Knowledge Ecology International (KEI)
IPRs and Standardization: A perspective from the Internet Governance Forum, the WIPO SCP and the WIPO Development Agenda

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To some observers, the inherent tensions that routinely arise in the realm of patents and standards can appear as distant and arcane areas with little relevance to the field of international trade. Recent developments in the WTO Technical Barriers to Trade (TBT) Committee, the Internet Governance Forum (IGF) and the recently concluded 12th meeting of the WIPO Standing Committee on the Law of Patents (SCP) illustrate both the relevance and the importance of this topic.

Although the question of IPR in technology standards is often complex, there are some areas where policy relevance is obvious, and the governments have an important role to play.

1. One is where the standards play an important role in terms of competition and interoperability.

2. Another is where the process for adapting a standard is fraught with difficulty because of opportunistic behavior by patent owners, including deliberate failures to disclose patent claims, or an unwillingness to license patents on on a timely basis on reasonable terms.

3. Yet another are cases where national policies regarding the granting of patents with low thresholds for inventive step (and biases in terms of the ownership of patents) are are used as a barrier to trade.

KEI supports new policy interventions in all of these cases.

Our first example explores a concrete case where standards play an important role in terms of competition and interoperability. In particular, KEI is interested in the question of data formats. Consumers often want the benefits of using a popular standard, because network effects can be very important. But they may also be faced with vendor 'Lock-in" regarding propriety data formats, be forced to buy upgraded software to read new versions of the data formats, or more generally be harmed by a lack of competition or poor interoperability with other products and services.

This problem is quite important for data formats for word processing, spreadsheets and presentation graphics programs, all of which today are based upon data formats that are effectively controlled by Microsoft, the software company that enjoys a global market share in excess of 90 percent for the software used in these applications.

To counteract this problem, Microsoft competitors have created an open standard, called Open Document Format (ODF). Some governments have called for procurement policies that require the use of an open standard for data formats. Microsoft has responded to these procurement policy announcements by obtaining ISO certification that OOXML, the new and complex Microsoft data format, is an open standard. How open it may be is a matter for debate. Some observers claim that only Microsoft can fully implement OOXML although it appears that Microsoft may not be able to fully implement OOXML just yet.

Today Microsoft is the only vendor that can effectively implement the OOXML standard for word processing, spreadsheets and presentation graphics, and its Office Suite is only available on two operating systems: Microsoft Windows (including XP and Vista), and Apple's Mac OS X.

Under pressure from the European Union, Microsoft has announced it will support the new ODF format next Spring, a decision that Microsoft had fought for several years. In this case, the European Union and several of its member states have played an important role in moving the software industry toward a more competitive and interoperable data format, which may restore competition of the desktop software market.

The recent ISO OOXML decision exposed the risks in designing government procurement policies in this area, however. KEI is considering working with others on a plurilateral agreement on government procurement to promote

open standards and interoperability.

One possible for a for this is the UN's Internet Governance Forum (IGF), which meets next in the fall in India. KEI is requesting that the Dynamic Coalition on Open Standards (DCOS) consider an agreement that would include, among other things, a requirement that software programs for word processing, spreadsheets and presentation graphics support as a default, a data format based upon an open standard, that in addition to traditional definitions of "open" mets two requirements:

1. There is an acceptable governance of the standard (it is not controlled one by one company),

2. The standard is open to anyone and can actually be effectively, fully and reliably be implemented by multiple suppliers on each of the three most popular client computer operating systems (Today that would include Windows (XP and Vista), Apple Mac OS X, and Linux.

A another proposal for policy intervention I would like to discuss concerns notice of patents on standards.

KEI notes that standards are increasingly global concerns, involving goods and services that move in international trade across borders.

As the WIPO Report on the International Patent System has highlighted, current competition and legal remedies may not be enough to solve the inherent tensions that routinely arise in the realm of patents and standards. In particular, are the questions relating to patent disclosure.

With regard to the issue of disclosure, WIPO should consider if the current systems of providing constructive (and useful) notice regarding patent status to standards making bodies is working well in a global economy. WIPO should also consider whether or not it can play a potential role by providing global disclosures of proposed standards, and if future norm-setting activities might include an instrument on patents and standards that would address both the issue of disclosure and remedies to non-disclosure, not only for members of standards-making organizations, but extending to third parties as well.

When goods move in international trade, the systems for such disclosure can

not be based upon the laws of a single country, and there is a strong rationale for global norm-setting in this area. Companies and patent owners who operate in good faith do not rely upon patent ambushes.

The WIPO patent committee needs to gather information and evidence regarding state practice in terms of obligations to disclose patents on proposed standards, and to invite innovative businesses to share their views on the adequacy of the current systems of managing disclosures.

Many businesses believe that the current systems for disclosure are inadequate, in part because they do not extend outside of the membership of standard-setting bodies, and the disclosures that are made are often deliberately not helpful.

The proposed Treaty on Access to Knowledge includes several sections relevant to standards and patents, and audience members may want to consider these proposals.

KEI is also working on proposals that address the problems that occur then patent owners do not make timely offers to license patents on reasonable terms. The key here is to address the issue of valuing a patent, when the patent owner is no longer entitled to exercise exclusive rights. One proposal is to allow manufactures to use patents without permission from patent owners, in return for a payment of a certain fraction of the sales to all of the possible patent owners, with a third party of divide royalties among various patent owners according to the importance of the patent.

KEI supports the proposal by China to have the WTO examine the role of patents on standards as a possible technical barrier to trade, particularly when governments issue patents of low quality and a low threshold for inventive step.