ITSSD Comments Concerning SCP/13/2 – Standards and Patents

I. General Comments

A. It appears that WIPO's newfound mandate to address cross-cutting technical patents and standards issues may result in undesirable 'mission creep' and 'regime shifting' that provides a more advantageous venue for non-IP asset owning stakeholders to raise issues not considered in other fora. SCP members and observers are left to question how the WIPO intends to handle, for example, overlapping jurisdictional issues with the World Trade Organization (WTO), in which the provisions of a number of WTO Agreements, including the WTO TRIPS, TBT, SPS and Government Procurement Agreements may be implicated.

B. There appears to be a gentle undercurrent to nudge stakeholders toward accepting more governmental intervention and control over the standards development, invention and innovation processes. And, this model appears more closely aligned with the European standards and innovation model which generally promotes one standard, one test, accepted everywhere, for each component of each product at the expense of market competition and market choice. Perhaps this is why the document expresses a preference for essential over nonessential patents and for complimentary over substitutable technologies, ultimately to be determined by government. Arguably, the standards development process at the national, regional and international levels should be used instead to help facilitate competition between and among different standards based on distinct technology platforms wherever possible, in order to reduce market concentration and to provide potential users/consumers with greater product and service choices in the marketplace.

C. This document arguably posits 'interoperability' as the holy grail end-in-itself to be achieved, and strongly suggests that the otherwise lawful exercise of exclusive private patent rights which interferes with and challenges that objective, is an inherent 'tension' in the current innovation system that can no longer be tolerated for the 'greater global good'. Hence all types of governmental prescriptions to ease the tension between patents and standards and to reduce obstacles to the creation of public goods from private ICT resources have been recommended. And, they will require the broad subjugation of exclusive private IP rights to the 'public interest' at the national, regional and international levels. What is more, the term 'interoperability' employed throughout this document reflects European national, regional and global policies, which express a preference for royalty-free open standards AND royalty-free open source software, primarily at the expense of rights holders.

D. There is clearly an overall effort by anti-IP forces, consisting of developing country governments, NGOs, academics, and certain corporations to allege without substantiation (anecdotal evidence) that there are systemic patent 'hold-up' issues that impede interoperability, innovation, dissemination of knowledge and that impair or jeopardize developing country public

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interest policies, and which require alternative solutions – i.e., solutions that are in lieu of private property-based patent protection. Consistent therewith, this document is strongly suggestive of a new utopian 21st century paradigm largely desired by non-IP asset owners in the developing world and by their various supporters, built upon communally developed open source software and a new communal form of open standards development wherein technology patents will increasingly become available (transferable) on a royalty-free basis and the underlying products in which they are incorporated will become commoditized. And, pursuant to said paradigm, innovation will increasingly become a service rather than a product". As a result, "Exclusivity – which…is 'the hallmark of property'…[will increasingly come]… under constant attack…"[1] This observable trend runs counter to post-Enlightenment Era history and to human nature.[2]

E. The 'license of right'/ 'soft' patent proposal that one U.S.-based multinational company has promoted with the support of the European Patent & Trademark Office may possibly, one day, make a good 'supplement' to the existing patent system, as long as it remains voluntary – i.e., as long as patent owners/holders are still capable of contracting freely. Freedom of contract is an important, if not indispensable political, legal and economic private property right that must be protected at all costs.[3] However, penetrating readers will discern that the license of right/soft patent proposal is likely intended as an eventual 'alternative' to the current patent system to ensure 'interoperability' of ICT and other technologies for the benefit of non-IP asset owners and their governments, and thus, that it will ultimately become mandatory and subject to increased governmental oversight. The WIPO SCP must vigorously work to educate other intergovernmental bodies and WIPO member governments about the benefits of recognizing and protecting exclusive private property rights, including both patents and contract licensing rights, nationally, regionally and globally.

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[1] *See* Sara-Jayne Adams, *Can WIPO Really Help to Rescue an IP system Under Stress?*, Intellectual Asset Magazine (March 19, 2009) at: http://www.iam-magazine.com/blog/detail.aspx?g=1f245707-a58c-4f9a-a879-5c69e53fea8f (quoting World Intellectual Property Organization (WIPO) Director General Francis Gurry at a lecture entitled "The Future of IP").

[2] French author and historian Alexis de Tocqueville wrote about the liberating power of private property, as envisioned by the U.S. Constitution, **to promote democracy, scientific and creative discovery, and innovation**. "As soon as citizens began to own land other than by feudal tenure, and transferable wealth was recognized, and could in its turn create influence and give power, discoveries in the arts could not be made, nor improvements in commerce and industry be introduced, without creating almost as many new elements of equality among men. *Once works of the intellect had become sources of force and wealth, each development of science, each new piece of knowledge, each new idea had to be considered as a seed of power put within reach of the people*" (emphasis added). *See* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 3, 5 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Random House 1945) (1840).

[3] "[Property means] that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual…[I]t embraces everything to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them…He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. **In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights**" (boldfaced emphasis added; italicized emphasis in original). *See* JAMES MADISON, Property, THE NAT'L GAZETTE, Mar. 29, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266-67 (Robert A. Rutland et al. eds., 1983).

F. Patent pools may or may not be useful market mechanisms to assist multiple patent owners in facilitating the development of multi-component technology standards without conflict. However, there is not yet enough data to conclude how to address their shortcomings and to construct a successful pool arrangement that does not engender conflict. Similarly, the Industrial Royalty Pie Model of allocating patent pool royalties is untested and requires more time to evolve and study.

G. While this report has been represented as being merely a preliminary study that contains NO conclusions, it is likely to evolve into something much, much more, that does contain controversial conclusions.

II. Specific Comments

Paragraph 25 states that, *"At the twelfth session of the SCP, it was clarified that the modus operandi of the Committee, namely, to move forward along a number of tracks, including the preparation of preliminary studies, was agreed upon for the purpose of developing the work program of the SCP (see paragraph 123 of document SCP/12/5 Prov.). With a view to this specific background, the preliminary study would contextualize the current issues regarding standards and patents, and would contain no conclusions.*

The ITSSD recognizes, based on the following excerpted paragraphs from the SCP's prior Draft Report [4] that the ultimate objective of the SCP Work Program is to arrive at a consensus for proceeding toward the negotiation of a final substantive patent law treaty (SPLT) that facilitates the international harmonization of now divergent national patent laws.

> 14. The Chair noted that document SCP/12/3 should become the basis of the future work program of the SCP, and suggested that, in terms of the procedure to review the document, delegations start with general statements and comments on the document, followed by suggestions and comments on specific parts of the document, for example, section by section or paragraph by paragraph. The Chair said that such interventions might lead the Committee to identify specific issues of common interest." [5]

[4] "Discussions on the draft Substantive Patent Law Treaty (SPLT) started at the fifth session of the SCP in May 2001. The discussions focus on issues of direct relevance to the grant of patents, in particular, the definition of prior art, novelty, inventive step/non-obviousness, industrial applicability/utility, the drafting and interpretation of claims and the requirement of sufficient disclosure of the invention. The SCP further agreed that other issues related to substantive patent law harmonization, such as first-to-file versus first-to-invent systems, 18-month publication of applications and a post-grant opposition system would be considered at a later stage." *See* Standing Committee on the Law of Patents, WIPO website at: http://www.wipo.int/patent-law/en/scp.htm .

[5] *See* "Draft Report of the Standing Committee on the Law of Patents" (SCP/12/5 Prov.) (Aug. 11, 2008) at: http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_5_prov.pdf .

"23. The Secretariat confirmed the Chair's statement that, while it was for the SCP to decide what exactly it wished to achieve, the original purpose of document SCP/12/3 was to assist the Committee in constructing a work program, that is, to form the basis of discussion upon which the SCP could build and identify a work program for the future". [6]

"123. The Chair clarified that the objectives of the exercise, namely, to move forward along a number of tracks including the preparation of documents on four issues for preliminary discussion, was to develop the work program of the SCP. The Chair, therefore, considered that the work being done, and to be done, were merely building blocks, so that different paths would lead the Committee to the objective, namely, the development of a work program…. [7]

124. In view of the discussions above, the following was decided:

> (c) The Committee asked the WIPO Secretariat to establish, for the next session of the SCP, preliminary studies on four issues. These four issues, which are not to be considered prioritized over the other issues contained on the list referred to in paragraph 7, are the following:
> …- Patents and standards… [8]

Paragraph 30, in part, states that, "*In conjunction with the increasing importance of ICT in the information society, more and more attention has been paid to the role of standards in supporting interoperability in the network society where technical standardization plays an important role in connecting people anywhere and anytime.*"

It would be helpful if the SCP better defined and explained the terms 'information society', 'network society' and 'interoperability' for the benefit of SCP members and observers. Does the term 'interoperability' used throughout this document (SCP/13/2) incorporate the same multidimensional (political, legal, economic and technical) definition employed by the European Community in revised version 2.0 of the European Interoperability Framework (EIF) – i.e., the standards/technical specifications platform established to facilitate the provision of Pan-European *e*Governmental Services[9]? If so, is the definition of 'interoperability' deemed germane to the

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] "'Pan-European eGovernment Services' means cross-border public sector information and interactive services, either sectoral or horizontal, i.e. of cross-sectoral nature, provided by European public administrations to European public administrations, businesses, including their associations, and citizens, including their associations, by means of interoperable trans-European telematic networks" (italicized emphasis in original). *See* EUROPEAN INTEROPERABILITY FRAMEWORK FOR PAN-EUROPEAN eGOVERNMENT SERVICES, DRAFT FOR PUBLIC COMMENTS – AS BASIS FOR EIF 2.0 – (7/15/08) at pp.5, 20-21, at: http://ec.europa.eu/idabc/servlets/Doc?id=31597.

development of standards for ICT technologies intended purely for private commercial business-to-business (B2B) use, business-to-consumer (public market) use, government-to-government use and/or government to business (procurement market) use? If so, is the EU policy objective of ensuring 'interoperability' limited only to the ICT sectors, or will it be more broadly applied "to facilitate the implementation of EU policies and initiatives"[10] relating to other industry sectors – i.e. "*e*health interoperability", as well?[11]

For example, it would appear that Europe's e-Health Action Plan "Advocates the development of *common interoperability approaches and standards* for patient identifiers, medical data messaging, [and] electronic health records",[12] based on adoption of Open Source reference implementations for care services…[and]…open and more free access to future and existing e-Health standards…taking inspiration from models such as the World Wide Web Consortium."[13] And, it would seem that, in addition to the emphasis placed on information-based ICT and *e*healthcare product-service standardization, other product-service industry sectors have also been targeted for 'interoperability' standardization improvements to ensure *universal access* to 'essential services' and so-called 'user rights';[14] they include energy, transport and broadcasting, among others. European "public authorities [have] classif[ied these product-services] as being of general interest and subject to specific public service obligations. This means that it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest."[15]

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[10] *See* Francisco García Morán, *European Interoperability Strategy*, European Commission Directorate General, Informatics (June 13, 2008) at p. 2, at: http://ec.europa.eu/idabc/servlets/Doc?id=31154 ; Francisco García Morán, *Proposal for a Community Programme on Interoperability Solutions for European Public Administrations (ISA)*, European Commission Directorate General, Informatics (June 20, 2008), at p.2, at: http://ec.europa.eu/idabc/servlets/Doc?id=31160 .

[11] *See* Flora Giorgio-Gerlach, *European Commission Strategy for European eHealth Interoperability*, DG Information Society and Media, ICT for Health, European Commission (Oct. 2008, Calliope, Crete, Greece) at: http://www.calliope-network.eu/Portals/11/assets/documents/Crete_Presentations/CAL%202008-10-09%20s11%20Giorgio%20%20EC%20Strategy%20Interoperability.pdf .

[12] *Id*., at p. 8 (emphasis added), citing

[13] *See* COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM (2004) 356 final (4/30/04), "e-Health - Making Healthcare Better for European Citizens: An Action Plan for a European e-Health Area", at pp. 16-17, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0356:FIN:EN:PDF . "The exchange of experience in the use of open standards and open source solutions among health administrations in Member States should be promoted." *Id*., at p. 17.

[14] *See* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS COM(2007) 725 final (11/20/07), "Accompanying the Communication on 'A Single Market for 21st Century Europe' - Services of General Interest, Including Social Services of General Interest: A New European Commitment", at pp. 7-10, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF.

[15] *Id*., at pp. 3-4..

Clearly, the term 'interoperability', as defined in the revised EIF version 2.0[16] and with respect to these other initiatives are much more communal, communitarian and social welfare orientated than proprietary in nature – i.e., public interest rather than private interest-focused. In other words, this document arguably does NOT reflect a balance between public and private interests.

The EIF version 2.0 definition of 'interoperability' moves far beyond the notions of data exchange and information and knowledge sharing originally proposed in the previous EIF version 1.0. It now encompasses "a more general view of interoperability as the ability of disparate and diverse organisations and systems to work together efficiently towards mutually beneficial common goals[17]…by means of interoperable trans-European telematic networks[18]…[which] implies a certain degree of integration of business processes…"[19] In addition, the term 'interoperability' is also defined in the 'negative'; it is *not* integration, *not* compatibility and *not* adaptability.[20] It is quite problematic that the term 'interoperability' as so defined reflects a preference for a top-down governmental intervention model of ICT standards development that "*describes the way* in which organisations have agreed, or *should* agree, to interact with each other, *and how standards should be used*. In other words, *it provides policies and guidelines that form the basis for selection of standards*" (emphasis added).[21] In other words, these are *governmental* in intent, force and effect. This is especially so, since such 'interoperability' governance rules would seem to apply to standards developed to promote ICT technologies for purely private commercial B2B use, for business to consumer (public market) use, for government-to-government use *and* for national and regional governmental procurement use/ purposes.[22]

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[16] *See* "Revision of the EIF and AG", IADBC [Interoperable Delivery of European eGovernment Services to public Administrations, Business and Citizens] website (Dec. 2008) at: http://ec.europa.eu/idabc/en/document/7728.

[17] "Interoperability is the ability of disparate and diverse organisations to interact towards mutually beneficial and agreed common goals, involving the sharing of information and knowledge between the organizations via the business processes they support, by means of the exchange of data between their respective information and communication technology (ICT) systems" (italicized emphasis in original). *Id*., at p. 5.

[18] "Telematics is the blending of computers and wireless telecommunications technologies, ostensibly with the goal of efficiently conveying information over vast networks to improve a host of business functions or government-related public services. The most notable example of telematics may be the Internet itself, since it depends on a number of computer networks connected globally through telecommunication backbones." *See* "What is Telematics", SearchNetworking.com (April 18, 2007) at: http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci517744,00.html.

[19] *See* EUROPEAN INTEROPERABILITY FRAMEWORK FOR PAN-EUROPEAN eGOVERNMENT SERVICES, DRAFT FOR PUBLIC COMMENTS – AS BASIS FOR EIF 2.0, *supra* at pp. 4-5.

