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WIPO Members Search For A Negotiating Agenda On Patent Law

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By Kaitlin Mara, Intellectual Property Watch

Patents aren't what they used to be at the World Intellectual Property Organization. Discussions to come up with a work plan at the Standing Committee on the Law of Patents (SCP) this week and in recent meetings point to the possibility of a sea change in thinking over what matters about intellectual property policy and law.

The SCP is meeting this week from 11-15 October, and delegates are working toward a future work plan for the committee after failing to come to an agreement at its last meeting in January (*IPW*, WIPO, 1 February 2010).

The committee has been meeting in informal discussions for most of the week, which exclude non-governmental groups. The SCP is in a slow-restart process from a past stalemate primarily over harmonisation of national patent laws on the agenda.

The pressure is on the committee to come up with a plan of work as there is no other multilateral forum for discussing patent policy. Developed country members who were frustrated in efforts to advance multilateral enforcement interests just completed substantive negotiations on an Anti-Counterfeiting Trade Agreement (ACTA) but in the final stages of the talks, patents were excluded from key areas of the text (*IPW*, Enforcement, 12 October 2010).

The informal meetings between members with SCP Chair Maximiliano Santa Cruz, the head of the Chilean patent office, and between regional groups, were expected to last through tonight. Sources said a draft chair's summary is expected to emerge, but likely not until tomorrow. It could reflect various proposals and positions put forward during the week on the way forward for the committee.

Meanwhile, a side event this week on patents and technical standards sparked a heated exchange between panellists and audience members over the issue of patents on standards.

Proposals

In the SCP, the Group B of developed countries, now being coordinated by France, has proposed a future work plan that focusses on patent quality, including the exchange of information on laws and practices relating to patent quality and the "elaboration of recommendations" on good legislative and practical measures for patents worldwide. It is available here [pdf].

The Development Agenda Group (DAG), a collection of countries supporting the WIPO Development Agenda and now chaired by Brazil, emphasised in its opening statement that exclusions, exceptions and limitations to patent law, the transfer of technology, patents and standards, and anti-competitive practices are particularly important to developing countries. "Discussions at the SCP should never lose sight of the fundamental trade-off at the root of the patent system" between protecting innovators in return for dissemination of their knowledge, the DAG statement [pdf] said.

The DAG is supporting a proposal on future work made by Brazil [pdf] at the last SCP that focusses on exceptions and limitations to patent law.

The African Group has proposed a study on patents and public health. The African Group also proposed two new topics to be added to a "non-exhaustive list" of potential topics for the SCP to discuss. These are the impact of the patent system on least developing countries and developing countries, and patents and food security.

And Slovenia on behalf of the Group of Central European and Baltic States proposed the addition to the non-exhaustive list of strategic use of IP in business, particularly for small and medium-sized enterprises.

Technical transfer, client attorney privilege, and dissemination of patent information are remaining issues from the last meeting.

Also up for discussion this week is how the SCP will report on its development-related activities to the decision-making annual General Assemblies. At the latest Assemblies in September, acoordination mechanism [pdf] for the Committee on Development and Intellectual Property was adopted that required "the relevant WIPO bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations." The SCP is the first WIPO committee to meet since the General Assemblies.

On this issue, the DAG has proposed in its opening statement this week a discussion on how to do that. As the Assemblies directive applies to all WIPO committees, this is likely to be a recurring issue.

And a new secretariat-prepared study on exclusions from patentable subject matter and exceptions and limitations to patent rights, available here [pdf] was also cause of much discussion in informal meetings, according to participants. A statement on the issue from the DAG is available here [doc], and a statement from the non-governmental Third World Network is available here [pdf].

Broadly speaking, there has been a massive cultural change at WIPO, said one participant. WIPO "was basically an industry-based organisation" when it began, and discussions were one-sided: mainly aimed at protection of IP rights, he added. Even non-governmental observers largely represented industry groups. But in recent years, the fundamentals of the patent system have been questioned. This puts the organisation at a critical juncture, but it is hard to see if any agenda is advancing, he said.

Patents and Standards

A spirited discussion was had between at a side event to the SCP [pdf] organised by the Institute for Trade, Standards and Sustainable Development (ITSSD) on 12 October.

Interoperability frameworks or government procurement preferences for nonproprietary technologies create legal and economic uncertainties that are "basically unfair and unnecessary," argued the event's organiser, Lawrence Kogan, president and director of the ITSSD. The ITSSD is a nonprofit organisation that promotes a "positive paradigm of sustainable development" which it says includes strong intellectual property rights and free markets. A testimonial posted on their

website called the group "deeply supportive of traditional American imperial ideology."

"Freedom of contract and exclusive IP rights" are needed for legal and economic certainty, which will cause increased knowledge dissemination and technology transfer, whereas compulsory licences and "royalty-free mandates" would dampen the movement of technology, Kogan said. Government procurement standards preferencing open standards constituted a potential trade barrier, he added.

This did not sit well with several audience members. No government has required procurement of IP-free standards, said Thomas Vinje, an audience member and an attorney who advises clients on software patents. The European interoperability framework "does not by any honest – and I repeat honest – measure mandate anything on patents." What it does say is that when governments procure software, they procure software that is open, defined as having less IP or limits to royalties that can be requested to licence the IP. "That is not IP-free. Anyone who says that is not being honest."

"Seeing as royalty-free standards can be implemented by anyone, where exactly do you see a barrier to trade in that?" added Karsten Gerloff, president of the Free Software Foundation Europe. The FSFE position on patents and standards is here. "Expressed preference is a nuanced way of saying 'if you wish a government contract, you must satisfy our demands' [which is] de facto mandatory," said Kogan, who added that trade barriers were a "possible but not necessarily probable" outcome of such preferences.

Many innovations that later become standards are created by small businesses, said Jonathan Zuck, president of the Association of Competitive Technology. Small business innovators are particular in that the up-front money is often supplied externally, from venture capital investors who require intellectual property protection as a condition of investment. Small businesses are also particularly vulnerable if "subject to decommercialisation" of their technology because its inclusion in a standard means it must licence for free or low prices. Small businesses often have only one technology, he said, and if it fails, the business disappears.

Innovation is not a top-down process and by and large what is needed is to create an environment in which some return on investment is likely, said Zuck. This requires the ability to protect them. The role of government in this environment "is predominantly to stay out of the way."

Standardisation is a private undertaking in which commercial companies get together "to cooperate in an area where they usually compete," said Benoît Müller, a Geneva-based attorney who previously worked for the Business Software Alliance, speaking on his own behalf. Governments became interested mainly out of concern for the anti-competitive effects of such cooperation. He said governments should stay away from

"mandating no-IP standards. Because then you won't be able to buy anything for your government," as most standards have some IP in them.

A recently published Berkeley Patent Survey at the University of California (Berkeley) interviewed 700 software entrepreneurs, said Vinje, and found that patents were the least important incentive mechanism among seven options. Zuck said a study conducted by the European Commission Enterprise & Industry Directorate General, available here, talked about the importance of IP to businesses, including small and medium-sized enterprises in the information and communication technology sector.

The "field of standardisation does not strike me as one in which patent issues arise any differently from any other field," Müller said. "Companies need to obtain patents, but should not abuse rights."

Martin Hinoul of the Leuven High Technology Region, Brussels, also spoke at the event.

William New contributed to this story.