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“DEVELOPMENT AT STAKE: ADDRESSING THE ANTI-COMPETITIVE EFFECTS OF IPRs IN STANDARDIZATION”

Seventh South Innovation Perspectives Series Seminar
30 June 2008, Palais Des Nations, Geneva

The issue of Intellectual Property Rights (IPRs) in technical standards is contentious since they can lead to anticompetitive situations affecting markets and international trade. While standards are adopted internationally and nationally, they are implemented across borders. This has provoked serious thoughts and syllogism over anticompetitive effects created because of factors associated with processes and norms that govern the issue of IPRs in standards. The Seminar focuses on these issues and finding remedial solutions for addressing these challenges.

CHAIR: Dr. Xuan Li, Coordinator, Innovation and Access to Knowledge Programme, South Centre

- IPRs and Standards are diametrically opposite. While IPRs are destined for exclusive private use, standards are intended for public, free and collective use.
- While IPR and standards may encourage innovation, their combination can result in anti-competitive situations. When any royalty bearing IP is included in a standard, the IP owner has the opportunity to exploit the situation through high royalties and/or restrictive licensing conditions.
- Developing countries are the worst victims when it comes to IP opportunism due to lack of coherent set of international norms governing the interface between IP and Standards.



Presentation 1: Current Multilateral Framework and Trends in IPRs and Standardization

Mr. Ermias Biadgleng, Programme Officer, IAKP, South Centre, Geneva



- The holder of an IPR incorporated into a standard could operate a monopoly especially when the costs of switching to another set of standards far outweigh the costs of staying with the current standard. This can stifle competition. It has trade implications for developing countries that are now integrating into global markets, and could also hinder industrial development as developing countries would not always be able to meet up to the lopsided licensing terms.
- This situation made it necessary for Standard Setting Organizations (SSOs) to act. However, principles devised by them concerning disclosure and licensing requirements are vague and

incoherent. For instance, there is no clear definition of what would constitute fair, reasonable and non-discriminatory. Also, they do not make provisions for post-standard licensing costs.

- There are few remedies in national courts for violation especially as it is not clear under which heading the remedies should apply. Further, application of antitrust/competition law comes into play only after the occurrence of the event.
- There are no provisions in international Agreements to sufficiently address the problem. While TRIPS provides for flexibilities to prevent anti-competitive environments, it only provides that members can adopt appropriate policies but does not stipulate policies per se. The TBT Agreement also falls short because the effects of IPRs on standardization are unlikely to be found contrary to its provisions because of the exceptions under GATT XX(d).

Presentation 2: Addressing the Anticompetitive Effect of IPR Issues in Standardization: A historical and legal perspective

Mr. Jonathan Band, Attorney, Washington DC, USA



- The Question is: How do you regulate IP in standard setting in a cost effective manner?
- Originally, IP was viewed as a tool used to confer monopoly and so was seen as antithesis of the competition law objectives. However, there was a dramatic change in the late 1970s primarily influenced by the Chicago School of thought. Nowadays, antitrust authorities and National courts treat IP as “property” and not as conferring any sort of *per se* monopoly. This complicates the matter for arriving at pro-competitive solutions concerning the incorporation of IPRs in standards.
- Copyrights, trade secrets, patents, trademarks can implicate technical standards. However, patents and copyrights, especially in case of ICT standards is a cause for concern. What RAND actually means is left to the eyes of the beholder. The recent Federal court’s Rambus decision in the United States has come to a conclusion the Standards Development Organisation rules can be manipulated.
- In terms of copyright and standards, the importance of software means that the holder of such a copyright is put in a position of enormous economic power when such copyrights form part of a standard. This is especially so, as there are no examination requirements for copyrights. However, reverse engineering is allowed as a fair use exception and thus ideas involved in a standard interface can be implemented alternatively.

