Executive Summary of
ITSSD Comments Concerning SCP/13/2
Report on Standards and Patents

1. **Paragraph 25** - The ITSSD recognizes 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.

2. **Paragraph 30 -** 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. The term 'interoperability' employed throughout this document seemingly incorporates 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. The ITSSD strongly recommends that the SCP solicit other 'interoperability' definitions and practices from its *non*-European members and observers, and calls upon the SCP to ensure that, once submitted, these alternatives shall be considered by the SCP and shared with all other SCP members and observers, in an open, transparent and equitable manner, and ultimately incorporated within a comparative analysis that becomes part of Document SCP/13/2 as either an addendum or annex.

3. **Paragraphs 35 and 37 -** The ITSSD wishes to express its understanding that the terms *de facto* and *de jure* standards have distinct legal meanings apart from their assigned meanings by members of the standards community. *De facto* standards are actually those developed, apart from the law, by recognized standards development (setting) organizations. Since industry standards are 'voluntary' by nature, this corresponds with the WTO TBT Agreement definition of 'voluntary' standard. *De jure* standards, by virtue of their connection to the law – public law- are more closely aligned with the WTO TBT Agreement definition of 'mandatory' standard, which in effect, is deemed a 'technical regulation'. 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 regional 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 definitions assigned *de jure* and *de facto* standards requires further analysis and clarity so that they are brought into line with the WTO TBT Agreement.

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4. **Paragraphs 43-44** - The European Commission has determined that standards, especially those relating to complex software-based ICT systems, must be developed in a manner that ensures 'interoperability'. Evidently, The evidence reflects that open standards or technical specifications are preferred by the EU Commission and EU Member States, 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. European policy documents also reveal that the EU Commission and its Member States are decidedly in favor of open source software.

5. **Paragraph 49** - Arguably, neither Brazil nor China qualify as 'developing' countries because of their technologically advanced industrial and agricultural sectors, stable economies and considerable foreign currency reserves. Thus, they should not be entitled to "certain special and differential treatments" afforded WTO developing country Members.

6. **Paragraphs 54-55 -** The negative perspective this document conveys towards patents arguably results in the portrayal of the relationship between the standards and patents systems as adverse, conflicting and tension-filled. 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). 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 and Chinese - demands for rebalancing public and private interests, such that ICT technology transfer can occur at concession-rate prices) for their own benefit. Furthermore, a patent grant is represented in this document solely as a statutory right afforded by the grace of governments, rather than as a natural property right recognized by national constitutions and then reduced by law via governmental statute and/or regulation to a temporary economic right of exclusion upon satisfaction of strict patentability criteria.

7. **Paragraphs 58-60 and 62** - Hypothetical possibilities are discussed throughout this document without providing anecdotal evidence that an actual 'patent hold-up' has occurred with irreversible adverse market consequences. In addition, the hold-up concept discussed throughout this document is much broader than has been acknowledged. The notion of holdup is used to describe not only a criminal transaction, but also an expansive array of ordinary economic transactions that take place in the backdrop of free markets. It does not specifically refer to the interactions between patents and standards. Therefore, it is arguable that the term patent hold-up has been posited as a 'strawman' diversion for purposes of creating a potential abstract problem that demands a legislative/regulatory or judicial solution, which calls for or results in the weakening of exclusive private patent rights on 'public interest' grounds. Indeed, life is full of potential problems that may or may not later arise. A patent hold-up might even be one of them. The potential hold-up problems which may occur when a patentee refuses to license or demands what is

perceived as an excessive royalty depends on the context – the facts and circumstances – it is not a given.

8. **Paragraphs 65-66** - Many innovative product standards, including those covering multi-component products, would not be possible without the incorporation of new inventions. And, in most instances, the time, costs and labors necessary to create new inventions that are capable of filtering throughout society and providing direct and indirect public spillover benefits, such as knowledge dissemination, new sources of derivative inventions, and greater consumer product choices, would not be invested, unless adequate economic incentives are provided. It may be true that standards can potentially serve to promote interoperability, reduce transaction costs, and ensure greater product workability, quality and efficiency, standards by themselves, have not been empirically shown to provide an adequate incentive for innovation, or to ensure greater market competition. The debate about standards and patents raised by governments, NGOs and some companies at the national, regional and global levels is, in part, disingenuous. It is being exploited by companies that are engaged in the 'art' of disguised regulatory protectionism, the objective of which is to secure favorable 'legal certainty' that effectively carves-out new legally sanctioned markets for their otherwise noncompetitive products and services.

9. **Paragraphs 68-70** - SSO self-regulation is the preferred approach for addressing potential standards and patents conflicts, since it is one of the only approaches that respects the right to private contract and other exclusive intangible property rights – i.e., patents. Forming patent pools is another possible way to overcome the complexities and costs of multi-component product standardization. However, it is ultimately up to private parties to decide for themselves whether or not they wish to enter into such arrangements. 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, in no instance, be imposed by government regulators or by the courts in a top-down fashion on unwilling parties where no violation of law, morals or ethics has occurred.

10. **Paragraph 117** - 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 among SSO members and third parties.

11. **Paragraph 124** - The Industrial Royalty Pie Model featuring 'aggregated reasonable terms' is untested and obviously contentious. This initiative is 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 than not, that each of the seven companies involved in patent pools had calculated that a volume-based rather than a profits-based business model would result in greater overall revenues during 2008

and thereafter. There are a number of uncertainties surrounding the methodology behind and operation of the Industrial Royalty Pie Model/ART. For example, questions have arisen concerning: i) how the relative values of contributions made to the pie are to be measured; ii) the need for stepped-down royalties or royalty caps, as well as, an analysis of their impact on the economic and other rights of patent owners; iii) the ultimate cost of the ICT technologies based on a standard employing such model; and iv) how the model's focus on 'essential' patents, consistent with European governmental and standards organization policies can be manipulated by influential industry participants to secure a competitive market/trade advantage domestically as well as internationally.

