

“Open Standards” Issue

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KEI Brown Bag Discussion**

Key issues in discussions of the use or requirement to use “Open Standards”

- Does “Open” in “Open Standards” discussions, refer to the openness and transparency of the “process”?
- Does the proposed definition for “Open Standard” mean the document itself must be freely available?
 - Possible major impact on Standards Development Organization (“SDOs”) who support their standards activities through the sale of copyrighted documents
- Does the proposed definition for “Open Standard” mean that patent holders who hold essential patent claims related to the standard must make their patented technology freely available?
 - Is this a way to acquire technology without having to invest in R&D and innovation with possible adverse impacts on participation and incentives to innovate?

Copyright Issue

- **Some groups want all information to be FREE, and thus deprive copyright holders, like SDOs, of their rights, including the right to sell their works**
 - Some SDOs have chosen to make all or some of their standards available at no charge either (i) just to their members (after raising dues), or (ii) the public at large. Some examples:
 - ETSI – single copy downloads free to public at large, but also sells full collection too
 - ATIS - Committee Member Organizations get free corporate access
 - ITU - public at large
 - SCTE – members and public at large, single copy electronic
 - TIA - some selected standards available free to public (single copy download), and one copy free to those who participated in development and voted, sell and license TIA standards to public at large

ANSI United States Standards Strategy

- **ANSI, which has almost 1,000 members, developed the United States Standards Strategy (“USSS”)**

http://www.ansi.org/standards_activities/nss/ussr.aspx?menuid=3

- **There is text in the USSS about protecting Accredited Standards Developers’ (“ASD”) copyrights and also protecting patent owners’ rights while also ensuring access to any essential IPR for implementers of standards.**
- **Different and conflicting definitions of “Open Standards” can adversely affect US developers, implementers of standards, and owners of Intellectual Property that may be essential IPR in compliance to a standard.**

ANSI United States Standards Strategy (cont'd)

Globally

- “Policies that protect patents, trademarks, and other intellectual property are not universally or rigorously applied. The standardization process must respect the rights of intellectual property owners while ensuring users have access to the intellectual property rights (“IPR”) incorporated in standards.”

ANSI United States Standards Strategy (cont'd)

- “The tactical initiatives that support this strategy focus on the **need to educate and influence policy makers and decision makers**, and stress the need for the individual organizations that comprise the U.S. system to be able to maintain their various funding models.
 - **Tactical initiatives** include:
 - *Government* should advance and respect policies at home and abroad that **ensure the continued ownership and control of the copyrights and trademarks of standards developers**.
 - *All elements of the U.S. standardization system* should support policies that allow U.S. standards developers to participate in international standards development activity **without jeopardizing their copyrights and trademarks**, and that recognize the flexible funding models that exist within the U.S.
 - *Governments* at all levels, in their consideration of **policies and legislation**, should recognize the societal benefits of standards development organizations and their role in public health and safety.
 - *Government* should recognize its responsibility to the **broader public interest** by providing financial and **legislative support**, and **by promoting the principles of our standardization system globally**. Global competitiveness of U.S. industry depends critically on standardization, particularly in sectors that are **technology driven**.”

Prior History on attempts to get patented technology for free – dispute with ETSI

- **ANSI, along with many others, dealt with a prior EU attempt to acquire USA-patented technology, in the initial formulation of the ETSI IPR policy and undertaking**
 - Proposed policy arguably had a “disclose it or lose it” approach
 - Ended up a 5-year battle with ETSI and EU
 - Complaint filed by CBEMA (now ITI) to EU Commission
 - Almost weekly meetings with US Government (“USG”) agencies
 - Strong protest letters to ETSI from ANSI, and others
 - Threatened expulsion of ETSI members who did not follow new ETSI IPR Policy
 - Was it a tactic to keep US companies out of the European markets?
 - Finally got resolved in 1994 after US DoJ had issued Civil Investigative Demands (“CIDs”) on ETSI members operating in the USA

“Open Standards Definition”