[20] *Id*., at p. 5.

[21] *Id.*

[22] "The EIF will be of interest to all of the stakeholders who have been previously identified: Administrations, Businesses and Citizens…The specific provisions of the EIF are however designed to provide practical guidance to two main classes of stakeholders: administration policy makers responsible for eGovernment service development and operation, and administration officials responsible for ICT systems implementation (and by extension any contractors working on their behalf)…The document may be used by EU agencies and institutions and national authorities during procurement exercises involving ICT systems." *Id*.,at p. 15.

> The pan-European *e*Government Services (PEGS) that are covered by the EIF can be subdivided into a number of interaction types involving trans-border operations: [1] Direct interaction between citizens or enterprises of one particular Member State with administrations of other Member States and/or European institutions…*Administration to Citizen and Administration to Business type interactions*…[2] The exchange of data between administrations of different Member States…*Administration to Administration type interactions*…[and 3] The exchange of data between various EU Institutions/Agencies or between an EU Institution/Agency and one or more administrations of Member States... *Administration to Administration type interactions*…" [23]

The ITSSD questions whether the European Union now expects that SCP members and observers to accept these proposed EU national and regional priorities for 'interoperability' as a global template for all nations to follow, as their own.

The ITSSD is concerned that the objectivity of this document SCP/13/2 and any related SCP Work Program that may arise from it has been unduly compromised because of the apparent prevalence of the European Union's model of 'interoperability' incorporated throughout this document. After all, the EIF version 2.0 expressly reflects that securing the holy grail of 'interoperability' is an European priority that has garnered strong political support "from the highest levels in the EU", and that such support has been "specifically manifested in a number of ambitious political objectives laid out by top European Policy makers."[24] Given this revelation, will not the European Commission and the EU Member State delegations to the SCP act magnanimously and invite other SCP members and observers to submit their own proposals containing a definition of interoperability that may be compared with the European proposal?

The ITSSD strongly recommends that the SCP formally call upon its *non*-European members and observers directly to identify and submit alternative frameworks for interoperability to the extent they exist, and for the SCP to formally consider how the ICT sectors in OTHER non-European countries define and then implement the term 'interoperability' in practice. To this end, the ITSSD also calls upon the SCP to ensure that alternative 'interoperability' proposals made by non-European SCP members and observers to the extent they have not already been presented, shall be considered by the SCP and shared with all other SCP members and observers, in an open, transparent and equitable manner.

Furthermore, the ITSSD requests that the SCP formally incorporate a comparison of all submitted alternative interoperability definitions and practices with the European interoperability definition and practices, as an integral addendum or annex to this document SCP/13/2, and to also incorporate such comparison into its current and future standards and patents Work Program. Moreover, the ITSSD calls upon the SCP to acknowledge the need for a longer timeframe in which to allow for the submission by other SCP members and observers of alternative

[23] *Id* (emphasis added).
[24] *Id*., at p. 7.

interoperability frameworks and to consider the comparative data and 'lessons learned' as necessary for elaborating a comprehensive and useful Work Program on standards and patents. Perhaps, the SCP and its members and observers will ultimately decide that a more decentralized market-based approach to interoperability and standardization is preferable to the top-down government-driven *European* model herein posited.

Paragraph 35 states, in part, that: "*Generally speaking, there are two categories of technical standards: de facto standards and de jure standards. A de facto standard is created when a particular technology is widely implemented by market players and accepted by the public so that such a technology becomes a dominant technology in the market even if it has not been adopted by a formal standard setting body. De jure standards are, in general, set by standard setting organizations (SSOs).*"

The ITSSD wishes to express its understanding that these terms – *de facto* and *de jure* standards - have distinct legal meanings apart from their assigned meanings by members of the standards community. *De jure* standards are those developed by recognized standards development (setting) organizations. Since industry standards are 'voluntary' by nature, this corresponds with the WTO TBT Agreement definition of 'voluntary' standard.

However, *de jure* has a different meaning in the context of the law. According to Black's Law Dictionary, it means "'by law'; legitimate; lawful; by right & just title". Webster's defines the term as "by right or legal establishment'. Ballentine Law Dictionary defines the term as "by right; by lawful right; complies with the law in all respects; valid in law". These definitions correspond more closely with the WTO TBT Agreement definition of 'mandatory' standard, which in effect, is deemed a 'technical regulation'. The WTO TBT Agreement has parallel but not identical provisions for these distinct types of documents.

Paragraph 37 states, in part, that: "*National standards may be either mandatory or voluntary. In general, mandatory standards are set in areas relevant to public safety, health or protection of the environment, while in most areas, adoption and implementation of standards are voluntary in the sense that participation in the adoption of the standards as well as the use of such standards, is voluntary…In some countries, the national SSO is part of the national government (for example, the Standardization Administration of the People's Republic of China (SAC)), whereas in some others, it is an independent organization but closely related to the government (for example, the Japan Industrial Standards Committee (JISC)). In the United States of America, a national standardization system consists of a number of governmental and non-governmental SSOs…*"

As noted above, in many countries standard setting is often directed by the government, and SSOs are often directly or indirectly affiliated with or otherwise related to the national or government. In these instances, the standards would arguably be mandatory technical regulations and have the force and effect of law – i.e., they are *de jure*. Where standards initiate from SSOs they would

arguably be *de facto* in nature, unless they are ultimately adopted by a national or regional government as a governmental standard, in which case they would become *de jure*. Thus, it is arguable that the definition of *de jure* standard requires further analysis and clarity so that it is brought into line with the WTO TBT Agreement.

Arguably, standards should be defined as either *de jure* or *de facto* by reference to their source, their characteristics and their underlying purpose. Do they have the force of law? Do they fulfill governmental policy objectives? Was the government in any way, directly, or indirectly, involved in their promotion, development and/or implementation? In other words, may SSO standards activities fairly be characterized as part of an overall governmental regime, and thus, as an extension of 'governmental conduct'? [25] The ITSSD previously emphasized these points within its comments to the WIPO Report on the International Patent System.[26]

Paragraph 43 states, in part: *"On the other hand, others consider that an open standard must be royalty-free. Advocates of that approach are convinced that society as a whole would benefit from the open and royalty-free access to standards, as is the case, for example, in the Internet context, which was established precisely in order to allow the free publication and retrieval of information from the web. According to this view, the royalty-free model would best promote interoperability, greater innovation and consumer welfare…"*

Arguably, the 'others' referred to in Paragraph 43 include the European Commission and its Member States. As noted in Paragraph 30, the European Commission has determined that standards, especially "within the context of complex, software based ICT systems", must be developed in a manner that ensures 'interoperability'.[27] According to version 1.0 of the European Interoperability Framework (EIF), this means using 'open standards', which is defined as meeting the following four characteristics: 1) [Its] ongoing development occurs on the basis of an open decision-making procedure available to all interested parties[;] [2] [It is] published and the standard specification document is available either freely or at a nominal charge[;] [3] *The intellectual property - i.e. patents possibly present - of (parts of) the open standard is made*

[25] *See* Lawrence A. Kogan, *Discerning the Forest From the Trees: How* Governments *Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability* at: http://www.itssd.org/GTCJ_03-offprints%20KOGAN%20-%20Discerning%20the%20Forest%20from%20the%20Trees.pdf (discussing the circumstances under which governments that have been sufficiently involved in the ostensibly private standards setting and implementation activities of SSOs will have those activities and their market effects on third party competitors attributed to them for WTO (TBT/GATT 1994) liability purposes). *See also* "ITSSD Response to The WIPO Report on the International Patent System (Document SCP/12/3)", Institute for Trade, Standards and Sustainable Development (Oct. 31, 2008) Comments on Par. 113 at pp. 9-11 and accompanying footnotes, at: http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/itssd.pdf.

[26] *See* "ITSSD Response to the WIPO Report on the International Patent System" (Document SCP/12/3), at par. 113, pp. 9-11, at: http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/itssd.pdf.

[27] See EUROPEAN INTEROPERABILITY FRAMEWORK FOR PAN-EUROPEAN eGOVERNMENT SERVICES, DRAFT FOR PUBLIC COMMENTS – AS BASIS FOR EIF 2.0, supra at p. 54.

irrevocably available on a royalty free basis[; and] [4] There are no constraints on the re-use of the standard."[28]

Apparently, the royalty-free IP requirement has since been elaborated upon and rationalized as necessary to "allow all interested parties to implement the standards and to compete on quality and price…not to protect market shares by raising obstacles to newcomers…[W]e want to be able to choose open source solutions or proprietary solutions on the basis of price/quality consideration…"[29] (i.e., since open source software is licensed free of charge, so should the patents underlying the standards platform. "[O]pen standards or technical specifications can be implemented by both proprietary and open source software, with no limitations arising from IPR associated with the standard in question".[30] In addition, the IPR requirement has been portrayed as consumer-friendly, and the decision of technology owners concerning whether or not to participate in the development of an 'open standard', as voluntary. [31] Evidently, "Open standards or technical specifications *are preferred*" by the EU Commission and EU Member States,[32] notwithstanding that there is a paucity of anecdotal evidence demonstrating that 'royalty-free' standards have benefited society by promoting interoperability, greater innovation and/or consumer welfare.

Paragraph 44 states, in part: *"Today, ICT standards may be implemented using open source software, proprietary software or, as is increasingly the case, mixed platforms that combine both open source and proprietary software. 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, legal factors and the support offered, should be taken into account."*

The last sentence of Paragraph 144 appears to reflect a neutral position based on relative costs, potential legal liabilities, benefits, efficiencies and technical features. At first glance, it would seem that the European Union's policy toward open standards and open source software also expresses such neutrality in the context of public procurement: "Public administrations should consider Open source solutions on an equal footing with proprietary solutions (which implement the open standard or standards in question) during public procurement procedures".[33] Yet, upon closer inspection, this policy reveals that it is decidedly tilted in favor of open source software,

[28] *Id* (emphasis added).
[29] *Id.*
[30] *Id.*
[31] "This definition reflects a consumer's viewpoint, with his needs uppermost in mind. It does not however place any constraints on any market player. It is up to the creator of the standard or technical specification to decide which kind of IPR regime he would like to associate with the standard or technical specification and it is up to the owners of technologies to decide if they are willing to make their technology available under the proposed IPR regime." *Id.* at p. 55.
[32] "[B]ut if there is no suitable, feasible open standard or technical specification, one can investigate some of the 'less open' alternatives." *Id.*
[33] *Id.*, at p. 64.

given its recommendations that EU Member State "Public Administrations…should provide a legal framework for using open source software…should wherever possible actively contribute to projects building applications using an open source development model...should support education, training and R&D related to open source technologies...[and] should support the creation of clusters around open standards or technical specifications and open source components".[34]

Paragraph 49 states, in part: "*With a view to technical and financial resources that may be required to implement international standards, the TBT Agreement provides certain special and differential treatments for developing country Members.*"

Arguably, however, China is not a 'developing country' in the many manufacturing sectors in which its industries operate,[35] including ICT. In addition, as of November 2008, China held 27% of the world's foreign currency reserves (approximately 1/3 if the reserves of majority Chinese nations such as Macau, Hong Kong, Taiwan and Singapore are included).[36] Furthermore, Brazil arguably is not a 'developing country' in many manufacturing and agricultural sectors. [37] According to the World Bank, Brazil is "an industrial power [with the] tenth [largest] GDP [in the] world measured by purchasing power parity (PPP, 2005). In addition, Brazil has a record surplus in balance of payments, has accumulated large foreign exchange reserves and has had stable economic growth.[38] Consequently, neither China nor Brazil need or require such special and differential treatment and resources.

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[34] *Id.* at pp. 64-65.

[35] "China acceded to the WTO as a hybrid, with treatment in some contexts the same as a developed country Member, in other instances the same as a developing country Member, and still, in other cases, on terms worse than either a developed or developing country Member." *See* "Chapter 34: Special and Differential Treatment of Developing Countries", in Patrick F. J. Macrory, Arthur Edmond Appleton, and Michael G. Plummer, "The World Trade Organization: Legal, Economic and Political Analysis" (Springer © 2005) at p. 1526, at: http://books.google.com/books?id=96x7IwWDJUQC&pg=RA1-PT1463&lpg=RA1-PT1463&dq=china+designation+as+developing+country&source=bl&ots=yIfGtQK53p&sig=Xv7PekYPb4Rm4k_oDR-QrdN2O9o&hl=en&ei=VCO3SYbwDY3BtgfxiImqCQ&sa=X&oi=book_result&resnum=10&ct=result .

[36] *See* "List of Countries by Foreign Exchange Reserves", Wikipedia, at: http://en.wikipedia.org/wiki/List_of_countries_by_foreign_exchange_reserves

[37] "The US undersecretary for Agriculture, J.B. Penn, stated…'It doesn't make any sense to consider Brazil a developing country when everybody knows that the country has a first world agricultural system'" *See* "Brazil is not a Developing Country, Stated US Undersecretary for Agriculture", Brazil-Arab News Agency (8/12/04) at: http://www2.anba.com.br/noticia_corrente.kmf?cod=7418163 .

[38]" In recent years, sustained by strong commodity prices, the economy has grown strongly, averaging 4.5 percent between 2004 and 2007, well above average annual grow (of just below 2.5 percent) in recent decades. The Brazilian economy grew by 5.4 percent in 2007. At the same time, inflation rates are around 6% a year, the balance of payments is registering record surpluses, the Country has accumulated large foreign exchange reserves and there was a great drop in public debt vulnerability. Better growth prospects and continuous sound macroeconomic policies have led to achievement of an investment grade rating by Standard and Poor's and Fitch in mid 2008." *See* "Advances in Development", Brazil Country Brief, The World Bank (updated September 2008) at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/BRAZILEXTN/0,,contentMDK:20189430~menuPK:322351~pagePK:141137~piPK:141127~theSitePK:322341,00.html .

Paragraph 54 states, in part: "*While the patent system and the standards system share certain common objectives, inherent tensions exist between patents and standards. These become particularly apparent when the implementation of a standard calls for the use of technology covered by one or more patents.*"

The negative perspective this document conveys towards patents arguably results in the portrayal of the relationship between standards and patents as conflicting. It is also quite clear that such a view is very European. Indeed, it is reflected in the comments made by the chairman of one European regional standards body, ETSI, and by the President of one European-based anti-IP activist group, Free Software Foundation Europe (FSFE). According to "Mr Karsten Meinhold, chairman of the ETSI IPR Special Committee… "*IPRs and Standards serve different purposes: IPRs are destined for private exclusive use, Standards are intended for public, collective use*".[39] And, according to FSFE President George Greve, "Both *patents and standards derive their justification from the public benefit, yet upholding one deprives the other of its function.* Standards seek to counteract monopolies, patents establish them…Allowing patents on standards consequently is an intentional act to grant monopolies on standards to certain parties that includes the right to block implementation by other parties."[40]

Also, some opportunistic American software and ICT companies have subscribed to this weaker patent vision and have sought to exploit the European Union's evolving royalty-free patents and open standardization policy (ostensibly supporting emerging economy – e.g., Brazilian[41] and Chinese[42] [43]- demands for rebalancing public and private interests, such that ICT technology

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[39] *See* "Free Software Federation Europe "Comments to the 19 November 2008 Workshop 'IPR in ICT Standardisation'", at p.1, at: http://ec.europa.eu/enterprise/ict/policy/standards/ws08ipr/contributions/20081203FSFE_en.pdf. *See also* George Greve, *Inside Views: Innovation Policy: The Balance Between Standards and Patent Regulation*, Intellectual Property Watch (Feb. 26, 2009) at: http://www.ip-watch.org/weblog/2009/02/26/inside-views-innovation-policy-the-balance-between-standards-and-patent-regulation.

