



*Précis*  
Of  
**ITSSD Side-Bar Event**

*Can Government Intervention Sustain  
Economic Incentive, Technological Innovation, and Capital Flows?*

**October 12, 2010**

**Room B  
World Intellectual Property Organization  
34, chemin des Colombettes  
CH-1211 Geneva 20, Switzerland**

Scheduled Time: 1:00pm to 2:45pm CET  
Actual Time: 1:35pm to 3:00pm CET

Moderator: Mr. Lawrence Kogan

Panelists: Mr. Jonathan Zuck  
Mr. Benoît Müller  
Dr. Martin Hinoul

(1:35)

***ITSSD Panel Convened***

(1:35-1:45)

***Introduction:*** (Moderator)

Ladies and Gentlemen, thank you for attending this side-bar event hosted by the Institute for Trade, Standards and Sustainable Development, a Princeton, New Jersey (USA)-based nonpartisan nonprofit charitable organization, and sponsored by The Kogan Law Group, P.C., a New York City-based multidisciplinary professional services firm serving the legal, business and policy needs of science and technology focused enterprises.

The ITSSD undertakes research, analytics, monitoring and reporting of emerging and extant international economic laws, regulations and technical standards that are likely to adversely impact the economic assets (including IP) and operations of multinational businesses and technology entrepreneurs, including small and medium-sized enterprises (SMEs).

At the outset, please note that there are handout materials provided out front for your reference. We also would appreciate you registering your attendance on the sign-in sheet that is being passed around the room and also taking a moment to complete a short evaluation form before departing upon the adjournment of our panel.

***Purpose of ITSSD Panel:*** (Moderator)

The purpose of this side-bar event is to address growing industry concerns that government intervention mechanisms proposed within recent SCP reports, if adopted, will create a high level of legal and economic uncertainty in the marketplace (i.e., in particular high technology sectors, including the life sciences, clean energy and information & communication technologies) due to the impairment of legal and economic rights held in patents, trade secrets, licensing, joint research, joint commercialization and other contractual agreements targeted or otherwise impacted by such regulatory mechanisms. The ITSSD believes, based on its experience, research and analysis that, as a result, essential new capital flows required by entrepreneurs to conduct basic R&D AND undertake technology commercialization efforts alone or in collaboration with others may not materialize and/or that previously committed and/or expended capital funds may diminish or otherwise be withdrawn prematurely by investors.

***ITSSD Principles:*** (Moderator)

The ITSSD wishes to emphasize three principles that underlie its position on these matters and which will guide the ensuing discussion:

1. Establishing the appropriate rule of law enabling environment in national and/or regional markets is critical to fostering innovation, investment and increased knowledge;
2. Legal and economic certainty via recognition and protection of exclusive private property rights, namely, freedom of contract and exclusive patent and trade secret development and licensing rights, will result in greater R&D-based investment from domestic as well as foreign entrepreneurial entities (Foreign Direct Investment), knowledge dissemination and technology transfer; widespread compulsory licensing will dampen such investment and the public good associated therewith.
3. Government procurement-related ‘open standards’ interoperability frameworks’ mandating or expressing a direct or indirect preference for business models premised on low or no-royalty (royalty-free) IP-based based *or* nonproprietary technologies to be incorporated within national or regional standards create legal and economic uncertainty adversely affecting technology investment decisions, is patently unfair and unnecessary, and may potentially engender trade disputes.

Please join me in welcoming the following three panelists who will endeavor to respond to three questions posed by the ITSSD in regard to these issues.



## ***ITSSD Panelists:***

### **Jonathan Zuck**

Jonathan Zuck is a software developer, technology entrepreneur, innovation policy advocate, public speaker and writer. He is President of the Association for Competitive Technology (ACT), a Washington, DC-based trade association promoting law enabling environments that inspire and reward technological innovation. ACT represents the interests of more than 3,000 small and mid-size information technology (IT) companies around the world.