- Current History

- Historically “Open Standards” were those developed under an “open” process
- Starting around 2004, we began to see efforts to “redefine” the term “Open Standards” to have other attributes, including:
 - The standard or document had to be available **FOR FREE**
 - Any embedded IPR in the standard also has to be available **FOR FREE** to users (*i.e.*, compensation-free aka Royalty-Free or “RF”) and possibly without other traditional RAND terms
 - This element of proposed Open Standard definition contrary to ANSI, TIA, ITU, ETSI, ATIS, ISO, IEC, IEEE, etc., IPR Policies
 - Sometimes proposed new “**Open Standard**” definition limited initially to e-Government services, or Government procurements, but many times broader in its application

“Open Standards Definition”

– Responses - ANSI

- **May 2005, ANSI issued a Critical Issues paper on “Open Standards” and efforts to redefine the term “Open Standard.”**

<http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/Critical%20Issues%20Papers/Open-Stds.pdf>

- “The term **“open standard”** has been used recently to describe a standard that may be copied, used and distributed for **no fee** and/or whose embedded technology is **irrevocably available on a royalty-free basis**. This definition has created some confusion among standards developers and users generally because it is contrary to the process-based definition of “open” and “openness” long held by the American National Standards Institute (“ANSI”) and many other recognized standards bodies who understand the term to describe a collaborative, balanced and consensus-based approval process for the promulgation of domestic or international standards.”
- **ANSI Open Standards Critical Issues paper was used as an input to ETSI Workshops on Standards, Open Standards and Interoperability (“SOS”)**

See Background Section of Briefing PPT for other information and responses

- **The Background slides which follow provide more information on other responses or information related to the Open Standards Debate.**

“Open Standards Definition”

– EU Assessment

- The European Commission (“EC”) has a Steering Committee (“EC SC”) of stakeholders giving advice to DG Enterprise for an EC White Paper and a Strawman document, prepared by DG Enterprise, has been distributed to members of the EC SC. It summarizes current internal considerations of the EC SC team assigned this issue regarding IPR and standardization.
- That DG ENTR EC SC document draft currently states:
 - “The experience of the Commission’s **IDABC European Interoperability Framework (“EIF”)** [which was] [f]ormerly in DG ENTR, now [a] DIGIT, initiative, ... aims to support the delivery of pan-European eGovernment services to citizen and enterprises, and for this, the **EIF defines "open standards"** in a way which makes them available for implementation on a **royalty-free basis**. **This excludes in principle many standards issued by the European Standards Organisations CEN, CENELEC and ETSI**. The EIF also recommends public administrations to **require" open standards"** in **public procurement**. Although the EIF has no legal status, it is widely cited by public administrations in Member States, as it is namely the case of the Dutch instruction.” (**Emphasis added**)

“Open Standards Definition”

– EC DG ENTR Strawman

- “The **position** of DG ENTR on this **critical** issue needs therefore to **combine** two elements:
 - The **neutrality of a general standardisation policy** supportive of innovation and competition among different players with possibly **different business models**; at this level [RAND/]FRAND terms should be the **default conditions** for dealing with IPRs in standardisation
 - The **need to accommodate the use in public procurement of selection criteria** giving a preference to more specific conditions such as **availability for royalty-free implementation**; in particular **in relation to open source software**, such as the Dutch initiative is undertaking to do
- **At this stage** it is clear that the use of **general terms** such as ‘open standards’ in order to refer to **specific conditions** in **public procurement** **should be avoided**, as it **introduces confusion** between the **general principles** of standardisation and the **specific criteria serving specific needs**, and also **provokes controversy** with standards organisations following a [RAND/]FRAND IPR policy, which is the case of **all formally recognised standards organisations**.” (Emphasis added)

“Open Standards Definition”

– Dutch Government Procurement

- From EC SC - Draft Position paper - Standardisation, competition and intellectual property rights

- 5. USE OF STANDARDS IN PUBLIC PROCUREMENT

Compliance with standards is often important for effective **public procurement**. Criteria for the identification of the appropriate standards may include the **openness of the development process** of the standard and the availability of the standard for implementations, in particular in relation to the possible inclusion of IPRs in the standard.