[40] *Id* (emphasis added).

[41] *See e.g.*, "Remarks by Dr. Ronaldo Lemos, at the Workshop: Global Intellectual Property from a Brazilian Perspective", University of Oxford Centre for Brazilian Studies (11/4/05), at: http://www.brazil.ox.ac.uk/confreports/IP%20report%20final3.pdf ; Steve Kingstone, *Brazil Adopts Open Source Software*, BBC News (6/2/05), at: http://news.bbc.co.uk/1/hi/business/4602325.stm ; Julian Dibbell, *We Pledge Allegiance to the Penguin*, Wired Magazine (Nov. 2004) Issue 12.11 at: http://www.wired.com/wired/archive/12.11/linux.html ; Andrew Stevens, *José Serra Mayor of Sao Paulo*, at: http://www.citymayors.com/mayors/saopaulo_mayor.html .

[42] "An Baisheng, deputy director of the Division of Technical Regulations, Department for WTO Affairs of the Chinese Ministry of Commerce, highlighted in his presentation at the workshop how it is essential to "Strike the Right Balance between Public and Private Interests in IPR in ICT Standardization". As demonstrated above, public and private interests are arguably out of balance at the moment for most standardisation bodies, and the combination of standards and patents has led to over-regulation that discriminates specifically against SMEs and a large part of the IT industry." George Greve, *Inside Views: Innovation Policy: The Balance Between Standards and Patent Regulation*, supra, at p.9. See also "5. International standard preparation should include technologies reflecting present technique development level in order to assure the quality of standards. Technologies protected by IPR in standards should be given sufficient and reasonable protection to safeguard IPR holder's interests. IPR policies in standardization should help strike a balance between standardization needs and IPR protection. II. PROPOSAL 6.

transfer can occur at concession-rate prices) for their own benefit. For example, the donation by some companies of nonperforming balance sheet assets (i.e., expired patents) to open standards development and open source software projects doesn't cost them any money and temporarily improves their public relations image.[44] It also serves to trigger a process that free market economist Joseph Schumpeter long ago recognized leads to the periodic 'creative destruction' of once economically successful industries (i.e., 'the old is destroyed by the new and improved').[45] One severe problem that may arise in the wake of this process, however, especially where short-term quarterly earnings-minded companies have 'partnered' with governments[46] predisposed toward systemic overregulation and attenuation of private property rights[47] to secure (carve-out) disguised regulatory protection from competition, is that the process subsequently brought about is likely to lead to socialistic bureaucratic administration and control that eventually stifles the very entrepreneurship and innovation that generated the particular industry's (here, the computer

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China is of the view that, IPR issues in preparing and adopting international standards have become an obstacle for Members to adopt international standards and facilitate international trade. It is necessary for the WTO to consider negative impacts of this issue on multilateral trade and explore appropriate trade policies to resolve difficulties arising from this issue." *See* "Communication from the People's Republic of China - INTELLECTUAL PROPERTY RIGHT (IPR) ISSUES IN STANDARDIZATION", World Trade Organization Committee on Technical Barriers to Trade G/TBT/W/251 (25 May 2005) at pars. 5-6.

[43] It is quite interesting and perhaps suggestive of the Chinese standards and patents strategy that Dr. An Baisheng, former deputy director of the Division of Technical Regulations, Department for WTO Affairs of the Chinese Ministry of Commerce now works as a Research Fellow at the South Centre notorious for its anti-intellectual property stance. Dr. An Baisheng has also been listed as a participating panelist at a KEI convened luncheon event to discuss standards and patents, scheduled to take place on March 23, 2009 at Salle B (World Intellectual Property Organization headquarters in Geneva, Switzerland).

[44] George Greve, *Inside Views: Innovation Policy: The Balance Between Standards and Patent Regulation*, supra, at p. 2. "IBM has granted 'universal and perpetual' access to patents related to over 150 software interoperability standards. The company claimed that the move is the largest of its kind, and that it will improve compatibility between computing devices and software…The software specifications and protocols involved in the pledge pertain to industry standards such as those reflected in web services that are under, or moving towards, stewardship by standards groups such as the World Wide Web Consortium and Oasis. 'IBM is sending a message that innovation and industry growth happens in an open collaborative atmosphere,' said Bob Sutor, IBM's vice president of open source and standards." *See* Robert Jaques *IBM Unveils Software Interoperability Patent Pledge*, Vnunet.com (July 11, 2007) at: http://www.vnunet.com/vnunet/news/2193996/ibm-pledges-free-access-key-web .

[45] *See* Joseph A. Schumpeter, "Capitalism, Socialism and Democracy", (Harper & Row Publ. © 1942, 1947, 1950, 1976).

[46] *See, e.g.* Francesco Guerrera and Richard Waters, *IBM Chief Wants End to Colonial Companies*, Financial Times (6/12/06); Samuel Palmisano, *Multinationals Have Been Superceded*, Financial Times (6/12/06); Karen Lowry Miller, *The New Big Blue Attitude*, Newsweek (12/19/05); Sam Palmisano, *The Information Puzzle*, Newsweek (12/2/05), reproduced at Michael Dolan Dot Com: *Linux, Law, Open Source*, (12/7/05), at: http://www.michaeldolan.com/90; Robert Jacques, *SCO Slams IBM's GPL Linux Defence*, Infomatics News (9/30/03), at: http://www.infomaticsonline.co.uk/articles/print/2123380 ; Robert McMillan, SCO : *IBM Cannot Enforce GPL, Free Software Foundation is the Only Entity That Can Enforce the GPL, SCO Officials Say*, IDG News Service (10/27/03), at: http://www.infoworld.com/article/03/10/27/HNscoenforce_1.html ;

[47] *See* Svetozar (Steve) Pejovich, *On Liberalism, Capitalism, The Rule of Law, and the Rule of Men*, Discussion Paper Prepared for CRCE Conference on the Rule of Law in the Market Economy Slovenia (October 2-4, 2008); Svetozar (Steve) Pejovich, *Capitalism and the Rule of Law: The Case for Common Law* (2007), at: http://economics.gmu.edu/pboettke/Boettke/workshop/fall07/Pejovich.pdf (permission for citation obtained); Svetozar (Steve) Pejovich, *Private Property—A Prerequisite for Classical Capitalism* (2005), accessible at: http://www.easibulgaria.org/docs/Pejovic.doc .

software and ICT industries') success in the first place.[48] Hence, the recommendation by the 'intellectuals' within FSFE and such companies that the European position on ICT and software standardization issues - "patents which limit or prevent interoperability should be unenforceable" - should be taken up on a global level "by WIPO as part of its ongoing Development Agenda discussions."[49] Apparently, such stakeholders have done better than they had ever anticipated, given their success in tabling these issues at the WIPO SCP.

Paragraph 55 states: *"So long as patent owners are motivated to contribute their patented technologies to standardization, and consequently, the best solution is adopted as a standard for wide use in the market with a reasonable cost, it appears that the patent system and the standard system share and support the objectives of promoting innovation and diffusion of technology. However, if the exclusive patent right, which is of course a statutory right granted to the patent owner, is enforced in a manner that may hamper the widest use of standardized technology, an ambivalence between the two systems may arise."*

Patent grants are represented in this document solely as a statutory right afforded by the grace of governments – patents are not really deemed private property rights in a number of countries. This is quintessentially a continental European perspective. In the U.S., however, the right of exclusivity to the fruits of one's mental and physical labors and the inventions such labors produce are a natural property right recognized by the U.S. Constitution and Fifth Amendment of the Bill of Rights, and reduced by statute to a temporary right of exclusion subject to strict patentability criteria. The nature of the intellectual property right recognized and protected in the U.S. and other common law jurisdictions is distinct from the grant of an intellectual property that occurs in civil law jurisdictions. More generally, there is a fundamental difference between common law and civil law jurisdictions regarding the scope, extent and quality of ALL property rights, including IP rights.[50] The WIPO SCP and its members and observers must not overlook this key point as they seek a way forward to harmonize intellectual property rights on a global level.

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[48] *See* Filomeno S. Sta. Ana III, *Saving Capitalism*, Business World Yellow Pad Vol. XXII, No. 81 (Nov. 17, 2008) at: http://www.bworldonline.com/BW111708/content.php?id=145. *See also* Svetozar Pejovich, *From Socialism to Socialism: A Property Rights Analysis of the Transition in Europe*, a paper to be delivered at The Wieser Memorial Lecture, as part of the forthcoming Prague Conference on Political Economy, *New Perspectives in Austrian Economics and Political Economy of Freedom*, (April 24-26, 2009). Information about this upcoming conference is accessible at: http://pcpe.libinst.cz/pcpe09 .

[49] "During the software patent debate in the European Union there was consensus among SME, Free Software and big businesses representatives from companies such as IBM or Sun Microsystems that patents which limit or prevent interoperability should be unenforceable. In the European Union, this could be introduced into the ongoing Community Patent debate. On a global level, WIPO should consider this as part of its ongoing Development Agenda discussions." George Greve, *Inside Views: Innovation Policy: The Balance Between Standards and Patent Regulation*, supra at p.9.

[50] *See* Discussion at pp. 18-26, ANNEX III - COMMENTS ON THE REPORT ON THE INTERNATIONAL PATENT SYSTEM RECEIVED FROM MEMBERS AND OBSERVERS OF THE SCP SCP/12/3 Rev.2, at: http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3_rev_2-annex3.pdf

Paragraph 58 states, in part: "*Under one possible scenario, a patent owner who has been participating in the standard-setting process may conceal (or at least not adequately disclose) existing or pending essential patent rights during the process of adopting a standard, and may enforce the rights only after such adoption (or only after the standard is widely used) but refuse to license the patent under reasonable terms and conditions (this scenario has been described as a "patent hold-up" or "patent ambush"). Under another possible scenario, an essential patent is owned by a patentee who was not participating in the standard-setting process and who may enforce the patent in a manner that discourages or blocks the implementation of the standard."*

Once again, hypothetical possibilities are discussed without providing anecdotal evidence that a patent 'hold-up' has occurred. The scenario posed is "where the patent holder is not participating in the standard-setting process and where the price requested "would make it very difficult to produce products that implement the standard". Which parties have made this determination of 'difficulty'? Is such a framing of the issue a prelude to establishing a 'public interest' exception to recognizing private patent rights? Do patent holders which are not SSO members have a legal and ethical obligation to enter into a private license of their patents with an SSO if the patents are deemed 'essential'? Are not the SSO and its members required to undertake a due diligence search for the 'missing' essential patent(s) before expending the time, money and resources to develop a standard? Do not the SSO and its members bear the burden and the risk in this situation? Or, is the burden to be placed on the third party patent holder to *not* act in a way that "prevent[s] or disturb[s] implementation of the standard, whether or not it is in compliance with the letter and spirit of the law? Apparently, the lack of credible supporting evidence of alleged patent 'hold-ups' is alluded to in the first sentence of Paragraph 59: "The extent of the hold-up problem in the real world, however, is somewhat debated."

Indeed, the hypothetical 'hold-up' situation posited in this case is purely a private matter between companies, unless the law is violated. At that point it becomes a 'public matter'. If, consumers believe they are being unduly denied a product in the marketplace, they will seek that product out, and companies will find a legal way to workaround the patented invention and to produce and distribute it or the final product into which it is incorporated.

Paragraph 60 states, in part: "*The patent hold-up problem may also arise even if each patent owner is willing to license his patent under reasonable terms and conditions. For example, in a field involving complex and cumulative technology, one standard may cover a number of patents owned by a number of different patentees."*

The 'hold-up' concept discussed throughout this section of the document (e.g., in Paragraphs 58-60 and 62) is much broader than has been acknowledged. It is used to describe not only a criminal transaction,[51] but also an expansive array of ordinary economic transactions that take place in the

[51] For example, it may include "a robbery carried out at gunpoint". *See* "Hold-up", Merriam-Webster Online at: http://www.merriam-webster.com/dictionary/holdup .

backdrop of free markets.[52] And save for its abstract use by certain academicians either ideologically opposed to strong national and international patent rights or paid to appear that way,[53] the term 'hold-up' does not specifically refer to the interactions between patents and standards. In any event, a 'hold-up' situation does not and should not include one in which a patent owner is willing to license his patent under reasonable terms and conditions. The fact that patents granted on inventions are valuable economic assets that cost money to license is well accepted.[54] Therefore, it is arguable that the term 'patent hold-up' has been posited in this and succeeding paragraphs as a 'strawman' diversion for purposes of creating a potential abstract problem which demands a legislative/regulatory or judicial solution (discussed in Sections VI and VII of this document) that results in the weakening of exclusive private patent rights on 'public interest' grounds. In the end, the ability of patent owners participating in the development of a standard for a multi-component product to negotiate a mutually beneficial business arrangement is a matter of private contract (addressable in court if a legal dispute subsequently arises), unless the conduct of any one or more owners or the SSO amounts to a violation of a public law, in which case, it may rightfully become a public matter.

Paragraph 62 states, in part: *"Indeed, the questions described above as to patent hold-up and accumulated patent-related costs of obtaining access to technology are general concerns that have been raised in contexts going beyond the standardization… The potential problems addressed are centered around excessive transaction costs and hold-up problems which may occur when a patentee refuses to license or demands an excessive royalty."*

Indeed, life is full of potential problems that may later need to be addressed. A patent hold-up may be one of them. The potential "'hold-up problems which may occur when a patentee refuses to license or demands an excessive royalty" depends on the context – the facts and circumstances – it is not a given. What is 'excessive' to one party is 'reasonable' to another. That is a fundamental characteristic of a free marketplace. Furthermore, different legal systems impose different responsibilities on private patent owners. For example, U.S. law does not require patentees to license their private interests – e.g., patents - to third parties, unless their failure to

[52] "The hold-up problem is a term used in economics to describe a situation where two parties (such as a supplier and a manufacturer) may be able to work most efficiently by cooperating, but refrain from doing so due to concerns that they may give the other party increased bargaining power, and thereby reduce their own profits." *See* "Hold-up Problem", Wikipedia, at: http://en.wikipedia.org/wiki/Hold-up_problem .