Prior to leading ACT, Mr. Zuck was Director of Technical Services at the Spectrum Technology Group of Washington, D.C., a consulting firm specializing in client/server, Internet and data warehouse solutions development, which he joined in 1997 following its strategic combination with Financial Dynamics. In 1996, Jonathan Zuck served as Vice President of Technology at Financial Dynamics, where he focused on technical architecture, career management and employee empowerment matters. During his tenure, company revenues doubled and his leadership helped position the firm for its strategic combination with the Spectrum Technology Group.

In 1988, Mr. Zuck founded and served as President of User Friendly, Inc., a Washington, D.C.-based consulting and software development services firm. He also established U.S. operations for a French software firm and helped to build the company into an \$11 million business.

In his current role at ACT, Jonathan Zuck continues to provide analysis, commentary and background information on a wide range of technology issues to the media, industry, the U.S. Congress and the public.

### **Benoît Müller**

Benoît Müller is a registered attorney at the bar of Geneva and operates his own Geneva-based private practice. He serves as a consultant on international, regional and national normative and policy initiatives in the area of intellectual property, technology and trade.

Prior to establishing his own practice in 2008, Mr. Müller served as Director Software Policy Europe, Business Software Alliance (Brussels, 2004-2008), Secretary General, International Publishers Association (Geneva, 2000-2003), and as Legal Counsel, International Publishers Association (Geneva, 1996-2000).

He has also served on the boards of directors of the Swiss Forum for Communication Law (Zurich, 2003-2004); the International Federation of Reproduction Rights Organizations (Brussels, 2001-2003); the International Digital Object Identifier Foundation (Washington DC, 1999-2003).

Benoît Müller was educated in Geneva, Zurich and San Rafael. He graduated from Geneva University law faculty in 1992 and was admitted to practice as attorney at the bar of Geneva in 1995.

## **Dr. Martin Hinoul**

Dr. Hinoul, is a technology entrepreneur, diplomat, academician and prolific author, and holds a Ph.D. degree in Physics and a postgraduate degree in Business Administration from the Catholic University of Leuven (K.U. Leuven). He has also done postdoctoral research at the Stanford University, at M.I.T., and at several other laboratories in Europe, the U.S. and Japan.

Since 1998, except for a two-year period during 2001-2003 when he served as Chief of Staff for the Flemish Minister for Economy, Martin Hinoul has remained the Business Development Manager for the "Knowledge Economy Region of Leuven", based at the HQ of K.U. Leuven Research and Development (the Technology Transfer cell).

Prior to his long tenure at K.U. Leuven R&D, Dr. Hinoul served, during 1984-1998, as the Technology and Science Attaché at the Embassy of Belgium in Washington, D.C. and at the Belgian Consulate in Los Angeles.

During 1978-1983, he worked within Bell Telephone - ITT in Belgium, where he headed the Materials Research Department, and within the Shelton Connecticut ITT Research labs for the development of the digital switch "System 12"; he also was involved in the joint venture between Bell Telephone and the PTIC in China.

Dr. Hinoul is a prolific researcher and writer and author of several well known published articles and books, including "Silicon Valley" (1998), "The European Knowledge Economy" (2006), "The Threat of the Dragon – Fiction or Reality?" (2007), and "Networking" (2008).

### ***ITSSD Panel Parameters:***

Each panelist has been asked to prepare an answer to each of the following three questions. It is intended that each panelist devote approximately 15-20 minutes to answer the three questions so that there may be ample time for Q&A and interventions at the conclusion of the panel presentations. We therefore ask the audience to hold all questions until that time.

(1:45-2:30)

### ***Summary of Panelist Presentations:***

(1:45-2:00)

### **Jonathan Zuck:**

The key issue that we must keep in mind when discussing these matters is the creation of the ideal environment for innovation and the ideal innovation business model.

We must remain focused on:

1. The upfront investment required;
2. The new market created as the result of the innovation, particularly, the extent to which that new market requires and fosters partnership and/or collaboration with larger firms; *and*
3. Licensing – the context for which is different with respect to small businesses – small businesses don't possess the same financial resources as do larger multinational companies; rather, they often seek 'friends and families' monies (e.g., from Aunt Martha) or 'Angel' monies from individual investors, and do not readily seek to secure 'Venture Capital' funds.