A relevant example here is the **reference to royalty-free standards** implementable in **Open Source Software**, as currently being undertaken by **several administrations** in Europe at national, regional and local level. A case in point here is the instruction to be issued by the **Dutch Government** requiring Dutch public administration to purchase ICT products and services which use standards listed by a government project. **Only ‘open standards’ implementable on a royalty-free basis may enter this list.** **This instruction**, which has recently been notified in the context of Directive 98/34, is thus **restricting the freedom of government departments to acquire different solutions that might also respond to the procurement’ functional requirements.** (Emphasis added)

WIPO SCP and Internet Governance Forum

- **WIPO's Standing Committee on the Law of Patents ("SCP") and the Internet Governance Forum ("IGF") Dynamic Coalition on Open Standards ("DCOS"), also are fora discussing "Open Standards."**
- **Comments from government members of WIPO, like the USG, and accredited NGOs are due to WIPO by the end of October on the WIPO Report.**
- **IGF Dynamic Coalition on Open Standards ("DCOS"), will be discussing Open Standards at the upcoming meeting in Hyderabad (December 3-6, 2008).**

ANSI-accredited SDOs

- **The ANSI Essential Requirements, including the ANSI Patent Policy, must be complied with to remain ANSI-accredited.**
 - ASDs audited by ANSI to ensure compliance
- **The *Essential Requirements* define the ANSI “open process” for development of American National Standards (“ANSs”)**

ANSI Essential Requirements

- **ANSI Essential Requirements (“ER”) ensure an open, transparent, inclusive process, where materially interested stakeholders can participate in the development of ANSs.**
 - Also includes having complaint/appeal rights
 - Other ANSI policies must be followed including ANSI Patent Policy
 - ANSI Patent Policy requires commitment or Letter of Assurance to offer licenses to all users of the standard, on Reasonable and Non-Discriminatory (“RAND”) terms, with or without compensation (e.g., reasonable royalties) for any essential patent claims that would be infringed by the practice of the ANS.

“Open Standards Definition”

– Responses - ETSI

- **ETSI launched a series of Workshops (three in total) to discuss and share views on Standards, Open Standards and Interoperability (“ETSI SOS”)**
 - ANSI participated in the ETSI SOS Workshops
 - SOS I, May 2005
 - SOS II, September 2005, attendees endorsed GSC-10 view on Open Standards definition
 - SOS III, February 2006
 - portal.etsi.org/docbox/workshop/2005/sos_interoperability/sos3/

“Open Standards Definition”

– Responses - ETSI

- **Director General at ETSI summed up at SOS III why the Open Standards, Interop effort at ETSI:**
 - “Intensive activity from policy makers
 - Study on ICT standardization in EU (DG ENTR)
 - Communication on Interoperability (DG ENTR)
 - Revision Directive 98/34 (DG ENTR)
 - EU Interoperability Framework for e-gov (IDABC, DG ENTR)
 - ICT Task force (DG INFSO/DG ENTR)
 - Consultation on patent system in EU (DG Internal market)
 - And in other regions as well (US Congress, FTC, DoJ ...)”

“Open Standards Definition”

– Responses - ETSI

- **Conclusions from ETSI SOS II at Closing Session by Karsten Meinhold, ETSI General Assembly Chairman, Chair ETSI IPR Reform Committee, and Co-Chairman of the SOS Workshop:**
- **“Open standards**
 - GSC Resolution 10/4 way of addressing the issue of «open standards» is **acceptable**.
 - **Every SDO should adopt this text** having in mind that:
 - it is valid in the ICT scope
 - it gives a characterisation of «open standards» through a minimum set of characteristics
 - in a given context, actors can precise their practical application.
 - [see document SOS2_17]”

“Open Standards Definition”

– Responses - GSC

- **The Global Standards Collaboration (“GSC”) meetings are by-invitation events which bring together the top Standards officials from the USA, Canada, the EU, China, Japan, Korea, Australia, and the International Telecommunication Union (“ITU”) to discuss their standards work programs and identify areas for collaboration and ways to accelerate global standards for the industry. Observers from other standards-related organizations, such as ANSI, are also invited to participate. www.gsc.etsi.org**