[53] *See .e.g.*, Michael Noel and Mark Schankerman, *Strategic Patenting and Software Innovation* at: http://sticerd.lse.ac.uk/dps/ei/ei43.pdf . "[T]here is a growing concern that the patenting of innovations is itself becoming an impediment to the innovation process. The argument is that strategic patenting activity creates patent thickets that constrain freedom of action in R&D and thus raise the costs of innovation. The dangers of patent thickets are frequently raised in public debates on patent reform .for example, National Research Council (2004). The concerns have been intensified by the acceleration in patenting over the past two decades, especially in high tech industries." *Id*., at p.1.

[54] *See* ITSSD Comments on "Chapter II. Economic Rationale for Patents and Different Interests and Needs in the International" of Annex III – Comments on the Report on the International Patent System Received from Members and Observers of the SCP" (SCP/12/3 Rev.2), at: http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/itssd_annex3.pdf .

license amounts to an antitrust, deceptive business method or unfair trade practice law violation, or there is otherwise an exigent public emergency that requires government access to a patent. Some *European* and other nations' laws, however, as a general rule, subjugate private patent rights to expansive public interest concerns, and thus treat almost any refusal to license a patent, either to private parties or to the government, as a violation of the law. [55]

Paragraph 64 states, in part: *"Achieving an appropriate quality of granted patents, reducing the pendency period between the filing of a patent application and grant of patent, and containing the costs of obtaining and maintaining patents internationally and for solving disputes, are some of general challenges that the patent system faces today."*

The need to ensure that national patent offices are provided the tools to operate with greater accuracy and efficiency is undisputed. Legal certainty largely depends on this. However, legal certainty can also be improved if inventors, SSOs and/or companies participating in standards development efforts act prudently and undertake due diligence reviews of prior art. The burden should not be placed solely on the patent holder to ensure proper functioning of the patent system. Potential competitors and downstream users must bear an equal burden.

Paragraph 65 states, in part: *"From the policy standpoint, the most essential objective appears to be the encouragement of innovation and wide implementation of standards, taking into account the interests of: (i) patent holders…(ii) third party producers… and (iii) the public…[A] market environment that ensures healthy competition should not be compromised by standardization, for example, if possible price agreements reached during the standardization process would potentially exclude third parties from that process."*

It must be remembered that many innovative multi-component product standards would not be possible without the incorporation of new inventions. And the time, cost and labors necessary to create new inventions that ultimately filter throughout society and provide direct and indirect spillover public benefits such as knowledge dissemination, sources of entirely new or derivative inventions, and consumer product choices, would not be invested, unless adequate economic incentives were available. Strong statutory and case law recognition and temporary protection of exclusive natural private property rights in an invention provides *the* most powerful and proven incentive to promote private parties to develop inventions that benefit society as a whole. At the same time, the standardization of industrial and technological products can serve to reduce transaction costs, ensure greater product workability, quality and efficiency. But standards, by themselves, have not been empirically shown to provide an adequate incentive for innovation, or to ensure greater market competition. Actually, it is arguable that multiple competing standards for competing and complimentary multi-component products do, since they pave the way for introduction of more distinct products in the marketplace.

[55] *See* Discussion at pp. 18-26, ANNEX III - COMMENTS ON THE REPORT ON THE INTERNATIONAL PATENT SYSTEM RECEIVED FROM MEMBERS AND OBSERVERS OF THE SCP SCP/12/3 Rev.2, ,*supra*.

Paragraph 66 states, in part: *"Although the patent system as well as the standardization system have both existed for a long time, potential tensions between the two systems have been increasingly brought to light in debates in the recent past...From the policy perspective, since interoperability is crucial for communication in the information age, how to ensure interoperability in an environment that promotes innovation and competition becomes an important question to ask."*

The debates referred to above occur mostly in academic or governmental settings and in particular countries without free markets. Often, they are driven by companies that seek a new way to compete against entrenched market leaders. It is quite true that new technologies foster new business models. It is also quite true that, in the quest for increased revenues and profitability companies employ various business strategies to exploit the strengths and weaknesses of the patent and standardization systems. However, this does not mean that the systems themselves are flawed and need to be replaced. Companies often forget that business is a contact sport that has winners and losers, and success in the marketplace is not guaranteed. What is most troubling is that, absent egregious or unethical conduct and a violation of the law on the part of competitors, many companies continue to believe that they can simply 'create' unsubstantiated accounts of hypothetical market problems ('crises') that potentially threaten important public interests, and then seek academic and governmental assistance to resolve those problems in a way that effectively carve-out new markets for their products and services. In other words, such companies are engaging in disguised 'regulatory protectionism' at the national, regional and/or international levels. Thus, while increased interoperability of competing multi-component products in the ICT and software sectors may be desirable, it should not be put forth as a public policy end-in-itself, if other more pressing policies such as industrialization, innovation and economic development are also at stake.

Paragraphs 68-70 state, in part: *"One such approach is to improve the self-regulatory mechanisms of SSOs for increasing transparency and accessibility to patented technologies"; "A second approach is to seek pragmatic and practical solutions in the market"; "A third approach which has been looked into involves the application of legislative measures, either internal or external to the patent system."*

SSO self-regulation is the preferred approach since it is one of the only approaches that respect private contract and property rights. Patent pools are another possibility, but it is ultimately up to private parties to decide for themselves whether or not they wish to enter into patent pools. Patent pools, which are not exclusive to standardization, may appeal to some parties and not to others. It all depends on the economics and politics involved. Patent pools should not be imposed by government regulators or by the courts in a top-down fashion on unwilling parties where no violation of law has occurred.

Resort to legislative and related regulatory means to promote innovation and dissemination of standardized technologies should not be had unless there is a clearly identified and substantiated market failure, a clear violation of law, or a clear public policy emergency that places public interests at risk. A legislative solution may legitimately be called for in order to address systemic antitrust violations or regular abuses by more than one company of a dominant market position. But alleged violations and abuses should be substantiated anecdotally with actual occurrences of violation or abuse before a legislative/regulatory solution is pursued – hypothetically possible violations and/or abuses are not enough. It is nevertheless recognized that certain national governments in civil law (as opposed to common law) jurisdictions assume an interventionist role in the marketplace and endeavor to set rules in an ex ante preventive fashion that dictate the rules of the game in order to preempt potential future conflicts. The question remains – is this the most efficient, effective and favorable means to promote innovation and interoperability?

Paragraph 78 states, in part: *"The Chair of the technical committee that develops the standard will, if appropriate, ask members about any relevant patents and patent applications at each meeting so that all participants are aware of the Common Patent Policy. However, there is no requirement for a participating party to conduct a patent search."*

Perhaps there should be such an obligation imposed on technical committee members, in the name of an SSO (e.g., ETSI, ITU/ISO/IEC, etc.) to conduct an IPR search if the resulting standard developed under the respective SSO 'brand' could potentially result in an infringement of a patent, especially one held by other than an SSO member. Undertaking such simple due diligence can avoid a multitude of potential legal problems that can stymie the development of an important standard and better ensure that the public policy goals of patents and standards are realized.

Paragraph 81 states, in part: *"If the patent holder does not agree to option (i) or (ii), the ITU/ISO/IEC promptly advise their technical committee to take appropriate action, such as reviewing the standard or draft standard in order to remove the potential conflict, or further examining and clarifying the technical considerations causing the conflict."*

This paragraph points to the affirmative obligation of the ITU/ISO/IEC technical committee, upon receiving information about the patent of an SSO member unwilling willing to license on nonexclusive royalty-based or royalty-free RAND terms, to explore the possibility of a 'workaround' to avoid potential legal conflicts with that member. In other words, the technical committee must undertake due diligence before it can determine whether it is 'locked-in' to the unlicensed patent.

Paragraph 117 states, in part*: "While there are some inherent limits to the self-regulation model, such as non-applicability of IPR policies to non-members of SSOs, the IPR policies have been playing an important role in addressing potential tensions between patents and standards from the practical and pragmatic standpoint."*

It would appear that SSOs have taken a great many potentialities into consideration and are well equipped, as private bodies comprised of private companies and other organizations, to continue addressing patents and standards issues in the future. Perhaps, those SSO policies that are not as clearly delineated as some members would like should be reconsidered by the governing bodies of such SSOs in an effort to reduce both patent and latent potential ambiguities. This should help mitigate tensions within the SSO and among its members and technical working group participants. Perhaps SSOs should consider making reference to a 'triggering event', such as actual or constructive knowledge of a potentially conflicting patent held by a non-SSO member or participant, which would require the SSO and its working group members to undertake a due diligence patent review. This would go a long way toward further reducing the potential impediment to standards development, technology dissemination, and consumer choice, let alone the related risk of litigation.

Paragraph 124 states, in part: *"Based on the Industry Royalty Pie model, in April 2008, with respect to IPR licensing relating to 3GPP Long Term Evolution and Service Architecture Evolution Standards (LRE/SAE), eight wireless technology companies… agreed that a reasonable maximum aggregate royalty level would be a single-digit percentage of the sale price for LTE in handsets, and a single-digit dollar amount for notebooks with embedded LTE capabilities."*

The Industrial Royalty Pie Model/'aggregated reasonable terms' are untested and obviously contentious. As the accompanying footnotes below reveal, these initiatives are being promoted by certain companies for primarily strategic competitive reasons that likely have little to do at all with ensuring that the public policy goals of interoperability, economic efficiency (lower transaction costs) and consumer choice are achieved. It is more likely that each of the seven companies involved had calculated that a volume-based rather than a profits-based business model would result in greater overall revenues during 2008 and thereafter. But, what if, as has actually occurred since the announcement of this initiative,[56] the markets for these and comparable products have significantly diminished such that much lower sales volumes are actually being realized? Not only will these companies have suffered a sales loss year-to-date, they will have also locked themselves into an artificially low royalty rate, which together with negative sales, substantially reduce company profitability. Perhaps there is good reason that other companies and SSOs have thus far been reluctant to enter into or otherwise promote these initiatives until, at least, they are better tested in the marketplace.

First, what party determines when "the maximum aggregate licensing costs are reasonable"? Is there an independent arbiter, or must a consensus first be achieved among the parties to the arrangement? Second, how is it determined whether an individual royalty claim does or does "not exceed the proportional contribution it makes to the patented technology in the standard"? In other words, who determines how an "individual ought to take into account the value of the

[56] See *Wireless Industry Leaders Commit to Framework for LTE Technology IPR Licensing*, Nokia Press Release (April 14, 2008) at: http://www.nokia.com/A4136002?newsid=1209094 .

patented contribution, the value of other contributions (both from within the company and from other patent owners), and the cost of manufacturing the product." As a result, companies might need to consider as an alternative 'stepped-down' royalties, or possibly even something as contentious as imposing 'royalty caps' on licensees, which may result in other unanticipated tensions that sour the working environment, discourage or block dissemination of the standard and also possibly result in litigation.[57]

Fourth, there has been at least one critical refutation of the Industrial Pie Model/ART, which relies on "counting the numerical share of 'essential' patents to a given technology standard held by each different patent owner [as] the appropriate method for measuring the relative value of the patents and determining the appropriate level of royalties that each patent owner should be able to obtain."[58] Critics have argued that ART "is not an appropriate, let alone, accepted methodology, as it bears no relationship to patent value".[59]

Fifth, the notion of ART and its central role in the Industrial Pie Royalty model arguably reflects a mischievous disguised protectionist effort to also define what is and is not an 'essential' patent; for purposes of excluding otherwise commercially competitive but technically 'non-essential' patents from the development of an industry standard in which a number of companies have participated. If adopted universally, this method would potentially limit consumer choice, since other technically competitive and useful, but 'nonessential' technologies would, for all practical purposes, never see the commercial 'light of day'.

One ostensibly 'unbiased' academic consulting team favorably sites the narrow definition of 'essential patent' articulated as an SSO-wide policy in 2000 by the European Telecommunications Standards Institute (ETSI). According to ETSI, an 'essential' patent is one in which "every element of at least one claim must be practiced in order to implement the standard."[60] Originally, this definition was phrased in the negative:

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[57] *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Texas Law Rev. 1991, 2043 (2007) at: http://faculty.haas.berkeley.edu/SHAPIRO/stacking.pdf . "[P]roducers might negotiate a "step-down" royalty, paying each new claimant a declining percentage to reflect the claims already made against the product…[Or,] [p]erhaps the producer could set a total cap on the rates patent licensors could charge, with the result that the royalty rate paid to each one would actually decline as other patent owners asserted rights in the product, reducing the relative contribution of each patentee." *Id*.

[58] *See* Donald L. Martin and Carl De Meyer, Carl, *Patent Counting, a Misleading Index of Patent Value: A Critique of Goodman & Myers and its Uses* (Dec. 4, 2006). Available at SSRN: http://ssrn.com/abstract=949439

[59] *Id*., at p. 3. "The scope and aim at the Nokia G&M paper have been misinterpreted, perhaps misinterpreted to be misleading, to enable some to conclude that it specifies the 'market' shares of essential patent holders for 3G wireless communication standards (CDMA 2000 and WCDMA) and determines the value of those essential patents, in particular, as regards WCDMA. This is not correct…G&M merely attempted to determine the validity of the patent owners' declarations that their patents might be essential, and reached the unremarkable conclusion that there are differences between patents declared to be potentially essential and patents that are 'actually' essential." *Id*.

[60] *See* David J. Goodman & Robert A. Myers, *3G Cellular Standards and Patents*, in PROCEEDINGS OF IEEE INTERNATIONAL CONFERENCE ON WIRELESS NETWORKS, COMMUNICATIONS AND MOBILE COMPUTING 2 (2005) at p. 5 citing , available at http://eeweb.poly.edu/dgoodman/wirelesscom2005.pdf .

> "'ESSENTIAL' as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR." [61]

Apparently, during 2005, a consortium of 'objectively minded' telecommunications industry trade associations and standards development organizations involved in two Third Generation Partnership Projects (3GPP and 3GPP2, "concerned with descendents of GSM…[and] advanced versions of the original CDMA cellular system [,respectively]") embraced this narrow definition.[62]

ETSI reaffirmed this narrow definition more recently during November 2008. And, it is now accompanied by an enhancement that effectively amounts to a nuanced 'public policy' justification for the infringement of patents held by SSO members and nonmembers alike:

> "15.6 *ESSENTIAL as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR.* ***For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL****".* [63]

ETSI provides the following explanation for this expanded definition:

> "In simpler terms, an 'essential IPR' is an IPR which has been included within a standard and where it would be impossible to implement the standard without making use of this IPR. The only way to avoid the violation of this IPR in respect of the implementation of the standard is therefore to request a license from the owner." [64]

Arguably, ETSI relies upon the legal obligation ETSI members owe to one another and to the ETSI Secretariat, and the corresponding burden placed on patent-holding *members* to justify their unwillingness to license, to resolve patent licensing logjams in the interest of the SSO rather than the patent owner. This way, the ICT standard in question is developed and utilized to promote a favored technology.