Patents serve an important role for innovation businesses, especially those operated by SMEs.

Patents are akin to an insurance policy providing greater assurance against infringement of innovations by imitators.

Patents are cited more frequently by SMEs than by large companies because patents are usually much more important (pound for pound) to SMEs which possess fewer of them and rely upon them to ensure market exclusivity.

Patents pave the way for SME productization of innovations, and are thus more critical to SMEs than to large companies like IBM or Microsoft which file hundreds of patents each year.

We must not forget the influence that large companies have on the value of SME patents. In many ways large business IP constructively contributes to the economic value of small business IP.

However, if small business IP is acquired by a large business, based on what has been discussed during the ongoing debates at the SCP and other international venues, patents may likely fall subject to compulsory licensing [in BRIC and developing countries] which would severely diminish its economic value in the global marketplace, with negative consequences to the royalty flows due small business owners/licensors, and ultimately, to innovation.

Furthermore, many innovations that later become standards are created by small businesses.

Small business innovators and their technologies are quite vulnerable. They are in need of the up-front money that is often supplied externally by angel and venture capital investors who require IP protection as a condition of investment. Their technologies can be subject to de-commercialization if their inclusion in a standard means they must be licensed royalty-free or for unreasonably low prices. Small businesses often have only one technology, and if it fails, the business disappears.

(2:00-2:15)

**Benoît Müller**

A nuanced response is needed to question #1.

Standardization is a private undertaking that reflects cooperation and a delicate balance in an area where distinct parties normally compete in the marketplace.

Government intervention justified/based on antitrust/anticompetitive effects could be called for should such cooperation-based activities reduce competition in the marketplace. Governments are interested mainly out of concern for the anti-competitive effects of such cooperation.

However, too much government regulation creates an economic disincentive to investment and innovation when considering standardization.

To ensure against this possibility, there are ongoing industry efforts to work with governments to establish a 'safe harbor' of activities.

All standards are not the same. Few standards attract patents.

SSOs/SDOs need to find rules that work for them. They must watch the anticompetitive risk, but government intervention should be limited.

IP is critical to commercialization and licensing in the context of standards.

Some companies may have manufacturing capacity, while other companies may require capacity from others.

It is important not to take the side of a given business model. Standards reflect a balance of competing interests, and thus, they should be technology agnostic.

National/regional standards policies don't make sense and are not relevant in the current global economy in given fields/areas. International standards are the generally agreed upon solution. Regional standards should help shape international standards.

The optimal government policy should be to 'buy the best technologies for the best price'. Public procurement solicitations should express a preference for the technical specifications that are consistent with public procurement requirements and principles.

An expressed preference for 'open standards' does not make sense because most IP is licensed under RAND/FRAND – there are hardly any standards used without IP restrictions.

If public procurement authorities insist upon IP-free standards, government administrators won't be able to buy anything for the government.

Solutions that governments may wish to consider can be based on different types of competing standards. Governments can rightfully express technical specifications at a higher level based on the performance of the technology.

If the EU had mandated that government administrators procure only OSI, France would have been cut off from the internet.

Governments should not impose direct or indirect mandates. Instead, SMART government procurement promoting the widest number of platforms is what is needed.

(2:15-2:30)

**Martin Hinoul**

One of the most critical elements of innovation and commercialization is the formation of collaborations between universities, governments and industry – the ‘triple helix’.

When I started at K.U. Leuven there was a lot of knowledge but nothing was done with it. We looked for incentives to liberate such knowledge and introduce it into the marketplace.

We then discovered the usefulness of patents.

Since I have been at K.U. Leuven, patents have permitted us to spin-off hundreds of companies, to generate approximately USD\$8 billion in licensing revenues, and to attract one hundred twenty (120) companies from abroad for collaboration.

Without patents, we would have had no spin-offs, no investment interest.

We needed the involvement of venture capitalists. However, without well protected patents VCs wouldn’t have been interested.