“Open Standards Definition”

– Responses - GSC

- **At GSC-10 (September 2005 and hosted at ETSI), the GSC-10 adopted a Resolution on “Open Standards.” (GSC Resolution 10/4)**
 - That GSC-10 “Open Standards Resolution” was then inputted to SOS II and endorsed by that Workshop in addition to the GSC Members.
- **GSC-11 (Chicago 2006) Reaffirmed the GSC Open Standards Resolution without any changes. (GSC-11/4)**
- **GSC-12 (Kobe 2007) Reaffirmed the GSC Open Standards Resolution without any changes. (GSC-12/05)**
- **GSC-13 (Boston 2008) Reaffirmed the GSC Open Standards Resolution without any changes. (GSC-13/24)**
 - [http://docbox.etsi.org/workshop/gsc13/gsc13_closing_plenary/GSC13-CL-35%20All%20Approved%20GSC-13%20Final%20Resolutions%20\(single%20.pdf%20file\).pdf](http://docbox.etsi.org/workshop/gsc13/gsc13_closing_plenary/GSC13-CL-35%20All%20Approved%20GSC-13%20Final%20Resolutions%20(single%20.pdf%20file).pdf)

“Open Standards Definition”

– Responses - GSC

■ GSC-13/24 Resolves:

- 1) that the Participating Standards Organizations (PSOs) define an “open standard” to include the following fundamental elements:
 - the standard is developed and/or approved, and maintained by a collaborative consensus-based process;
 - such process is transparent;
 - materially affected and interested parties are not excluded from such process;
 - the standard is subject to RAND/FRAND Intellectual Property Right (IPR) policies which do not mandate, but may permit, at the option of the IPR holder, licensing essential intellectual property without compensation; and
 - the standard is published and made available to the general public under reasonable terms (including for reasonable fee or for free). (Emphasis added)

“Open Standards Definition”

– Responses – ITU-T

- **“The ITU-T has a long history of open standards development. However, recently some different external sources have attempted to define the term "Open Standard" in a variety of different ways. In order to avoid confusion, the ITU-T uses for its purpose the term "Open Standards" per the following definition:**
 - "Open Standards" are standards made available to the general public and are developed (or approved) and maintained via a collaborative and consensus driven process. "Open Standards" facilitate interoperability and data exchange among different products or services and are intended for widespread adoption.”
 - www.itu.int/ITU-T/othergroups/ipr-adhoc/openstandards.html

“Open Standards Definition”

– Responses - ITU

- **“Other elements of “Open Standards” include, but are not limited to:**
 - **Collaborative process** – voluntary and market driven development (or approval) following a transparent consensus driven process that is reasonably open to all interested parties.
 - **Reasonably balanced** – ensures that the process is not dominated by any one interest group.
 - **Due process** - includes consideration of and response to comments by interested parties.
 - **Intellectual property rights (IPRs)** – IPRs essential to implement the standard to be licensed to all applicants on a worldwide, non-discriminatory basis, either (1) for free and under other reasonable terms and conditions or (2) on reasonable terms and conditions (which may include monetary compensation). Negotiations are left to the parties concerned and are performed outside the SDO.
 - **Quality and level of detail** – sufficient to permit the development of a variety of competing implementations of interoperable products or services. Standardized interfaces are not hidden, or controlled other than by the SDO promulgating the standard.
 - **Publicly available** – easily available for implementation and use, at a reasonable price. Publication of the text of a standard by others is permitted only with the prior approval of the SDO.
 - **On-going support** – maintained and supported over a long period of time.”
 - www.itu.int/ITU-T/othergroups/ipr-adhoc/openstandards.html

“Open Standards Definition” – TIA Response

- At an ITU Workshop in July 2008: “Intellectual Property Rights and ICT standards implementation” Geneva, July 1, 2008 (www.itu.int/ITU-T/worksem/ict-ipr/index.html), TIA’s General Counsel Paul Vishny noted:
 - TIA believes market-driven **Open Standards** can help promote competition and innovation. Such standards are developed or ratified through a **voluntary, open and consensus-based process**.
 - The patent policies of standards organizations typically find a **balance among differing interests**. For example, implementers need to access and use patented technology included in the standard. Patent holders need to preserve their rights in a way that encourages them to contribute their innovative solutions to the standardization effort. “RAND” patent policies seek to provide this type of balance by helping to make that patented technology available to all on “reasonable and non-discriminatory” (*i.e.*, RAND) terms and conditions.

