

Preserving the Rights of IP Holders in an Open Standards Environment

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- **ITSSD**: An independent, nonpartisan not-for-profit educational organization dedicated to the promotion of a *positive* paradigm of sustainable development
 - **Consistent with private property, free market and WTO rule of law-based principles**
 - **That affords future generations from all Nations greater opportunities for a higher quality of life.**
- **ITSSD**: Emphasizes the importance of economic growth, free markets, the rule of law and strong intellectual property rights to scientific discovery, technological innovation.
 - **AND, the need to establish balanced, science-based and cost-effective national regulatory and standards systems.**
- **ITSSD**: During 2007-2008, has made presentations to foreign government regulators within Brazil, Russia, South Korea concerning IP rights and standards

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■ ITSSD & WIPO:

- Ad Hoc Observer, *Standing Committee on the Law of Patents (SCP)*
- Ad Hoc Observer, *Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)*
- Ad Hoc Observer, *Advisory Committee on Enforcement (ACE)*
- Ad Hoc Observer, *Standing Committee on Copyright and Related Rights (SCCR)*

■ ITSSD & WTO:

- Three CEO-authored white papers discussing standards and disguised trade barriers posted on WTO website

■ ITSSD & UNESCAP (Economic Social Comm. Asia/Pacific):

- ITSSD Website designated as 'Selected Worldwide Website for 'Trade and Investment' and 'Information Source - Trade and Environment'

■ UN & Other Int'l Agencies Referencing ITSSD papers:

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■ WIPO Report:

- Standards promote wide adoption of new technologies in the market place, create predictability and interoperability and facilitate competition between implementations
- Standards often incorporate patented technology, which can promote or impede their adoption by industry and the public.
- Standards and patent policy must balance between the interests of IP right holders, producers who want to license those rights and produce the goods (or offer (or use) the services) covered by the standards incorporating such IP, and the public.
- Private SSOs and their members should be encouraged to review among themselves organizational policies and internal governance rules for addressing general patent notification, disclosure and licensing issues and potential conflicts among SSO members.

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- Technology producers hoping to license their patented technologies on **NON-exclusive terms**, should be encouraged to:
 - **Notify and disclose to SSOs and their members the presence of 'essential' patents (patents without which standards can proceed) before the standard is adopted;**
 - **Agree to offer RAND/FRAND terms to SSO members**
 - RAND applies to conditions including field of use, reciprocity or restrictions on sublicensing, which depend on the circumstances
 - RAND applies to royalty rates, which depend on the circumstances
 - RAND should NOT, by definition, be limited to 'Royalty-free' licenses, *unless* a particular SSO and its members agree
- **Licensing terms should be negotiated by & between individual SSO members, and NOT by the SSO, to reflect arm's-length market facts & circumstances for each set of parties - freedom of contract is a private property right**
 - Small businesses filing fewer patents on core technologies are especially dependent on maintaining strong IP rights in the marketplace to gain a competitive advantage.
 - They may choose not to participate in the standardization process at all, if they are unable to freely enter into royalty-based licenses with other SSO members on a RAND basis. 7

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- The subject matter of a license may include non-essential ('useful') patents that are NOT subject to RAND requirements, but which may be critical to successful commercialization of the technology
- SSOs should not require that licensing terms be disclosed prior to adoption of a patent-embedded standard, since all of the facts relevant to determining the commercial prospects for a patented technology are not yet known.

■ **Government Procurement Programs** seeking to facilitate technology transfer and capacity building should not require, or otherwise discriminate in favor of:

- Royalty-free RAND as a condition for eligibility of a technology incorporating an essential patent, if they wish also to promote entrepreneurship, private property ownership, foreign direct investment and the successful development of a market economy.
- Copyrighted royalty-free source code as a condition for eligibility of a technology, if they wish also to promote entrepreneurship, private property ownership, foreign direct investment and the successful development of a market economy.

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- ‘Open Standards’ should be defined as:
 - publicly available technical specifications that have been established in a voluntary, consensus-driven, transparent and open process, pursuant to which, any IP rights necessary to implement the standard are made available to all implementers on RAND terms, *with OR without royalty*.
 - Many R&D-based companies will be unable to function in a royalty-free environment, as they will be unable to recoup their R&D investments.
 - The potentially greater amount of revenues earned from sales of ‘standardized’ royalty-free patented products is unlikely to outweigh the loss of royalty income, especially during lean economic times
 - Consequently, not only will technology R&D and innovation suffer, but also the standard-setting process.
- ‘Open Standards’ should be not be confused with ‘Open Source Software’ (OSS), which are distinct concepts.
 - For example, royalty-free OSS software could be based on standards with embedded patents subject to licensing royalties negotiated on a RAND basis, paid from OSS service-related fees earned



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