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[61] *Id.*, at p. 2, fn# 10, "ETSI IPR Policy", Nov. 22, 2000.
[62] *Id.*
[63] *See* "ETSI Guide on Intellectual Property Rights (IPRs)", Version Adopted by Board #70 on 27 November 2008, *reciting* Clause 15.6 of the ETSI IPR Policy, (boldfaced emphasis added) at p. 51, at: http://www.etsi.org/WebSite/document/Legal/ETSI_Guide_on_IPRs.pdf .
[64] *Id.*

> "[O]wners of Essential IPRs who refuse to grant [a] license when no alternative is available, are requested to reconsider their position and provide the Director-General with a justification (*Clause 8.1*)" [65]

> "[T]he Director-General [is] to contact owners of Essential IPRs having refused to grant licenses on behalf of ETSI (*Clauses 8.1 and 8.2*)." [66]

> "[T]he Director-General [is] to request the owner of an Essential IPR to give within three months an undertaking in writing that it is prepared to grant licenses (*Clause 6.1*)." [67]

As concerns nonmember patent owners, ETSI recognizes that "Third parties have certain RIGHTS under the ETSI IPR Policy… as owners of Essential IPRs…[For example, they can] refuse the inclusion of their own Essential IPRs in ETSI Deliverables (*Clause 8.1 and 8.2*)." [68] Consequently, in this type of situation, ETSI spells out the following course of action:

> "[W]hen ETSI is informed that an IPR belonging to a non-Member could be essential for a standard, the non-Member owner is also requested to undertake to grant licenses on fair, reasonable and non-discriminatory terms and conditions (*Clause 6.1*)." [69]

What ETSI considers 'FRAND' licensing terms is, however, suspect. ETSI's express policy objectives are "to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector"[70] and "to balance between the needs of standardization *for public use* in the field of telecommunications and the rights of the owners of IPRs [, especially third parties.]"[71] This strongly suggests that ETSI overall standards policy, including its interpretation of FRAND, is related to and coterminous with the official European Union regional governmental standards policy. And, both are premised on and concerned primarily with promoting European standards and technologies.

For example, ETSI has embraced the mantra: "One standard, one test – accepted everywhere…'One standard, one test – accepted everywhere' implies that the existence of one internationally accepted standard and one internationally accepted test helps to foster the

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[65] *Id.*, at p. 50.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*, at p. 51.
[70] *See* "Annex 6: ETSI Intellectual Property Rights Policy", ETSI Rules of Procedure, 26 November 2008, Par. 3.1 at p. 34, at: http://www.etsi.org/WebSite/document/Legal/ETSI_IPR-Policy.pdf .
[71] *Id.* Are not SSOs intended primarily to advance the interests of their membership? Or, are they intended to serve a quasi-governmental function and to consider the interests of their members as well as the public?

development of a global market for goods or services."[72] As early as October 2001, EU regional standards policy expressed the same priority in emphasizing the importance of standards policy in promoting EU industrial and technological competitiveness. According to former EU Enterprise Commissioner Erkki Liikanen, previously responsible for regional standardization policy,

> "'In the global market place Europe is in a very strong position because it has linked European standardisation as closely as possible to international standardization'. The standardisation mantra 'one standard, one test, accepted everywhere' is constantly recited by those who are eager to trade and gain market opportunities, and international standards are seen as an important tool in this regard."[73]

The EU Commission subsequently clarified the purpose behind the 'one standard, one test, accepted everywhere' mantra in 2004. It highlighted that, "Standards function by *reducing variety*, ensuring interoperability, maintaining quality, and providing information."[74] In other words, standards "create and ensure [']interoperability[']…to avoid the fragmentation of markets. Apparently, as one commentator has discovered, "competing standards are anathema to current European Union industrial Policy".[75] "This is of particular importance in rapidly evolving markets with ever changing technologies, notably in the ICT area."[76] At least one U.S. SSO that supports product differentiation, welcomes market fragmentation and promotes competing standards and technology platforms strongly disagrees with the European Union's putsch for homogenous standards – namely, that 'one size fits all'.[77] [78] [79]

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[72] *See* "One Standard, One Test – Accepted Everywhere - World Standards Day Today", ETSI News Release (Oct. 14, 2002) at: http://ec.europa.eu/enterprise/standards_policy/international/world_standards_day/doc/wsd_2002_etsi_news_release.pdf . *See also* "One Standard, One Test – Accepted Everywhere", CEN European Committee for Standardization (Oct. 14, 2002) at: http://ec.europa.eu/enterprise/standards_policy/international/world_standards_day/doc/wsd_2002_cen_article.pdf .

[73] *See* "Commission Marks World Standards Day with Focus on Environment and Standards, Europa RAPID Press Release IP/01/1408 (Oct. 12, 2001) at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1408&format=HTML&aged=0&language=EN&guiLanguage=en .

[74] *See* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the role of European standardization in the framework of European policies and legislation, COM(2004) 674 final (Oct. 18, 2004) at Par. 2.2, at p. 5, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0674:FIN:EN:PDF .

[75] *See* Rudi Bekkers and Joel West, *The Effect of Strategic Patenting on Cumulative Innovation in UMTS Standardization*, DIME Working Paper No 9 (March 2006), at p. 24, at: http://www.dime-eu.org/files/active/1/IPR-WORKING-PAPER-9_BekkersWest.pdf .

[76] *Id*., at Par. 2.2.3 - *Standardisation and ICT/IT*, at p. 6.

[77] "In industry, we often say we want 'one standard, one test, accepted everywhere.' You've heard that many times from many places. And it's also used to describe the ideal situation. It's a lot like those of us who are engineers and want to describe the ideal battery that never loses power, the ideal lamp that never burns out and the ideal wires that never have any loss. While that represents the ideal, let's explore the real world that we all have to operate in. That "one standard" is a lot more elusive than we think…While one standard is an ideal, the reality is that this one standard can come from a wide range of places. No single organization or standards body fits the needs for everybody all the time. When I am asked which one of the many possible standards our businesses should use, I do have a ready

The European Union's European Interoperability Framework (EIF) for *e*Government Services, previously discussed in ITSSD comments to Paragraph 30 of this document, provides further evidence that Europe's broad top-down governmental policy of promoting optimal 'interoperability' is directed *against* competing ICT standards in national, regional *and* global venues.

> "It is important that the standards and technical specifications adopted by Governments support the wider-encompassing e-Government strategy. Tying in the standards and technical specifications selection with the more general policy

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answer that I can guarantee is always 100 percent accurate — what I say is that the only standard that really matters is the one that our customer specifies and uses. That standard can be a national standard, a global standard or a regional standard, but the important bottom line is that we have to meet that customer's expectations. The second important point about the mythical one standard is that customers are different, and they value different things when it comes to purchasing similar products. Functionality, versatility, reliability, first costs, life costs and many other things are all weighted differently in the customer's philosophy. So the priorities and the choices made in creating a specification or making a purchase decision result in different standards or expressions of the same standard because of those differences. A third point about the mythical one standard is that it's often assumed to be a box that's checked off. It's a destination. It's a point in space. And really, instead of a destination, I suggest to you that it is more of a journey…Products change and evolve through their life cycles, markets emerge and evolve, and new technologies and new materials come, bringing function and value and reliability to the users. The concept of 'one standard' also has to change with time…The bottom line for industry is that, while we say "one standard," we regularly and readily give resources to numerous alternatives for a lot of the reasons we previously cited. But in the end it seems to be better to have multiple standards than to ignore venues where your competitor may disadvantage your products. So you have to go there. As we say: 'You must be present to win.' So 'one standard' really means as few standards as possible, from any venue valued by users and customers, and one that continues as a dynamic rather than a fixed standard." *See* James E. Matthews, "The Reality Behind 'One Standard' - One Size Doesn't Fit All", ASTM Standardization News, PerSpective (March/April 2009) at: http://www.astm.org/SNEWS/MA_2009/perspective_ma09.html . "

[78] "World traders are calling for 'one standard, one test, accepted everywhere.' They want a passport standard that's good at every port of entry. They want to eliminate redundancies and outrageous expense. But they still want the special standards that will give them an edge over their competitors. They still want a menu of standards from which they can choose to create success in a given situation. One standard, accepted everywhere, is not as simple as it sounds. It means different things to different people. The world market is not a collection of homogeneous interests. It is rather like a puzzle, each national market a piece in its own right, each piece slightly or greatly different from the next, yet part of a global whole. The challenge to our industries is how to operate in this complicated universe… I think there is only one way we can serve these industries. We answer the call and fill the needs that are put before us. At ASTM International that means we listen to the demands of the market through our members… Standards and standardization are synonymous with change. Change is our job." *See* James A. Thomas, "The Changing World of International Standardization", ASTM Standardization News - Plain Talk for a New Generation (Dec. 2003) at: http://www.astm.org/SNEWS/DECEMBER_2003/plaintalk_dec03.html .

[79] Unfortunately, it appears that the American National Standards Institute, which is "the official U.S. representative to the International Organization for Standardization (ISO) and, via the U.S. National Committee, the International Electrotechnical Commission (IEC)", still does not quite understand the true economic, legal and technological threat posed by the 'one standard, one test, available everywhere' mantra promoted by European governments, SSOs and industry members. *See e.g.*, S. Joe Bhatia, Opening Remarks / Responses to Questions for Panelists, Rockwell Automation – Manufacturing Perspectives (Nov. 13, 2007), at Answer to Question #3 at pp. 8-9, and Answer to Question #7 at p. 14, at: http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Speeches/Bhatia%20-%20Rockwell%20Automation%20-%2011.13.07.pdf .

> directions of government itself ensures that the standards and technical specifications selected via the process are closely aligned with the overall strategy of the governments in question… the implementation of *isolated, monolithic or otherwise non-interoperable information systems* and the consequent duplication and/or redevelopment of similar business functions *as well as the often needlessly complex interactions necessary to exchange information that are associated with such situations, must be discouraged*… One way to characterise this approach is that it entails applying an 'urban planning'-style analysis to the use of IT standards throughout the IT ecosystem of public administrations in Europe. *Interoperability in general (that is, globally speaking) is severely handicapped by the uncontrolled and ad-hoc proliferation of multiple standards or technical specifications applicable for any one given function*, as well as by their varying characteristics. From this perspective, *it is clear that a globally oriented process of selecting standards and technical specifications has to be put in place to manage this situation properly*." [80]

Sixth, certain companies favoring the Industrial Pie Model/ART also arguably promoted a close analogue to the aggregate royalty approach as an 'outside' legislative mechanism – i.e., for incorporation within patent reform legislation to limit patent damage awards. During 2005, the Business Software Alliance endeavored to persuade the U.S. Congress to adopt patent law damages reforms that would have "expressly require[d] courts faced with component inventions to consider the importance of other components of the product sold that are not covered by the patent at issue…[thereby, effectively] *cementing in the law* the obligation to consider other parts of a multi-component invention."[81] The U.S. Congress acted prudently, however, and was not swayed. Most importantly, it was gravely concerned with the likely adverse impact that such an approach, if adopted, would have had on the inventiveness and financial success of small inventors.[82] The WIPO SCP and foreign national and regional governments, likewise, should not be persuaded.

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[80] *See* EUROPEAN INTEROPERABILITY FRAMEWORK FOR PAN-EUROPEAN eGOVERNMENT SERVICES, DRAFT FOR PUBLIC COMMENTS – AS BASIS FOR EIF 2.0, *supra* at p. 57.

[81] *Id.*, at p. 2040 (emphasis added), *citing* PREPARED STATEMENT OF EMERY SIMON, counselor to the Business Software Alliance, *AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2795, THE "PATENT ACT OF 2005"* HEARING BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 109th Cong., 1st Session on H.R. 2795 (Sept. 15, 2005) at pp. 23-24, at: http://commdocs.house.gov/committees/judiciary/hju23434.000/hju23434_0f.htm. Several academic commentators who were most likely employed by this industry group supported this legislative effort. ""We support such an amendment because it will emphasize to judges and juries that the royalty rate must be based not just on the value of the invention in the abstract, but what it contributes in the context of the other elements of the accused product. Even if it does not pass, courts have and should exercise the power to consider those components under existing law." *See* Lemley & Shapiro, *Patent Holdup and Royalty Stacking*, supra at p. 2040.

[82] "This provision seeks to limit the damages to the portion of the total value of the method or apparatus in question by the value of the overall invention (entire market value rule). It seems that the courts are the best place for this to continue to transpire because a broad-based law might have an adverse effect. For example, while attempting to hinder willful patent infringers, this provision would reward them. It also can be viewed as sort of compulsory licensing. If infringers are not worried about getting hit with the full market value of the overall invention, then they

Paragraph 125 states, in part: *"Another question relating to the effectiveness of patent disclosure is how to identify, at the early stage in the standard-setting process, patent applications and patents which may become essential to the implementation of the standard under discussion, whether right holders are participating in the standardization process or not…There are concerns, however, about the conduct of patent searches by participants in standard-setting bodies arising from a punitive damage award made in the case of willful infringement in the United States of America. There is a concern that the knowledge acquired by the collective patent search could make the participants liable for punitive treble damages in possible future litigation, although the Federal Circuit recently held that proving willful infringement required at least a showing of objective recklessness…A mechanism for managing disclosures on patents relevant to standards was proposed by a multi-stakeholder group."*

The ITSSD has included its discussion about the significance of 'essential' patents within its comments to paragraph 142.

As noted, the SDO Advance Act of 2004 neither provides protection to SSOs against punitive treble damages (as opposed to actual damages), nor provides protection to SSO *members* for either actual or punitive damage awards. While the *In re Seagate* decision has been arguably referenced in paragraph 125 for the broad proposition that the U.S. Federal Circuit Court has indirectly weakened patent rights, by shifting the evidentiary burden of proof from the infringer (an affirmative duty) to show that it acted with due care – i.e., that it obtained an opinion of counsel,[83] to the patentee to prove 'objective recklessness', one must question which party will now actually bear the greater burden – the patentee or the infringer? Although an alleged infringer

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can simply view the infringement as a 'cost of doing business.' Large corporations could hammer small businesses and inventors because the curtailing effect of damages due to the inventor would be lowered substantially. Let's take a look at an example to determine damages by the 'portion' of the 'total value' —Think in electronic terms of a wheelbarrow. If the invention in question were the wheel, and the entire wheelbarrow sells for $100, what is the contribution of the wheel? Though the wheel may be considered only 10 percent of the cost, its contribution to the whole is infinite. It is the causal component and without it, the wheelbarrow is 'worthless.' Let's now consider that there is a wheel on the original product, but the new invention provides the equivalent of a ball or roller or other bearings which make the wheel work much better. What then is the value of the new invention? Would it be simply the cost of the bearings? With invention, one must consider what makes the invention enabled. Without the wheel or the bearing, it is not a wheelbarrow. Though other inventions may be more subtle, the value of the whole invention may rest upon the inventive content. This is because an improvement to the product may be *the* reason the newly combined devices can be sold at a premium (or even sold at all). That can be referred to as a 'competitive edge', and without the new invention, it is just another of the same" (emphasis in original) *See* PREPARED STATEMENT OF RONALD J. RILEY, PRESIDENT, PROFESSIONAL INVENTORS ALLIANCE USA, *AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2795, THE "PATENT ACT OF 2005"* HEARING BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 109th Cong., 1st Session on H.R. 2795 (Sept. 15, 2005) at pp. 119-120, *supra*.