(www.itu.int/dms_pub/itu-t/oth/06/14/T06140000030001PDFE.pdf)

“Open Standards Definition”

– TIA Response (cont’d)

- **Consistent with this voluntary, open and consensus-based process, globally recognized standards bodies like TIA, ISO, IEC, ITU, ETSI, IEEE, etc. all produce Open Standards that address many important ICT challenges in the marketplace while preserving incentives for further innovation and improvements over time.**

- **For example, TIA supports the Global Standards Collaboration (“GSC”) Resolution that outlines the following elements of an “Open Standard”:**
 - The standard is developed and/or approved, and maintained by a collaborative consensus-based process;
 - Such process is transparent;
 - Materially affected and interested parties are not excluded from such process;
 - The standard is subject to RAND/FRAND Intellectual Property Right (IPR) policies which do not mandate, but may permit, at the option of the IPR holder, licensing essential intellectual property without compensation; and
 - The standard is published and made available to the general public under reasonable terms (including for reasonable fee or for free).
 - **Resolution GSC-12/05: (Opening Session) Open Standards - www.gsc.etsi.org**

“Open Standards Definition”

– TIA Response (cont’d)

- **Recently, there have been some attempts to re-define “Open Standards” that may disrupt this process and its related balance of interests. The concept of “open” is being equated with patented technology that is “free” (without payment) or “free to use freely” (without payment and without any restrictions). These proposed re-definitions are being used to advocate policy changes that would undermine the rights of those who have invested in the development of the standardized technology.**
- **While the notion of patents being “free to use freely” is superficially attractive, like most “free” things, it comes at a cost. Technological capabilities and innovations most often result from substantial investments in R&D. Such investments typically drive the growth of the investor’s patent portfolio. If patent holders in standards-setting activities are expected to give away or waive their patent rights, there are likely to be significant adverse results including:**
 - Technology leaders will reduce or cease participation in (or technical contributions to) voluntary standards-related activities, or
 - Individuals and organizations will not invest (or will invest less) in the development of innovative and next-generation technology in the technical areas subject to standardization, thereby creating innovation “dead zones” in those areas.

“Open Standards Definition”

– TIA Response (cont’d)

- **These types of adverse results would cause (a) the standardization system; (b) its open, voluntary and consensus-based process; and (c) ultimately the resulting Open Standards, to be less effective or successful than they are today.**
- **Moreover, TIA believes that these results would have a negative impact on global respect for intellectual property that helps stimulate innovation and develops local economies around the world.**

“Open Standards Definition”

– TIA Response (cont'd) - Open Source Confusion

■ Open Standards are Different from Open Source Software (“OSS”)

- **“Open Source” Software should not be confused with “Open Standards”:**
 - Open Standards are technical specifications that are developed and ratified through the open, voluntary, consensus-based process described above.
 - “Open Source” Software is software distributed with the source code openly available under a certain specified software distribution license. Open Source Software is distributed under license, often for “free” by distributors who charge instead for other products or services, including upgrades or full-feature proprietary software licenses, customization and maintenance services for the software, or related consulting and integration services.
- **While an implementation of a particular standard may be distributed under an Open Source Software license, the development of the standard is independent of the license that the distributor of an implementation may ultimately choose to adopt. The standards development process is neutral to accommodate and balance the interests of all stakeholders and all business models.**
- **TIA strongly favors the traditional fundamental elements of Open Standards which support a balance of interests that preserves the incentives to innovate and spreads development costs in and around technology areas that are subject to standardization.**
- **In doing so, TIA notes the important distinction between “Open Standards” and “Open Source Software,” which should not be confused.**

