High Technology Innovations Face Uncertain Future Amid Emerging 'BRICS' Compulsory Licensing and IT Interoperability Frameworks*, San Diego International Law Journal, Vol. 13, No. 1 (Fall 2011), at pp. 24-35, (hereinafter referred to as 'Kogan SDILJ') available at SSRN: http://ssrn.com/abstract=1759655 .
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[49] See Andy Updegrove, *United Kingdom: U.K. Comes out for Royalty-Free Standards for Government Procurement*, supra.
[50] Id.
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[57] Id., at pp. 104-105.
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[61] Id. at p. 9.
[62] Id., at p. 7.
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