

The WIPO Meeting with the Standing Committee on the Law of Patents, SCP/14, January 25-29, 2010

General notes and impressions

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Background

At the preceding SCP/13 meeting March 25-29, 2009, it was decided that the following session, SCP/14, eventually set for January 25-29, 2010, would take up

again the four topics discussed at SCP/13:

- a) Dissemination of patent information (*inter alia* the issue of a database on search and examination reports);
- b) Exceptions from patentable subject matter and limitations to the rights, *inter alia* research exemption and compulsory licenses;
- c) Patents and standards;
- d) Client-attorney privilege;

It was also decided that five further studies would be prepared for the SCP/14 meeting:

(i) the Secretariat would commission external experts a study on exclusions, exceptions and limitations focused on, but not limited to, issues suggested by Members, such as public health, education, research and experimentation and patentability of life forms, including from a public policy, socio-economic developmental perspective, bearing in mind the level of economic development;

(ii) the Secretariat would prepare a concept paper on technical solutions to improve greater access to, and dissemination of, patent information;

(iii) the Secretariat would expand the preliminary study on the client-attorney privilege, document SCP/13/4, to reflect the current state of play in this area, taking into account perspective of various stakeholders and using external experts, if necessary;

the Secretariat would establish preliminary studies on two additional topics contained in the non-exhaustive list of issues agreed at the 12th session of the SCP:

- (iv) "Transfer of Technology" and
- (v) "Opposition Systems".

The Committee also supported that a conference on Intellectual Property and Public Policy Issues be held in July, 2009, to take up the issues of health, the environment, climate change and food security.

Documents attached:

- SCP/14/9 Rev. dated January 29, 2010: Summary by the Chair
- ICC general statement read at the meeting
- ICC statement on patents and standards read at the meeting

and on the topic of exceptions and limitations:

- SCP/14/7 dated January 20, 2010, Proposal by Brazil
- SCP/14/INF/2 dated January 26, 2010, listing the commissioned external experts and the terms of reference for the study to be made.

General impressions from the SCP/14 meeting

First, a note on the agenda item “Work program and future work” of the SCP.

The outcome of the discussion on this item as stated in paragraph 10 of the Summary by the Chair, is the following:

10. Following a proposal by the Chair, the Committee agreed to carry on discussions at its next session on the basis of the agenda of its fourteenth session. Item 7(b) of that agenda will include the study by external experts on exclusions, exceptions and limitations, as well as the proposal by the Delegation of Brazil on exceptions and limitations to patent rights contained in document SCP/14/7. Member States may submit proposals on the work of the Committee prior to its next session.

This outcome reflects what must be considered the failure of the Committee to agree on a future work program. On that item of the agenda, only closed informal consultations were held, for one and a half days. The final outcome is the attached Summary by the Chair, which was taken up in a very brief concluding plenary lasting from 19.52 to 20.14 the last day, Friday January 29, where some minor amendments were agreed.

Reportedly, six proposals were tabled during the informal consultations from different country groupings. Only one of these documents was made available to all delegations including the NGOs. That document was a paper emanating from a new grouping in the SCP context named “Asian Like-Minded Countries”, a grouping which reportedly, but not confirmed, comprised Indonesia, India, Sri Lanka, and Iran. I was informed that Korea and Singapore were not members of this new grouping.

The following quotation from the said Asian Like-minded Countries document for SCP/15 are probably illustrative of what was behind the lacking consensus:

“... the 15th session of the SCP will

ii) also consider a revised preliminary study on transfer of technology, focusing on how the patent system impedes technology transfer

iii) consider the expanded preliminary study on patent and standards, examining the issue of IPR misuse in standardization and suggest measures to mitigate the misuse;”

It remains to be seen what will happen with the future work item for the SCP at its next meeting, preliminarily scheduled for October 11-15, 2010.

On another aspect, calls were again made from some Arab country delegations that Arabic should be added to the WIPO official languages. The Secretariat informed that this was a budget issue and would be taken up in that context.

Client/Attorney Privilege:

This is taken up in separate notes from the meeting.

Exclusions from Patentable Subject Matter and Exceptions:

The **study to be carried out by a group of independent experts**, decided at the SCP/13 for discussion at SCP/14, was ongoing. The Secretariat informed it would be distributed by October 11, 2010. It will be discussed at SCP/15 as noted in the Summary by the Chair.

The WIPO Secretariat made available during the meeting a list of the experts commissioned for the study. Also the Terms of Reference for the study was made available, in response to requests from delegations. See attached document SCP/14/INF/2.