[83] "[T]he objective recklessness standard for establishing willful infringement may create little practical change because obtaining a competent opinion of counsel will continue to be the best way for potential infringers to rebut a charge of willful infringement." *See* Christopher C. Bolten, Note, *In re Seagate Tech., L.L.C.: Is the Objective Recklessness Standard a Practical Change?*, 49 Jurimetrics J. 73-90, 74 (Fall 2008).

needn't rely any longer on opinion of counsel to meet an affirmative defense, patentees will likely use the 'objective recklessness' standard to persuade courts to employ a broad 'facts and circumstances' analysis consisting of many more factors. This could actually strengthen the patentee's hand and make it more difficult for the infringer to defend against a finding of imputed knowledge, and thus, an award of punitive damages.

The proposed mechanism obliquely referred to above that accompanies footnote #27, is discussed on pages 38-39 of Annex III of the WIPO Report on the International Patent System. It concerns Part VI of the draft Treaty on Access to Knowledge (A2K), specifically, its mechanism for managing disclosures on patents relevant to proposed standards. To better understand this mechanism, however, it is advisable to review the context under which the A2K treaty initially arose.

The proposed A2K Treaty was first seriously discussed as an idea during early February 2005 at a Geneva meeting organized by civil society anti-IP activist groups, including Consumer Project on Technology (CPTech) (now known as Knowledge Ecology International/ KEI) and Third World Network (NTW). The meeting's objective was "to find common ground amongst the diverse range of interest groups who feel harmed by current intellectual property regimes, to discuss proposals for a draft treaty on access to knowledge and to start to build a global, social movement to advance the Access to Knowledge agenda."[84] It is generally agreed that the draft A2K Treaty followed from a developing country-supported proposal initiated by the governments of Argentina and Brazil for the WIPO General Assembly to establish a WIPO Development Agenda, which it ultimately did in October 2004. The proposal "asks for fundamental changes at WIPO". Some parts of it "are directed at the special concerns of developing countries, while others are aimed at institutional reform within WIPO to give more weight to public and consumer interests."[85]

According to at least one academic commentator, the WIPO Development Agenda and the subsequently introduced A2K initiative had been triggered by a sense that key multilateral organizations, such as UNCTAD and UNESCO, had failed to "seriously address[] the issue of how institutions of knowledge might be better designed to meet the goals of achieving basic freedoms and economic development for the world's poor."[86] It thus reflected "[d]eveloping country resistance to [an] emerging paradigm of globalised intellectual property rights…[in which developing countries were unable to secure] significant international treaty-making gains on developing country issues, such as technology transfer, the control of anticompetitive conduct or, more broadly an economic framework that addresses the deep structural inequities of the world economy." [87] In addition, it is arguable that the A2K treaty proposal, including its standards and

[84] *See* "Geneva Meeting on Access to Knowledge", EDRI-Gram No. 3.5 (March 10, 2005) at: http://www.edri.org/edrigram/number3.5/WIPO .
[85] *Id.*
[86] *See* Peter Drahos, *Access to Knowledge: Time for a Treaty?*, Bridges Comment No. 4 (April 2005) at p. 15, at: http://www.iprsonline.org/ictsd/docs/Drahos_AccessKnowledge_treaty_BRIDGES9-4.pdf .
[87] "A different concrete world order has come striding out of the shadows of globalisation, one in which developing countries continue to remain bit players." *Id.*

patent disclosure component, reflects a long desired ambition to resurrect the political landmarks of the 1970's, especially the International Economic Order.[88]

As drafted, the A2K treaty is intended to remedy two central flaws in the development strategies of developing countries: 1) the failure and need of national governments "to encourage[e] investment in human capital and this essentially translates into investment in health and education"; and 2) the failure and need of national governments to create "models of governance for the production of knowledge". In this commentator's opinion, absent *national* institutional capacities, a top-down multilateral instrument is needed to "maximise the participation of developing countries in the processes of innovation, t[o] maximise the spillover benefits of knowledge and t[o] minimise the social cost of accumulating knowledge." [89]

Given these developing country objectives, the ultimate form that an evolving A2K regime assumes will likely vary between a detailed rules-based treaty and a general rules-based treaty (i.e., a 'framework convention') accompanied by more specific Annexes (i.e., protocols), including one on technical standards and IP, one on innovation and open source software and one on technology transfer.[90] These and other annexes would be drafted by "group[s] of technical experts in the relevant field" and the resulting rules would be issued, "at least in the beginning…in the form of recommended practices". It is believed that such a 'soft law' approach "would leave states with the freedom to choose those standards consistent with their overall treaty obligations…provide them with expert guidance as to the kind of norm-setting they should be contemplating in order to maximize their chances of innovation-based growth and the social welfare of their populations…and would be one way of maximizing support for the treaty process, [following which] the recommended practices might become binding standards."[91]

It is only after undertaking this review of the history of the A2K treaty initiative that one is able to draw an objectively honest conclusion. What is most striking about this proposal, including its standards component, is that it has been indirectly referenced in Paragraph 125 of this Document SCP/13/2 concerned with Standards and Patents. Unfortunately, page 38 of SCP/12/3 Rev.2, Annex III does not adequately discuss the heavy developing country thrust behind this initiative;[92] nor do the KEI comments submitted in response to the WIPO Report on the International Patent System, which only mention the A2K treaty proposal in passing and reproduce it as an 'Attachment'.[93] It would make a great deal more sense and result in a more efficient use of WIPO's limited resources if this KEI initiative were redirected to the WIPO Development Agenda the work program of which would be more attuned to developing country concerns, and

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[88] *Id.*
[89] *Id.* at p. 16.
[90] *Id.*
[91] *Id.*
[92] Page 38, however, does mention how, "[i]n March 2005, a multi stakeholder group proposed a treaty on access to knowledge. This included a mechanism for managing disclosures on patents relevant to proposed standards".
[93] *See* "Knowledge Ecology International Comments to the WIPO Report on the International Patent System - Part I," Knowledge Ecology International (Oct. 28, 2008) at p 4 and Attachment, at: http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/kei.pdf .

capable of adequately and appropriately addressing the many questions and issues that this proposal is certain to raise.

Paragraph 127 states, in part: *"Since the IPR policy does not bind non-participants to the standard-setting process, whether a licensing commitments made by the previous patent owner during the standardization process has a legally binding effect on the new patent holder (who did not participate in the standardization) is an interesting question…In the United States of America, the Federal Trade Commission (FTC) found that Negotiated Data Solutions LLC (N-Data) violated Section 5 of the FTC Act by engaging in unfair methods of competition and unfair acts or practices regarding its enforcement of patents essential to implement a computer network standard. The patents essential to implement the Ethernet standard were first owned by National Semiconductor Corporation (National) which had made a licensing commitment during the standard setting process."*

This paragraph characterizes the nonbinding effect of SSO patent policy on SSO *non*members as problematic especially where the *non*member, following the acquisition of the assets or stock of an SSO member, determines that it is not bound by the prior member's SSO RAND contractual obligations. Arguably, however, this is precisely the type of private party transaction that calls for resolution either at the private negotiation level between the parties or at the private litigation level in the courts. Is this not essentially a matter of private contract involving good faith on the part of the seller/assigner and due diligence on the part of the buyer/assignee, and enforcement on the part of the SSO?

While Paragraph 127's description of the *NData* case is generally accurate, it fails to explain the FTC's reasoning and to discuss the broader factual context underpinning the FTC's findings against NData Corp., LLC that led to the settlement (a proposed consent order) ultimately reached between them.

The FTC majority concluded that NData's decision not to accept its predecessor's RAND obligations pursuant to the SSO patent policy constituted an unfair method of competition under Section 5 of the FTC Act. It reasoned that NData had acted coercively and/or oppressively by virtue of having tried "to exploit the power it enjoy[ed] over those practicing the Fast Ethernet standard and lacking any practical alternatives". According to the FTC majority, these acts also had an "adverse impact on prices for autonegotiation technology and…threat[ened]…standard-setting at IEEE and elsewhere."[94] To repeat, the primary basis for the FTC majority drawing these conclusions was that, as a practical matter, firms engaged in the Fast Ethernet standards development process were "locked into" and were unable to 'workaround' the NData patent.

[94] ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT, In the Matter of Negotiated Data Solutions LLC, File No. 051 0094 at pp. 5 and 8, at: http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf .

It seems that one key fact militated in favor of these findings, namely, that NData's "sole activity [wa]s to collect royalties in connection with a number of patents". In other words, plaintiffs were successful in persuading the FTC in viewing NData as a patent troll rather than as an inventor, manufacturer or downstream user, and thereby stigmatized them.[95] The FTC, thus, could not conceive of the acquisition and licensing of patents as a legitimate business model. It also did not consider the extent to which NData had made bona fide efforts to renegotiate the RAND obligations with the SSO and the companies working on the standard in question.

Paragraph 127, for example, fails to discuss key facts revealed in the dissenting opinions. Commissioner Majoras found that, "from the time [NData predecessor] National Semiconductor submitted its letter of assurance in 1994 and at least until 2002, some patent holders [had] changed or clarified the terms of their letters of assurance – even after the relevant standard was approved. And although a new IEEE bylaw, passed in January 2002, purported to make patent letters irrevocable, it did not address whether it was to apply retroactively."[96] In addition, Commissionar Majoras found that, "When Vertical submitted its 2002 proposal under which it would offer its entire patent portfolio that originated with National for license on reasonable and nondiscriminatory terms, the IEEE's Patent Administrator did not object to the departure from the $1,000 commitment…The IEEE then appeared to have accepted the revised proposal by posting Vertical's letter on its web site along with National's June 7, 1994 letter."[97]

Furthermore, "Although National in 1994 had offered to grant a paid-up, royalty-free license to the technology for $1,000 to anyone seeking to practice the standard, no company had sought to accept the offer until after publication of the 2002 revision on the IEEE web site. And despite ongoing licensing efforts by National's successors, Vertical and N-Data, only one company paid materially more than the originally-quoted $1,000 for rights to the NWay technology. Most users evidently have preferred to infringe, running the risk of presumably minimal patent damages that they might face at the outcome of litigation."[98]

Moreover, Commissioner Majores found that the FTC lacked adequate evidence to conclude that NData's "conduct was "coercive" and "oppressive" and had an "adverse impact on prices for autonegotiation technology". It also argued that even if NData had "desire[d] to strike a better bargain than National made several years earlier that, alone, should not be considered a competition-related offense. If the majority's theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope".[99]

Lastly, Commissioner Majores argued that the FTC lacked evidence to support its findings that NData had "engaged in an "unfair act or practice" to the detriment of consumers. "In particular,

[95] *Id*., at p.1.
[96] *See* Dissenting Statement of Chairman Majoras *In the Matter of Negotiated Data Solutions LLC*, File No. 0510094, at pp. 1-2, at: http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf .
[97] *Id*., at p.2.
[98] *Id.*
[99] *Id*., at p. 4.

finding 'substantial consumer injury' here requires the majority to treat large, sophisticated computer manufacturers as 'consumers'. I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged 'victims' here…Some may argue that the Commission has already made the policy decision to treat businesses as consumers, and that there is no rational distinction between the companies we have protected…small businesses, non-profits, churches, and 'mom and pop' operations that lack the resources and, in some cases, the experience or understanding to defend themselves adequately against fraud…and large corporations. I disagree. Although it is important to draw lines, there is such a vast difference between sophisticated corporations, on the one hand, and storefront shops, on the other, that we do not need to draw a bright line to distinguish this matter from previous cases the Commission has brought to protect small businesses."[100]

Paragraph 129 states, in part: *"SSOs' self-regulating rules intend to encourage early disclosure of essential patents and declaration of the licensing positions of the patent holders…In cases where a standard includes a number of essential patents owned by a number of different patent holders, the coordination problem becomes apparent…Consequently, bilateral negotiations may not be the best solution in terms of the transaction costs involved in the licensing negotiations and accumulated royalties. A patent pool is one of the market-driven mechanisms which can reduce such transaction costs."*

As noted above, in addition to the problem of accumulating royalties, there is also the problem of time and resource management. According to one commentator, "Even with reasonable royalties — either through licensor forbearance or through astute use of cross-licensing — a proliferation of patent holders substantially increases transaction costs. Negotiating licenses with multiple licensors entails significant managerial and legal costs, particularly for the inherently complex (and contentious) issues of valuation in cross-licenses."[101] However, depending on the context – i.e., the competitive landscape and the business models employed (high volume, low margin vs. low volume, high profit) by IP holders,[102] the personalities involved,[103] and degree to which

[100] *Id*., at p. 5, fn# 16.
[101] *See* Rudi Bekkers and Joel West, *The Effect of Strategic Patenting on Cumulative Innovation in UMTS Standardization*, supra at p. 7.
[102] "[P]atent pools do not eliminate all problems…especially the most crucial problem, that of conflicts of interest. [Conflicts of interest, particularly] those between (1) business models that are dominantly based on market shares vs. business models dominantly based on licensing income and (2) conflicts resulting from stakes in different, competing technologies is not likely to be addressed successfully by pools." *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, Paper for the EASST 2006 Conference, Lausanne, Switzerland, (Aug. 23-26) at at p. 50, at: http://www2.unil.ch/easst2006/Papers/B/Bekkers%20Iversen%20Blind.pdf.
[103] "[E]ven a casual analysis of the patent pool suggests a more fundamental problem: assigning exclusive control of the right to license one's IPRs requires a strong alignment of interests of the IPR holders. When there is competitive heterogeneity between the firms' product and IPR positions, it will be difficult for patent pools to attract (or maintain)

control over exclusive patent rights and related income streams is lost,[104] the patent pool mechanism may not provide the right solution. Thus, it would be more accurate to say in the last sentence of Paragraph 129 that, "a patent pool is one of the market-driven mechanisms which can *potentially* reduce such transaction costs".