“Open Standards Definition”

– TIA Response (cont’d)

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- **TIA strongly favors the traditional fundamental elements of Open Standards which support a balance of interests that preserves the incentives to innovate and spreads development costs in and around technology areas that are subject to standardization.**
- In doing so, TIA notes the **important distinction** between “**Open Standards**” and “**Open Source Software,**” which **should not be confused.**

WIPO Report on International Patent System

- Pursuant to the decision by the 34th WIPO General Assembly held in September/October 2007 to submit a Report on the International Patent System to the Standing Committee on the Law of Patents (“SCP”), a document was submitted by the Secretariat as a working document for the twelfth session of the SCP, held from June 23 to 27, 2008.
- That WIPO Report also discusses “Open Standards”

WIPO Report, paragraph 121

- 121. Among technology standards, there is particular interest for “open standards”. While **there is no universally accepted definition of that term, all open standards have the following common characteristics:** (i) the specification is publicly available without cost or for a reasonable fee to any interested party; (ii) any IP rights necessary to implement the standard are available to all implementers on RAND terms, either with or without payment of a reasonable royalty or fee; and (iii) the specification should be in sufficient detail to enable a complete understanding of its scope and purpose and to enable competing implementations by multiple vendors. Some define open standards as publicly available technical specifications that have been established in a voluntary, consensus-driven, transparent and open process, others appear to add to this definition the requirement that an open standard has to be available royalty-free. **The defenders of the first definition favor patent policies on a RAND basis, which they believe to maximize flexibility through a commitment to license combined with the right of patent holders to receive reasonable and adequate compensation for their sharing of their technology, and trust in the co-existence of this model and a royalty-free model.** They also question **how, in a royalty-free environment, investments in research and development could be maintained in the long run and how a broad participation in standard-setting processes could be maintained.** On the other hand, the advocates of the latter approach are convinced that society as a whole would benefit from the open and royalty-free access to standards, as it is the case, for example, in the Internet context, which had been established precisely in order to allow the free publication and retrieval of information from the web. According to them, this model would best ensure interoperability, greater innovation and consumer welfare. In addition, they argue that, even where a royalty-free policy is adopted, the benefit of standardization may outweigh the loss of royalty income in certain technologies, simply through greater quantities of a certain product being sold. (Emphasis added)

WIPO Report, paragraphs 122 and 314

- **122.** In this context, the notion of “open source” is often mentioned, but it **should not be confused with open standards**. . . . When governments and other users are in the process of selecting a specific technology to meet their needs for interoperability and/or free use of that technology, in addition to the open or proprietary nature of any software involved, factors such as overall costs, the maturity of the technology, and the support offered, should be taken into account. (Emphasis added)
- **314.** Given the different levels of development, **there might be no answer that fits all**. Development is a long-term goal, and the determination of how the international patent system could contribute to development **may require long-term strategies**. (Emphasis added)

WIPO SCP Meeting results from June 2008

- **The WIPO Standing Committee on the Law of Patents (“SCP”) agreed to give WIPO members and accredited Non Governmental Organizations (“NGOs”) the opportunity to provide written comments to the WIPO Report on The International Patent System (document SCP/12/3)**

http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3.pdf

- **The SCP also identified four areas for the WIPO Secretariat to undertake further analysis, including the topic of patents and standards**

Internet Governance Forum

- **Internet Governance Forum (“IGF”): Procurement and Open Standards.**
 - A draft document was prepared by Knowledge Ecology International (“KEI”) to stimulate discussion among members of the IGF Dynamic Coalition on Open Standards (“DCOS”), at the upcoming meeting in Hyderabad (December 3-6, 2008).
 - KEI has prepared a draft "Agreement on Procurement and Support for Interoperability and Open Standards" which is proposed as an initial model for an agreement on **Procurement and Interoperability** and **Open Standards** that could, in a modified form, be signed by governments, businesses, non-profits and individuals.

- **Practical applications of the KEI draft could result in NO procurements** if no Web browsers met the criteria specified, or a **sole-source supplier or monopoly supplier** if only one met the criteria.