We structured ourselves at K.U. Leuven, as follows:

- 1/3 technology-focused;
- 1/3 patents-focused;
- 1/3 legal/contracts/licensing/regulations-focused.

We let each stakeholder fulfill their respective role.

(2:30-3:00)

***Questions & Answers (Q&A)/ Interventions:***

**Q/I -1.** *Question/intervention posed by Lawrence Kogan, Moderator to each of the Panelists:*

What should governments’ role(s) be as concerns research & development, innovation, and commercialization?

*Panelists Respond:*

### **Jonathan Zuck**

There is a difference between research and innovation. Research can be directed and it is where governments can play a larger role. By contrast, innovation is more organic and market-based. It is not a top-down process. Consequently, government should play a lesser role creating an environment that is conducive to innovation, one in which entrepreneurs are free to innovate, to protect their innovations and to earn a fair return-on-investment (ROI). The role of government in this environment is predominantly to stay out of the way.

### **Benoît Müller**

WIPO member states should have well functioning infrastructures and synergies between patent offices to drive down costs and potential barriers to innovation.

Patents do not arise any differently in the field of standardization than they do in other fields. Standards and patents do not constitute a special subject for study. Where abuses of rights occur, governments should step in.

Collaborations between SDOs and patent offices may be promising and may produce helpful synergies – e.g., European Patent Office (EPO)/ European Telecommunications Standards Institute (ETSI).

Such collaborations must be undertaken at other than an EU regional level. Rather, they must be entered into at an intraregional level within individual European countries – even collaborations at a national level will be insufficient.

### **Martin Hinoul**

Governments do not promote a climate of entrepreneurship.

They generally do very little or next to nothing with basic research & development, which is left to languish in government laboratories.

Governments need to *do something more* with the R&D to bring innovations to the marketplace.

**Q/I -2.** *Question/intervention posed by Alfonse Schäfers, representative of the German Association for the Protection of Intellectual Property (GRUR), an NGO:*

Will such collaborations be possible in light of the current patent backlogs even in developed countries?

### **Jonathan Zuck**



As concerns patent backlogs, we are, in part, still paying for the dot.com boom of the 1990's when patents were filed on the backsides of napkins (figuratively speaking).

The EPO is aware of the poor quality of patent applications and has worked to raise the bar on patent quality.

While the criteria for patentability are still correct, they must be strictly adhered to. There are many 'stupid' patents.

### **Martin Hinoul**

Now we have a cleantech bubble that has resulted in another wave of poor quality patents.

We all need to adopt a conservative approach towards looking at patents, as we have done at K.U Leuven. We have only experienced people looking at patents that other people need.

We first look to identify a good technology.

We then ascertain whether such technology has market potential.

If so, only then do we focus on the business plan.

### **Q/I - 3.** *Question/intervention posed to audience by Lawrence Kogan, Moderator:*

Is it not also possible that self-help measures undertaken by innovators and inventors, in terms of conducting adequate prior art searches, would help ameliorate such patent backlogs?

Would not undertaking such due diligence reduce the burdens on the patent system and the risks of infringement litigation, while contributing to /improving patent quality?

### **Q/I - 4.** *Question/intervention posed by Thomas Vinje, Partner, at the Brussels-based offices of Clifford Chance, and representative of the European Committee for Interoperable Systems (ECIS), an NGO:*

First, we would like to correct the record – there is no instance within any European country or within the EU of government procurement rules mandating the use of royalty-free or patent-free/ nonproprietary standards, as has been represented by the ITSSD. That simply is not true. Rather, government procurement interoperability requirements are a quite nuanced matter which the ITSSD has not acknowledged.

The European interoperability framework does not by any 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 license the IP. That is not IP-free. Anyone who says that is not being honest.

We also wish to shed light on the results of the Berkeley Patent Survey which reveals that patents are not quite as indispensable as has been represented here, including to SMEs.

The Berkeley Patent Survey interviewed seven hundred (700) software entrepreneurs and found that most such companies (a great majority) bypassed patents in favor of securing a competitive market advantage.

The issue of patents and standards is a red herring.

There is little, if any, patenting by SMEs, let alone within standards.