Paragraph 130 states, in part: *"Patent pools are encountered most often in the case of standards in the fields of digital technology and telecommunication technology, which frequently involve many patents owned by different parties."*

The statement reproduced above regarding patent pools, especially in the ICT sector, is arguably inaccurate because there is a paucity of anecdotal evidence of their use. As one knowledgeable commentator has related, "Despite the[] theoretical advantages of patent pools in standardization, empirical evidence as to their benefits remains scarce. Possible factors include the rarity of their use, the comparatively recent rise in patent issues in standardization, or even the inevitable secrecy of how patent pools allocate returns to participants." [105] In fact, while patent pools were once a subject of public discussion in the U.S., "[i]n Europe, patent pools have not been a matter of much public discussion" at all.[106]

Paragraph 135 states, in part: *"The patent pools listed in Table 1 allow members of the pool to retain their independent right to grant a non-exclusive license on the pooled patents under the terms and conditions agreeable between the member and its licensee to any third party."*

Paragraphs 130, 132 and 135 refer to Table 1, which "provides examples of patent pools created to facilitate the development of technical standards in the digital and telecommunications industry sectors." What these paragraphs do not mention, however, is whether or not the examples set forth in Table 1 were successful, and why. Several commentators, however, have examined the few functioning patent pools noted above, and have analyzed why they have succeeded or failed.[107] It is highly recommended that the SCP review, summarize and incorporate by reference

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broad enough participation necessary to make a significant patent pool." *See* Rudi Bekkers and Joel West, *The Effect of Strategic Patenting on Cumulative Innovation in UMTS Standardization*, supra, at p.8.

[104] Patent pools whose main driver is price control, not promotion and larger market size, are not very likely to be successful. There will be too many IPR owners who will conclude that joining a pool will not satisfy their expectation for licensing income. In addition, they some control over their IPR, limiting their ability to use it as 'bargaining chips'. *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, supra at p. 47.

[105] *Id*.

[106] *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, supra at p.50.

[107] *See* Rudi Bekkers and Joel West, The Effect of Strategic Patenting on Cumulative Innovation in UMTS Standardization, DIME Working Paper No 9 (March 2006) *supra*; Rudi Bekkers, Eric Iversen & Knut Blind, Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization, Paper for the EASST 2006 Conference, *supra*. *See also* Rudi Bekkers, Knut Blind, Heide Coenen, Eric Iverson, Kai Jacobs & Kamal Hossain, INTEREST Integrating Research and Standardisation - Case Studies on the Interface Between Research and Standardisation and Case Studies on Patent Pools as a Coordination Mechanism, Project co-

within this document these studies' findings, substantiated by evidence, that corroborate the statement made in Paragraph 135. The SCP should then disseminate the 'lessons learned' to SCP members and observers to promote a greater understanding and appreciation of how best to organize successful patent pools while simultaneously avoiding the documented failures of unsuccessful ones.

Paragraph 136 states, in part: *"Participation in a patent pool is voluntary at the option of patent holders. Therefore, some owners of essential patents may opt out from participation in a pool if they do not agree with the licensing terms and conditions of the pool, or they may even form another patent pool…This suggests that, while a patent pool reduces costs for licensing activities, it may not alone be able to completely address patent hold-up concerns."*

Several commentators have identified similar limitations regarding the use of patent pools.[108] Yet, they have also noted circumstances under which 'non-assertion covenants' may be constructively employed to attract would-be patent pool participants not otherwise concerned with limiting their licensing revenues. A non-assertion covenant is a bilateral agreement that accompanies a licensing agreement, pursuant to which "the issuer…often a dominant player with large IPR holdings…agrees not to assert a defined set of rights."[109] It is "used to signal to potential adopters of the standard (and to regulatory authorities who might be interested in the 'openness' of a given standard) of their intention not to assert such rights in as far as they overlap the area of an emerging standard. The covenant is based on the principle of reciprocity, meaning that it provides the strong incentive for other rights-holders to follow suit."[110] Unfortunately, there is not much anecdotal evidence confirming the successful use of such a covenant in other than an 'open standards' setting in which IP rights are deemed anathema to innovation.[111]

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funded by the European Commission within the Sixth Framework Programme, STREP, Priority 8, Contract 503 594 (2006), at: http://home.tm.tue.nl/rbekkers/INTEREST_D04_V5_(as_sent_to_the_Commission).pdf .

[108] "Although pools may have the effect of bring[ing] down [cumulative license] fees, this is only to the degree that the pools at the same time increase the total market size (by the promoting function of the pool). Pools that are established with the main goal of bring[ing] down the cumulative fee (e.g. using price caps) are likely to fail, as long as one may not expect the total market to grow substantially as a result of…creating… the pool. Finally, pools also do not seem suit[able] to cop[ing] with the question of unwilling IPR holders, patent ambushing / submarine patenting strategies, patent trolls, etc." *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, supra at p. 50.

[109] *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, Paper for the EASST 2006 Conference, supra, at p. 41. *See also* Rudi Bekkers, Eric Iversen & Knut Blind, *New Coordination for IPRs and Standards - Looking Beyond Ex Ante Disclosure Rules*, NIFU STEP (2008) at p. 10, at: http://home.tm.tue.nl/rbekkers/Iversen_Bekkers_Blind(2008)_%20DIME_fundamentals_poster.pdf .

[110] *Id*.

[111] *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, supra at pp. 41-42; *New Coordination for IPRs and Standards - Looking Beyond Ex Ante Disclosure Rules*, supra at 11-12.

Paragraph 141 states, in part: *"With respect to legislative measures internal to the patent system, exclusions from patentable subject matter, and exceptions and limitations to the enforcement of patent rights, have been pointed out as relevant mechanisms…the international legal framework in this respect is provided in [Article 30 of] the TRIPS Agreement and the Paris Convention… Article 31 of the TRIPS Agreement provides that a Member may allow, under the stipulated conditions laid down in that Article, use other than that allowed under Article 30 without authorization of the right holder (so-called "governmental use" and "compulsory licenses")…The Paris Convention, in Article 5, also contains provisions concerning compulsory licenses."*

Penetrating readers cannot but conclude that Paragraph 141 quite strategically inserts direct reference to the distinct legal remedies of compulsory licensing and governmental noncommercial use, as well as, an oblique reference to the TRIPS Declaration on Public Health TRIPS and the TRIPS Council Decision on paragraph 6 of the Declaration, each of which must be weighted differently as a matter of international law, with only the latter having been elevated to a formally proposed TRIPS Amendment. These documents are more extensively addressed in Paragraphs, 13, 46, 91-93 and 141-142 of SCP/13/3 – *Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights*. Arguably, certain members of the SCP raised these issues for a reason, and that reason becomes clear when reviewing Paragraph 142 in *this* document. In Paragraph 142, these members believe it appropriate to float the idea that, perhaps, an analogous international compulsory licensing or governmental noncommercial use regime should be erected to facilitate the free, or virtually free, dissemination of patented ideas deemed 'essential' to the implementation of a technical multi-component product standard by developing countries in need of a relatively inexpensive information and communication infrastructure and related ICT technologies and end-user products. Such a regime would legally sanction the 'taking'/expropriation by SSOs, acting in the legal capacity of an agent of the State, of 'essential' patents at concession rate prices without the authorization or consent of the patent owner. And, it would seem, based on the language used in Paragraph 142 ("To the knowledge of the International Bureau, no national legislation [yet] includes a specific provision limiting the right conferred by a patent the exploitation of which is essential for the implementation of a standard", that such a regime would be ideal where the patent owner is deemed by the SSO and national governmental authorities to be 'holding up' the development and dissemination of a technology-rich national, regional or international standard politically characterized as indispensable to the 'public interest'. After all, the footnote accompanying that passage refers directly to document SCP13/3.

Paragraph 142 states, in part: *"[E]xisting provisions under national laws concerning exceptions and limitations, including a compulsory license provision, may be applicable to essential patents relating to standards in the same manner as to other classes of patents."*

All of this 'talk' within paragraphs 141-142 about the legislative tools that may be needed to 'balance public and private interests' is arguably a pretense for enabling progressive national and regional governments to unilaterally and arbitrarily curtail the exercise of exclusive private IP

rights. The notion of 'balance' has been introduced time and again within different international intergovernmental and other public fora by academicians and activist community members that support emerging and developing countries' quest to secure cutting-edge technologies at concession rate prices. It has been raised in the context of access to healthcare[112], transfer of environmental technologies (in connection with climate change mitigation)[113] and now also with respect to the dissemination of information and communications technologies, including software[114], internet[115] and telephony. Typically, if private IP owners (e.g., patentees) fail to agree to the onerous demands of such stakeholders, in addition to resorting to compulsory licensing,[116]

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[112] "Since 1996, the WHO has closely monitored the implementation of TRIPs, advising WHO member states on ways to achieve their national health goals by making use of so-called 'safeguards' already in TRIPs that grant flexibility to balance intellectual property protection against public health objectives." *See* Lawrence A. Kogan, *Brazil's IP Opportunism Threatens US Private Property Rights*, 38 U. Miami Inter-Am. L. Rev. 1, 23-24 (2006) at pp. 36, accessible at: http://www.itssd.org/Publications/IAL105-II(frompublisher)%5B2%5D.pdf . "[O]n January 27, 2006, the WHO Executive Board voted to adopt…(EB117/Conf.Paper No. 3)… that alluded to "the primacy of human rights obligations over economic policies and agreements" and cast serious doubt about the ability of the current international IPRs paradigm to stimulate innovation, promote technology transfer and enhance public welfare… moving the prior 2000 and 2001 resolution language it had advanced within the UN Human Rights Sub-commission on the Promotion and Protection of Human Rights and Intellectual Property Rights into the WHO… Three assumptions underlie this resolution's many points:… 3) a "proper balance [must be provided] between [IPRs] and the public domain and IP rules . . . need to be . . . implemented in a manner that is consistent with the fundamental right of every human being to the enjoyment of the highest attainable standard of health and the promotion of follow-on innovation." *Id*., at pp. 41-42.

[113] *See* "Climate Change, Technology Transfer and Intellectual Property Rights", International Centre for Trade and Sustainable Development (ICTSD) (Aug. 2008) at: http://www.iisd.org/pdf/2008/cph_trade_climate_tech_transfer_ipr.pdf. "Opponents of IP rights have used compulsory licensing of medicines as a vehicle to undermine IP regimes. They have used their attack on pharamaceutical patents to push back against the obligations WTO members signed up to under the TRIPS Agreement. They are now using CO2 mitigation technology as their next battleground to broaden the definition of the applicability of compulsory licenses." *See* Tim Wilson, *Undermining Mitigation Technology: Compulsory Licensing, Patents and Tariffs*, IPA Backgrounder 21/1, Institute of Public Affairs (Aug. 2008) at: http://www.apec.org.au/docs/08_IPAAASC_MT.pdf .

[114] Brazil, in addition to proposing the so called 'Development Agenda' at the WIPO, is in the "forefront of several proposals regarding intellectual property, such as embracing free software and creative commons, as well as struggling for the for the proper balance of patent rights in order to promote access to medicines." *Id*., at p. 87.

[115] During both phases of the UN World Summit on the Information Society convened by the International Telecommunications Union (ITU) during 2003, "India and Brazil among other countries unsuccessfully attempted to insert language into the official WSIS documents that called into question the lack of balance in current international standards for intellectual property rights, such as the TRIPS Agreement. But the US flexed its muscle and calls for balance were ignored..." *See* Robin D. Gross, IP Justice Exec. Dir., *World Summit to Create 'Pay Per-Use' Society: Human Rights Ignored as Big Business Dominates in Geneva*, (Dec. 21, 2003), at: http://www.ipjustice.org/WSIS/IPJ_WSIS_Report.html .

[116] "Major developing countries have called for the creation an international mechanism under the UN Convention on Climate Change aimed at operationalising the transfer technology to developing countries and also assist them in adapting or developing technologies of their own to address climate change. Concrete proposals were presented among others by China, Brazil, Ghana, India, Pakistan and Bangladesh (on behalf of LDCs) on barriers to technology transfer and the measures and institutional mechanisms for overcoming these [M]ost of the developing countries highlighted the need to address the effects of intellectual property on access to technology, and the need for government and international actions…*As regards patented technologies, Brazil proposed a public multilateral fund for purchasing licences with a view to facilitate transfer. It stressed the need for the consideration of criteria for compulsory licensing considering the climate change situation, bearing in mind the example set by decisions in other*

these advocates call for governments and UN bodies to promote antitrust remedies and other 'outside' legislative or judicial measures (including also 'access and benefit sharing' regimes[117], 'advanced market commitments'[118] and 'patent buy-outs'[119]) as an alternative to, or for the purpose of reshaping, the current IP regime as set forth under the WTO TRIPS and WIPO [120]Agreements. They argue, just as in the case of patented medicines and renewable energy

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relevant international fora related to intellectual property rights, such as the Doha Declaration on the TRIPS Agreement and Public Health" (emphasis added). *See* Meena Raman, *Developing Countries Call for New Technology Transfer Mechanism*, TWN Bonn News Update 4, Townside (June 6, 2008) at: http://www.twnside.org.sg/title2/climate/news/TWNbonnupdate4.doc , cited in Lawrence A. Kogan, *Brazil's IP Opportunism Threatens US Private Property Rights*, supra at p. 90 and accompanying fn 392.

[117] "In early 2005, for example, Brazil and other parties proposed the creation of a new international IPR treaty that sanctions the nationalization of biodiversity and any derivative IP. It calls for tighter patent rules to prevent misappropriation of their 'sovereign' biological resources and to ensure fair sharing of benefits arising from their use. The proposal would "require users of biological resources to first seek informed consent of the country of origin, and to ensure that the origin of the resources were disclosed in patent applications… A proposed treaty would, if adopted as a final text, most likely become a Protocol to the UN Convention on Biological Diversity…[A] (regulatory) convention would permit them to control how products *derived from* their biological resources can be used by others. This would consequently provide them with economic benefits to which they would not otherwise be entitled under the TRIPS and WIPO agreements. In effect, '[e]ven after a patent has been granted for an invention using genetic material, the country from which the material was sourced would have the right to determine how products based on a patented invention from it would be used.'" Kogan, *Brazil's IP Opportunism Threatens US Private Property Rights*, at pp. 66-67, *citing* Priya Shetty, Biodiverse Countries Call For Tighter Patent Rules, SCI. & DEV. NETWORK, Feb. 28, 2005, http://www.scidev.net/News/index.cfm?fuseaction=readNews&itemid=1954&language=1 and Alan Oxley, A Healthy Dose of Property Rights is Good Medicine, BANGKOK POST, Feb. 18, 2005, at 1, available at http://www.williams.edu/go/native/moreipr.htm . Indeed, "Brazil was instrumental…[during the] February 2006 CBD Working Group meeting in Granada, Spain…in helping to craft a draft ABS convention text, *International Regime on Access and Benefit Sharing*, which was then passed on to the CBD Conference of the Parties (COP) for consideration at their subsequent meeting held in Curitiba, Brazil, in late March 2006." Kogan, Brazil's IP Opportunism Threatens US Private Property Rights, supra at p. 70, citing Chee Yoke Ling, New CBD Meeting Ends with Draft Elements of ABS Regime, SOUTH-NORTH DEV. MONITOR (Feb. 7, 2006), http://www.choike.org/nuevo_eng/informes/3946.html .