The group of experts commissioned has the following members:

- Professor Lionel Bently, Center for Intellectual Property and Information Law, Cambridge University, United Kingdom, Coordinator;
- Professor Denis Barbosa, Catholic University of Rio de Janeiro and Rio Grande do Sul, Brazil;
- Professor Shamnad Basheer, National University of Judicial Science, India;
- Professor Richard Gold, McGill University, Canada;
- Professor Brad Sherman, University of Queensland, Australia;
- Professor Coenraad Visser, University of South Africa, South Africa.

The selection procedure, paragraph 3 in the document, was that Professor Bently was commissioned and has then nominated the other experts.

It was suggested at the meeting that an expert from the Arab region should also be nominated. No decision was taken on that proposal.

The terms of reference of the study includes that the study should cover, i.a., public health, education, research and experimentation, plants, animals and other life forms, computer program, and biotechnology.

The **proposal from Brazil**, document SCP/14/7, was distributed only in the afternoon the first day of the meeting. It was supported by many delegations already in their opening statements, even though the document by then was not yet distributed. It was criticized procedurally by i.a. Spain for the EU and its Member States, as not distributed timely.

The proposal paragraphs 24-28 in the document, is that a working program be set up in the SCP to carry out a debate in three steps on the issue of existing provisions of limitations and exceptions and the concerns raised by the limited use of limitations and exceptions by developing countries:

- in a first step, exchange of information on existing provisions and on experience of such provisions,
- in a second step, to investigate what exceptions and limitations are effective to address development concerns and the conditions for their implementation, and
- in a third step, to elaborate an exceptions and limitations manual as a reference for WIPO members.

On the Exclusions/limitations topic, 33 delegations and 4 NGOs made submissions.

Discussion of the Brazilian proposal was in the end postponed to SCP/15.

Transfer of Technology

This item was based on the study by the Secretariat in document SCP/14/4 dated December 11, 2009.

Submissions were made by 21 country delegations, for the most part developing country delegations, by Spain for the EU and its Member States, and by 4 NGOs. I am not going into any details here.

Standards and Patents

This part was a continuation of the discussion on document SCP/13/2 dated February 18, 2009 presented for the SCP/13 meeting.

Spain made a statement for the EU and its Member States, stressing the great importance of the topic and referring, as I understood it, to an EU strategy dated July, 2008.

One country submission was made, from Uruguay, which emphasized the need to continue with the study.

Submissions were made also by ICC as attached, KEI, ECIS, and TWN. The ICC submission, which came after Spain, raised interest from two NGOs: KEI, James Love, and from Karsten Gerloff, Free Software Foundation Europe, fsfe, who was particularly interested in the section on open innovation in the submission.

TWN made a strongly critical submission, although I must say that some of what was said was not easy to understand as to how it related to patents and standards. What was said was, i.a., that

- this is a subject of concern for developing countries
- there are documented misuses of patents, especially in developing countries
- open standards should be promoted
- the study prepared by the Secretariat does not go into the effects for developing countries
- use of flexibilities, especially under TRIPS, should be taken in.

On other aspects,

- KEI held a side event Tuesday lunch Patents, Standards and Remedies for infringement, with Thomas Vinje, James Love, and Karsten Gerloff in a panel.

- There were also papers placed on the usual table for documents:

- a 34 pages ITSSD paper, "Supplement to ITSSD Comments Concerning the WIPO Report on Standards and Patents (SCP/13/2) Paragraph 44"

- ICTSD Policy Brief no. 3, February 2009, "Addressing the Interface between Patents and Technical Standards in International Trade Discussions".

Dissemination of Patent Information

This was a rather technical discussion based on the Secretariat study, document SCP/13/3, prepared for the SCP/13 meeting.

In all, 19 submissions were made. Just one note: in its submission, Brazil seemed to suggest that the work on the PCT should be placed under the SCP.

Opposition systems

Discussion was based on document SCP/14/5 dated December 11, 2009.

In all, 12 submissions were made, mostly on corrections to be made in the study. I am not going into those here.

The Conference July 13-14, 2009, on intellectual property and public policy issues

The Chair gave a brief report on the conference. Those who made submissions generally were satisfied with the conference. Suggestions were made that a further conference should be organized, aiming at more focused discussions. No decision was taken on this proposal.

ICC action to be Considered

1. Generally, it is of course important to follow the continued work of the SCP.

Following are specific suggestions where ICC could decide to take action:

2. In regard to the client/attorney privilege issue, suggested ICC action is provided in my separate notes on that item.
3. In regard to exclusions, exceptions and limitations, ICC should for the SCP/15 meeting preliminarily scheduled for October 11-15, 2010
 - be prepared to study the forthcoming report from the expert group, and
 - study the Brazilian proposal
4. In regard to patents and standards, the Task Force examining those issues should study the outcome of the SCP/14 discussions and prepare for a continuation at SCP/15
5. It would also be important to follow the developments on the Transfer of Technology topic in the SCP, as obviously connected with parallel discussions in other fora, perhaps currently predominantly regarding IP and climate change.