Presentation 3: Addressing the Anticompetitive Effect of IPR Issues in Standardization: An Economic perspective

Mr. Rishab Aiyer Ghosh, Senior Researcher, UNU-MERIT, Netherlands

- Standard derive a lot of value from the network they create and not necessarily from the technology itself. This can be referred to as the Network effect. Network

effects can result in anticompetitive environment by constituting barriers for entry of new technology. Even when you control the technology, you are not totally free from the network effect.

- However, the introduction of standards that are subject to IPR would serve to reduce competition and render IP holders more powerful. SSOs have made efforts to control this effect for instance with the RAND requirements. Open standards should be encouraged to maintain natural monopoly of the technology (which would arise from owning rights over a standard) while encouraging competition among suppliers of the technology.
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- By their nature, standards limit innovation. They cause path dependence and natural monopolies. Consumers are assured of compatible products and producers are assured of large markets. Only the controllers of the standard can be innovative within the standard and this prevents others from achieving the same goal.
- Interoperability should be the only 'compatibility' criterion for software procurement. This would help reduce the anticompetitive effects of IPRs on standards. Otherwise, public recognition would strengthen monopolies of IPR holder.

Discussant 1: Policy Implication: IPRs and Standardisation- of Conflict or Complementarities: A Perspective from WIPO and the Development Agenda
Mr. Thiru Balasubramaniam, Knowledge Ecology International (KEI), Geneva

- The relationship between IPRs and standards is now more evident in the light of the recent developments in the WTO Technical Barriers to Trade (TBT) Committee, the Internet Governance Forum (IGF) and the 12th meeting of the WIPO Standing Committee on the Law of Patents (SCP) held in June 2008.
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- There are three important areas where governments should act. They are: where standards play an important role in terms of competition and interoperability; where the process for adapting a standard is complicated by the opportunism of IP holders; and where national policies on granting of patents with low thresholds of inventive step are used as a barrier to trade. KEI proposes policy reform on all three areas.
- KEI also proposes policy intervention on notice of patent on standards and proposes that WIPO consider the effectiveness of the current system of providing constructive notice regarding patent status to SSOs.
- WIPO should also consider what role it can play in the areas of global standard setting, disclosure, provision of additional remedies for non-disclosure for both members of SSOs and others and regulation of state practice in terms of disclosure obligations.

Discussant 2: Policy Implication: *International Competition Dimension at Stake: Will Current Policies at Various Forums Help Resolve the Deadlock?*

Dr. An Baisheng, Deputy Director, WTO Department, Ministry of Commerce, the People's Republic of China



- The challenge provided by the effect of IPRs on standardisation is a new one for both developing and developed countries. The concerns for developed countries include the need for fair competition and the importance of IPRs. For developing countries, manufactures can not keep up with royalty payments and go bankrupt; there is need for sustainable innovation and ICT infrastructure. On the part of governments, they should among other things, become more aware of the issues; adopt open standard policies; and adapt effective competition law.
- The concerns for developed countries include the need for fair competition and the importance of IPRs. For developing countries, manufactures can not keep up with royalty payments and go bankrupt; there is need for sustainable innovation and ICT infrastructure. The concerns for the information society include the need for open standards, interoperability for e-government; information security and traceability; national security.
- Disclosure is rendered less effective because there could be thousands of IPRs inherent in one standard and so patent searches are not very useful. Even though the SSOs have introduced RAND, it is left to patent holders' interpretation and the courts have not provided much redress.
- Proposed actions include the WTO: Chinese submission on IPRs issues in standardization; the WIPO: Report on International Patent System (SCP/12/3).

Concluding remark:

Dr. Xuan LI :

- The anti-competitive impact is particularly severe in developing countries because they often do not have the economic means to meet high royalties or the intellectual property to strike cross-licensing agreements. The inclusion of IP that is either royalty-bearing, contains overly restrictive licensing conditions, or both, in standards can preclude developing countries from participating in or benefiting from technological advancements.
- Standardization can serve as a powerful tool for ensuring fair competition and access to knowledge and technological advancements. It is a mechanism of balance for private rights and public goods.
- While the challenges are complex, the solutions are not. What is really needed is simply **a standard for standards.**

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