There is no government mandatory preference for royalty-free and/or IP-free standards.

**Q/I - 5.**      *Intervention by Stephane Tronchon, former Counsel to European Telecommunications Standards Institute (ETSI) (responding to comments of Thomas Vinje of ECIS):*

Based on my experience at ETSI, I must respectfully disagree with Mr. Vinje. SMEs *do, in fact*, intervene in standardization. A look at the ETSI IPR Online Database shows that IPR declarations have been made.

Participation in the standardization process entails certain costs and incentives are provided to SMEs so that they are better able to bear those costs (e.g., membership fee reductions for SMEs).

Furthermore, FRAND includes the notion of royalty-free, but it is an *option* – it is *not* mandatory, unlike the government procurement preferences that are in dispute.

Also, a license can be restrictive as to other terms besides royalties, consistent with FRAND.

ETSI IPR policy promotes patent disclosure and encourages rights holders to enter into private negotiations regarding licensing terms.

**Q/I – 6.**      **Jonathan Zuck** (*Intervention responding to comments of Thomas Vinje of ECIS*):

In the context of government procurement standards become more complex.

We should perhaps look back to the United States, in particular, to a prior Massachusetts government procurement requirement for evidence of the negative consequences of government procurement *mandates*.

The Massachusetts government procurement mandate was intended to offset the market power of Microsoft. It was meant to exclude file formats not subject to certain protocols.

However, it had negative downstream effects on other technology entrepreneurs. For example, MOBI (electronic books) could not sell their technology to Massachusetts because a mandate rather than a preference was involved.

SMEs are creators of de facto standards protected by IP, and their businesses can be seriously disrupted by government procurement mandates.

Even government procurement preferences can be problematic, depending upon how things are defined under such preferences.

Preferences can create a rhetorical environment that impairs the efficient functioning of markets, with especially negative economic consequences for SMEs and negative innovation consequences for society.

In addition to the Berkeley Patent Survey, people should consider the study conducted by the European Commission Enterprise & Industry Directorate General, which talked about the importance of IP to businesses, including small and medium-sized enterprises in the information and communication technology sector.

**Q/I – 7. Moderator** (*Intervention by Lawrence Kogan responding to comments of Thomas Vinje of ECIS*):

Mr. Vinje's comments concerning there being no European government procurement express preferences for patent-free and/or royalty-free ICT standards is simply false and misleading.

Interoperability frameworks or government procurement preferences for nonproprietary technologies, such as the proposed European Interoperability Framework and a number of national EU member state procurement requirements create legal and economic uncertainties that are basically unfair and unnecessary.

The ITSSD has submitted a detailed supplement to its comments on SCP report SCP/13/2, particularly focusing on paragraph 44 of SCP/13/2. There are numerous instances of direct and indirect government procurement preferences being expressed by EU member states, including France, Germany, Spain, the UK, Denmark, Belgium and especially the Netherlands, as well as by the EU itself, for royalty-free and non-proprietary (non-patent-based) standards notwithstanding what Mr. Vinje claims. They cite cost-savings and avoidance of vendor lock-in as justification, as has been expounded upon by Professor Rishab A. Ghosh, UNUMERIT researcher and author of several studies recommending European Union government migration to royalty-free open source software and open standards. One need only access the ITSSD submission on the WIPO website for SCP observer comments or to the ITSSD website under 'Programs' to review our supplement (*Supplement to ITSSD Comments Concerning the WIPO Report on Standards and Patents (SCP/13/2) Paragraph 44*) and the several hundred footnoted resources contained therein to see the evidence. Indeed, we have also looked to the U.S. to track how the current

administration in Washington has also begun (*misguidedly*) to promote and employ similar preferences in the areas of SMART health and SMART energy procurement rules, evidence of which is contained in an April 2010 ITSSD presentation to the ANSI Intellectual Property Rights Policy Committee (IPRPC) entitled, *How SMART Are Standards that Sacrifice Intellectual Property Rights?*.