[118] *See* "Making Markets for Vaccines: Ideas to Action", The Report of the Center for Global Development Advanced Market Commitment Working Group (April 2005), at: http://www.cgdev.org/doc/books/vaccine/MakingMarketscomplete.pdf; Michael M. Phillips, "Global Vaccine Initiative Hits Snag" Wall Street Journal (7/7/06), at p. A 5, at: http://lists.essential.org/pipermail/ip-health/2006-July/009809.html;

[119] *See* Kevin Outterson, "Patent Buy–Outs for Global Disease Innovations for Low- and Middle-Income Countries", *American Journal of Law and Medicine*, Vol. 32 No. 2 and 3 (2006) at: pp. 13-16, at:http://papers.ssrn.com/sol3/papers.cfm?abstract_id=873402 .

[120] On September 29, 2004, shortly following the commencement of the special session…open source advocates and civil society activists submitted their own WIPO proposal, otherwise known as the Geneva Declaration on the Future of World Intellectual Property Organization. The declaration demanded that "WIPO [ ] abandon its current culture of expanding monopoly privileges without regard to social cost and to instead strike a balance between the public domain and competition on the one hand and the realm of property rights on the other. [It] also expresse[d] strong support for the…Argentina and Brazil…proposal." It focused on the perceived inequities surrounding access to innovations and the scientific and technical know-how underlying medical, information, and other essential technologies. It also called for WIPO to ensure universal access to all such knowledge as a matter of both morality and international law. *See* "Geneva Declaration on the Future of the WIPO", CPTech (predecessor to Knowledge Ecology International (KEI), at:, http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf (last visited March 16, 2009) [hereinafter Geneva Declaration on the Future of WIPO], *cited in* Kogan, *Brazil's IP Opportunism Threatens US Private Property Rights*, supra at pp. 96-97 and accompanying footnotes.

technologies, that standards and patents relating to software and ICT technologies must be subject to outside mechanisms (proposed governmental interventions, not merely 'smart regulations') that 'balance' public and private interests and resolve the 'inherent tensions' between innovation and human health, innovation and a healthy environment, innovation and information and technology dissemination. **"**Given the tension between IP protection and the transfer of technology, a 'balancing act' is necessary to ensure international IP rules advance broader public policy objectives (Maskus, 2003)."[121]

Paragraph 143 states, in part: *"Some have proposed that the mechanism of the so-called "license of right" under the patent law should be explored in order to ensure access to the technologies incorporated in standards at a reasonable cost. Many national patent laws [e.g., United Kingdom] provide a mechanism allowing a patentee to voluntarily file a statement with the patent office that he is prepared to allow any person to use the invention as a non-exclusive licensee."*

Paragraph 143 posits but another European (British and German) concept for consideration as a global IP legal norm that is intended to limit the fundamental notion of exclusivity that serves as the foundation of ALL private property rights, including IP, especially in the United States. A 'license of right'[122] in the UK[123] and Germany[124] is currently described as a *voluntary* decision on the part of the patent owner to register its patent with a national Patent & Trademark Office (e.g., the UK Intellectual Property Office – IPO) as a nonexclusive license available to all interested prospective licensees on 'reasonable terms'. Nevertheless, a historical review of UK patent law, in particular, the UK Patents and Designs Act of 1919, will nevertheless reveal that it once functioned as a compulsory licensing statute.

> "Under that Act, not only could the proprietor register the patent as being available as of right, but also any interested party could request the comptroller issue a license of right on the ground that there had been an abuse of monopoly rights under the patent. The consequences, i.e. a license could not be refused to any applicant, were the same regardless of whether the entry was made voluntarily or compulsorily…It is also important to note that attempts to reach an agreement on a license are not a precondition for an application for a license of right."[125]

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[121] *See* "Climate Change, Technology Transfer and Intellectual Property Rights", International Centre for Trade and Sustainable Development (ICTSD), *supra*, (repeatedly citing the work of Professor Keith Maskus in the context of different industry sectors in support of this proposition).

[122] *See* Tanuja V. Garde, *Supporting Innovation in Targeted Treatments: Licenses of Right to NIH-Funded Research Tools*, 11 Michigan Telecommunications and Technology Law Review 249, 279-280, at: http://www.mttlr.org/voleleven/garde.pdf.

[123] *See* UK Patents Act 1977 Section 46, accessible at: http://www.jenkins.eu/patents-(statutes)/pa-77-as-amended.asp#s46.

[124] "Licenses of right are also provided for under the German patent laws. Such a license is called a Lizenzbereitschaft. The provisions and incentives for applying for a Lizenzbereitschaft are very similar to those provided for under the UK law." *Id*., at p. 280, *citing* German Patent Law, Section 23, accessible at: http://www.ip-firm.de/patentact.pdf.

[125] *Id*., at pp. 279-280.

In other words, following the grant of a patent, the patent owner is free to choose whether or not to register its patent as a 'license of right' before such a license is ever negotiated with a prospective licensee. Once a patent has been so registered, however,[126] any prospective licensee who is interested in taking a license is effectively deemed, for purposes of the law, as possessing a 'license of right', even though the terms of such a license have not been conclusively settled.[127] Licensees of right are entitled to request that the patent owner legally defend the patent, or may defend the patent itself, by instituting an infringement action against an unauthorized third party user or even the patent owner itself.[128] In cases where the patent owner and licensee cannot agree on reasonable terms (i.e., a reasonable arm's length royalty), the Comptroller of the IPO (its Chief Executive) will make such a determination.[129] Furthermore, if during the course of an infringement action an EU defendant elects to take a license of right under the terms demanded by the patentee, or by the licensee on behalf of the patent owner, "no injunction…shall be granted against him and the amount (if any) recoverable against him by way of damages shall not exceed double the amount which would have been payable by him as licensee if such a licence on those terms had been granted before the earliest infringement."[130] Notwithstanding the absence of any express reference to a compulsory license, it is arguable that this latter scenario effectively amounts to a *de facto* compulsory license. As a matter of observation, it is quite interesting how Sections 46-47 and 48 of the UK Patents Act, which deal respectively with 'Licenses of Right' and 'Compulsory Licenses' have been grouped together within their own area, apart from the other sections of the Act.

The European Patent Office has enlisted the aid of at least one American company to recommence a public dialogue concerning the 'license of right' concept. This is, in large part, an effort to resuscitate the dream of a European-wide patent[131] that had died years ago with the failure of the previously proposed draft European Community Patent,[132] which had contained

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[126] *Id*., at p. 279, *citing* UK Patents Act 1977 Section 46(2): "when a patent owner makes an application for a license of right to be entered under the patent, the comptroller must give notice to any person registered as having a right under the patent and an entry will be made only after it has been determined that the applicant is not precluded from granting licenses to make such entry".

[127] *Id*., citing UK Patents Act 1977 Section 46

[128] *Id*., citing UK Patents Act 1977 Section 46(4): The licensee under a licence of right may (unless, in the case of a licence the terms of which are settled by agreement, the licence otherwise expressly provides) request the proprietor of the patent to take proceedings to prevent any infringement of the patent; and if the proprietor refuses or neglects to do so within two months after being so requested, the licensee may institute proceedings for the infringement in his own name as if he were a proprietor, making the proprietor a defendant or defender."

[129] *Id*., citing UK Patents Act 1977 Section (3)(a) "any person shall, at any time after the entry is made, be entitled as of right to a licence under the patent on such terms as may be settled by agreement or, in default of agreement, by the Comptroller on the application of the proprietor of the patent or the person requiring the licence."

[130] *See* UK Patents Act 1977 Section 46(3)(c). The rule does not seem to apply, however, where the defendant is an importer of an article originating in a "country which is not a member State of the European Economic Community." *Id.*

[131] *See* "The European Community Patent - A Realisable Dream: The European Community Patent Revisited", IBM Discussion Paper (July 20, 2007) at: http://www.ipjur.com/data/070720European-Interoperabily-Patent-1-0.pdf .

[132] "At present no EU patent exists. There is a European Patent granted by the European Patent Office but such a patent is only a bundle of identical national patents conferring national protection (see Order in Case T-295/05

such a provision.[133] However, the EPO's newly minted initiative refers to this mechanism, for obvious political reasons, in different terms – as either the European 'Interoperability' Patent (EIP) (which satisfies EU strategic standardization and competition policy objectives) or the European 'Soft' Patent (ESP) (which may eventually appeal to some in industry).[134] Under the proposed EIP/ESP, as in the case of a 'license of right, any person would be eligible to become a licensee if they would be willing to negotiate a reasonable royalty in return. Also, "[i]nfringement and royalty disputes would be determined by the courts…" [135] In other words, "injunctions to stop infringement would not be available. Instead the patent owner would acknowledge that some form of compensation for infringement would be acceptable - the compensation could be monetary with perhaps a cross license being taken into account if appropriate."[136]

Unfortunately, the interoperability/soft patent suffers the same infirmities as does the license of right – they each serve to weaken the principle of exclusivity which serves as the foundation of private property rights. First and foremost, "an EIP-type right would eventually [a]ffect the value of 'reasonable royalties'…paid. If you're going to have to license it anyway, then there's little argument about the price you can command (you've lost exclusivity as an economic driver)." [137] Second, an ESP would effectively redistribute or surrender a share of the patentee's property right to, and thereby, reward so-called 'innocent' infringers, who allegedly "have not engaged in any nefarious or unprincipled behaviour but need to use patented invention(s)…inventions essential for software interoperability, essential for Internet use, for telecommunication projects where interoperability is a must-have, or for Open Source projects." Arguably, in situations where a

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Document Security Systems, paragraph 53) (For an example - which concerns the refusal to grant a European Patent…). Disputes on the EPO patents are decided by national courts with the risk of multiple litigation. Consequently, the Council is working on a draft agreement to create a new European-wide jurisdiction. The agreement will be between the States wishing to ratify it and the EU itself. *See* "Draft Agreement on European Patent Judiciary: New Developments", EU Law Blog (Jan. 24, 2009) at: http://eulaw.typepad.com/eulawblog/2009/01/draft-agreement-on-european-patent-judiciary-new-developments.html .

[133] "Article 43 of the draft [failed] Community Patent Convention also provides for a means to obtain a license of right using similar language as that found in the UK and German patent laws. *See* Tanuja V. Garde, *Supporting Innovation in Targeted Treatments: Licenses of Right to NIH-Funded Research Tools*, supra, at p. 280.

[134] "The Vice-President of the European Commission, Günter Verheuegen, stated at the European Patent Forum in Munich in April 2007 that 'an incomplete European patent system puts European businesses at a competitive disadvantage' and that he expected the Community Patent to become reality 'in the next five years'... Speaking at the European Patent Forum in Munich in April 2007, Hans-Ulrich Maerki, IBM's EMEA Chairman, pointed to the increasing importance of collaborative innovation and stressed the need for a balance between open and proprietary development based on standards. Leading on from this, he emphasised that we need intellectual property protection that serves both open and proprietary innovation…Soft IP is a system that enables efficient capture and protection of IP, with provision for making licenses available to all interested parties… Perhaps there could be other advantages for the Non-exclusionary Community Patent with standards bodies or similar bodies directing technology adoption to those inventions covered by the Community Patent where Licenses of Right are therefore available." *See* "The European Community Patent - A Realisable Dream: The European Community Patent Revisited", IBM Discussion Paper, *supra*.

[135] *See* Duncan Bucknell, *Big Blue Proposes New Type of Patent Right*, Magazine of Intellectual Property and Technology (Aug. 16, 2007) at: http://www.ipfrontline.com/depts/article.asp?id=15763&deptid=6.

[136] *See* "The European Community Patent - A Realisable Dream: The European Community Patent Revisited", IBM Discussion Paper, *supra*.

[137] *See* Duncan Bucknell, *Big Blue Proposes New Type of Patent Right*, supra.

court would decide the reasonable and nondiscriminatory royalty terms, (e.g., following registration of the patent) a *de facto* compulsory license will have resulted. And, in other instances, where a court permits or otherwise directs a patent infringement defendant to agree to court ordered licensing terms to resolve a dispute, it is arguable that an illegal government 'taking' of private property for *other than* public use, within the meaning of the Fifth Amendment to the U.S. Bill of Rights, will have occurred, especially where a government procurement contract is not involved and 28 USC 1498 (the U.S. governmental noncommercial use statute) is not invoked. In such case, no court determined royalty is likely to be deemed reasonable enough as a matter of U.S. constitutional law.

Third, proponents of the EIP/ESP claim that "the proposed Community Patent would be an optional system and an additional system; therefore full cost national patents obtained directly or through the EPO would still be available."[138] While this feature suggests that patent owners would retain the freedom to decide whether or not to register their patent as an EIP/ESP, such freedom is illusory, for it is likely that they would be susceptible to public disparagement and peer pressure campaigns from their competitors and/or third party activist groups, and might even be subject to governmental pressure and intimidation. After all, "companies which did not use the EIP, but still played in open standards and interoperability would have some explaining to do (i.e., they would be seen as free-riding off everyone else's innovation)." [139]

Paragraph 158 states, in part: "*The competition authorities of the United States of America and the European Commission have provided substantial guidelines with respect to the analysis used to evaluate potential competition issues associated with patent pools…In general, the inclusion of substitute technologies is more likely to harm competition than a pool of complementary technologies. If all pooled patents are essential, that is, there are no substitutes inside or outside the pool and the technology in question is necessary for the implementation of the standard, those patents are necessarily complements. Where non-essential but complementary patents are included in a patent pool, there is a potential risk of excluding third party technologies…Further, the inclusion of non-essential patents in the pool may force licensees to pay for technologies that they do not need.*"

This paragraph speaks dismissively of nonessential patents in the context of a patent pool formed for standards development purposes. Nonessential complementary patents included in a pool should be deemed acceptable to promote competition. But within the European Union, as noted in the footnotes accompanying this paragraph, there seems to be a conflicting mindset among governmental authorities that wishes to ensure a pool of only essential patents, notwithstanding the fact, as several commentators have expressed, that

[138] *See* "The European Community Patent - A Realisable Dream: The European Community Patent Revisited", IBM Discussion Paper, *supra*; Duncan Bucknell, *Big Blue Proposes New Type of Patent Right*, supra ("The EIP would not replace current patents, but sit alongside them as another option.").
[139] *See* Duncan Bucknell, *Big Blue Proposes New Type of Patent Right*, supra (paraphrasing David Kappos (VP IP law at IBM).

> "*[N]on-essential patents can be very valuable*…An example: a substantial part of the buyers of mobile phones seems to attribute great value to so-called predictive text input feature on GSM phones. This feature allows them to compose short text messages more easily. In order to market a successful phone, a manufacturer may feel that it needs to license that patent, even though the standard does not include this feature and the patent in question is therefore has to be considered non-essential."[140]

Consequently, Paragraph 158 should be supplemented with the statement that, "Inclusion of nonessential patents in the pool can be very valuable, in an intangible sense, as they may provide end-users with commercially attractive product features that, while nonessential to the product's technical operation, contribute to ease or enjoyment of use."

[140] *See* Rudi Bekkers, Eric Iversen & Knut Blind, *Patent Pools and Non-assertion Agreements: Coordination Mechanisms for Multi-Party IPR Holders in Standardization*, supra at pp. 5-6 (emphasis added).