12. **Paragraph 125 –** Although, as a result of the *In re Seagate* decision, an alleged infringer 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. Furthermore, the mechanism proposed by a multi-stakeholder group to manage disclosures on patents relevant to standards is actually a previously proposed draft Treaty on Access to Knowledge (A2K). It was first seriously discussed as an idea during early February 2005 at a Geneva meeting organized by civil society anti-IP activist groups, which followed from a prior 2004 developing country proposal initiated by the governments of Argentina and Brazil for the WIPO General Assembly to establish a WIPO Development Agenda. The A2K initiative was a response to the failures of UNCTAD and UNESCO in addressing how developing countries are to create institutions of knowledge to achieve basic freedoms and economic development. It thus reflected developing country priorities. It evidenced developing country resistance to what was perceived as an emerging paradigm of global intellectual property rights, and a long held desire to resurrect the New International Economic Order of the 1970's. In essence, this proposed mechanism, which focuses predominantly on developing country problems and concerns, would be more appropriately placed in the WIPO Development Agenda than addressed in the SCP.

13. **Paragraph 127 –** Non-SSO members, upon acquiring the stock or assets of an SSO member, may or may not be bound by the prior member's SSO RAND contractual obligations and SSO patent policies, depending on the particular facts and circumstances. Arguably, this is precisely the type of private party transaction that calls for resolution either as a matter of private negotiation between the parties themselves or as a private litigation matter before the courts. It is not a public interest matter to be resolved by governmental authorities. The report's description of the *NData* case which engendered such issues and the U.S. Federal Circuit Court decision in that case is generally accurate. However, it fails to explain the FTC's reasoning and to discuss the broader factual context underpinning the FTC's findings against NData Corporation that led to the settlement (a proposed consent order) ultimately reached between them.

14. **Paragraphs 129 - 130** - A patent pool is one market-driven mechanism which can potentially reduce transaction costs surrounding multi-component product standard-setting. 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 multiple IP holders, the personalities involved, and the degree to which control over exclusive private patent rights and related income streams is maintained or lost, the patent pool mechanism may or may not provide the right solution in all situations. It must also be recognized that, despite the theoretical advantages of patent pools in standardization, empirical evidence as to their benefits remains scarce.

15. **Paragraphs 135-136 –** The examples of patent pools created to facilitate the development of technical standards in the digital and telecommunications industry sectors set forth in Table 1 do not indicate whether were successful or not and why. The SCP should review, summarize and incorporate by reference within this document currently available study findings and analyses that explain why and how such patent pools have succeeded or failed, and then disseminate the 'lessons learned' to SCP members and observers. The use of a non-assertion covenant, which is a bilateral agreement that accompanies a licensing agreement, pursuant to which the issuer agrees not to assert a defined set of rights, may serve to work around certain identified patent pool limitations. 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.

16. **Paragraphs 141-142 –** Repeated reference to the need for legislative tools to 'balance public and private interests' is arguably a pretense for enabling progressive national and regional governments and activist NGOs to unilaterally and arbitrarily curtail the exercise of exclusive private IP rights. The need for balance between public and private interests has been raised in the context of access to healthcare, transfer of environmental technologies (in connection with climate change mitigation) and now also with respect to the dissemination of information and communications technologies, including software, internet and telephony. Where private patent owners fail to agree to the onerous demands made by these stakeholders, outside legislative and judicial measures such as compulsory licensing, noncommercial use, exclusion from patentability and antitrust remedies are called for as alternatives to, and other economically redistributive remedies such as access and benefit sharing, advanced market commitments and patent buy-outs are recommended as supplements to, the current international IP regime.

17. **Paragraph 143 –** The 'license of right' is 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. It is currently described as entailing a voluntary decision by a patent owner to register its patent with a national Patent & Trademark Office as a nonexclusive license available to all interested prospective licensees on 'reasonable terms', contingent on the patentee waiving injunctive relief against future infringers. Nevertheless, the license of right has historically functioned as a

compulsory licensing statute. Indeed, it actually functions as a *de facto* compulsory license where the national patent and trademark office executive intervenes to determine reasonable licensing terms if the parties themselves are unable to agree, and where, in infringement suits, defendants are directed by the court to abide by the patent owner's reasonable licensing terms. As a matter of statutory construction, licenses of right and compulsory licenses are also grouped together by the UK Patents Act 1977. The European Patent Office has enlisted the aid of at least one American company to reopen a public dialogue concerning the license of right concept. This is, in large part, reflects an effort to resuscitate the dream of a European-wide patent that had died with the failure of the previously proposed draft European Community Patent, which had contained such a provision. For obvious political reasons, the license of right is now referred to as the European 'Interoperability' Patent or the European 'Soft' Patent. Unfortunately, an analysis of the interoperability/soft patent reveals that it 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.

18. **Paragraph 158 –** This paragraph, which seems to reflect the mindset of European Union governmental authorities, speaks dismissively of nonessential patents in the context of a patent pool formed for standards development purposes. Much to the contrary, nonessential complementary patents should be included in a pool and deemed acceptable for promoting competition, because they can provide 'value' in an intangible sense. For example, the evidence shows that 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.