The issue is not as nuanced as Mr. Vinje has represented. In fact, given the extent of these expressed preferences and their potentially deleterious influence on the private markets apart from government procurement bids and solicitations, one may argue that such government preferences are tantamount to compulsory licenses. (*Mr. Vinje strenuously objected to this last comment*).

I have several questions for Mr. Vinje:

Apart from the issue of *patent*-free government procurement preferences, how do you think such preferences would impact ICTs that are protected by *trade secrets* in addition to or in lieu of patents?

Is it not true that patents are often accompanied by trade secrets that cover the associated ‘know-how’ needed to implement patented inventions, and/or that trade secrets are often chosen by entrepreneurs to protect their IP because of their much lower costs of administration?

Wouldn’t an express government procurement preference for disclosure of know-how, royalty-free and/or nonproprietary ICT technologies effectively vitiate the exclusive private property right recognized in related trade secrets?

How could SMEs or any other business protecting their innovations via trade secrets viably participate in EIF or EU member state government procurement solicitations that express a clear preference for transparent, royalty-free and/or nonproprietary standards without effectively sacrificing the entire value of their scrupulously maintained trade secret (IP) asset altogether?

Wouldn’t SMEs and entrepreneurs effectively be subject to what we refer to in the United States as a ‘taking’ of private property for public use *without* payment of full, adequate or complete (‘just’) compensation?

Freedom of contract and exclusive IP rights are needed for legal and economic certainty, which will lead to increased investment, knowledge dissemination and technology transfer, whereas compulsory licenses and royalty-free mandates would, no doubt, dampen the movement of technology.

Furthermore, government procurement standards expressing a preference for ‘open’ standards as so defined constitute a potential trade barrier.

**Q/I – 8.**      *Question posed by Karsten Gerloff, representative of Free Software Foundation Europe (FSFE), an NGO to Moderator, Lawrence Kogan:*

Seeing as royalty-free standards can be implemented by anyone, where exactly do you see a barrier to trade in that?

Also, why do you and this panel spend so much time going over the ‘value of patents’ to innovation in your presentations when the subject matter was addressed conclusively in 2007, and it was agreed that patents have ‘economic value’?

**Moderator** (*Intervention by Lawrence Kogan, responding to Karsten Gerloff’s questions*):

Expressed preference is a nuanced way of saying if you wish a government contract, you must satisfy our demands, which can amount to a de facto mandatory imposition. It is also possible, and not necessarily probable, that such a preference can also rise to the level of a potential trade barrier if, pursuant to WTO rules, ‘national treatment’ is found to be denied to foreign imports, the preference is found directly or indirectly to ‘discriminate’ against ‘like’ competing foreign or domestic competitive products or the regulation’s adoption, implementation or enforcement effectively creates an unnecessary (e.g., overly costly) obstacle to international trade – i.e., it is not the least trade-restrictive alternative available to satisfy a legitimate national policy objective. The ITSSD has performed a great deal of research and reporting on the subject of disguised regulatory barriers to trade which are available for viewing on the ITSSD and WTO websites.

ITSSD research on analogous indirect government preferences expressed in connection with environmental criteria reveal that governmental preferences or recommendations can rise to the level of indirect governmental mandates even if the government itself does not directly impose the mandate, but rather, private standards bodies or consortia do. In cases where governments indirectly facilitate development, promotion, enactment, adoption, implementation and/or enforcement of government policy preferences and/or prescriptions by private standards bodies or consortia, GATT case law holds that there may be enough of an imprimatur of government involvement to hold the government culpable under WTO law should evidence of disguised regulatory trade barriers be found to exist and sufficient evidence that foreign competitors have been disadvantaged economically as a result thereof has been adduced. I would suggest that you and other skeptics review the 2007 ITSSD paper published in the *Global Trade and Customs Journal* entitled, *Discerning the Forest From the Trees How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability*, which is available online at the websites of the ITSSD and the British Library Direct.

As concerns your second question, the reason why this panel believed it important to once again emphasize the value of patents and other IP (e.g., trade secrets) to innovation is that, apparently, many developing country delegates and NGO delegates have failed to understand this concept.

(3:00)

***ITSSD Panel Adjourned***