

EDITORIAL:

It's Time for IPR Equal Opportunity in International Standard Setting

Andrew Updegrove

Standards occupy what may be a unique niche at the intersection of society, government, commerce and opportunity. That's because safety, health and technical standards of all types touch every aspect of our daily lives. One would think that governments would therefore take great interest in how they are developed and deployed. Curiously enough, however, they largely don't. While this hands off attitude has worked reasonably well in the past, the increasing importance of technology in the modern day world may be ushering in an era when international standards wars will become increasingly common, unless efforts are undertaken now to level the playing field.

How disconnected are governments? In some nations, the role of government is very significant. But in others (such as the United States), government involvement is largely at the technical committee participation level, rather than as an overseer or accreditor. And with the exception of a few organizations such as the International Telecommunication Union (which operates under the aegis of the United Nations), the bodies that globally adopt standards are non-governmental entities rather than treaty organizations as well.

This is rather surprising, because despite their nominal status as technical specifications, standards can provide commercial and social benefits at many levels that would not be otherwise attainable. At the global level, standards are capable of creating markets for new products and services that would not otherwise exist. For those in developing nations, telecommunications standards (for example) can bring educational and other benefits that would be impossible to provide absent the existence and broad adoption of standards-based technologies. For vendors as a group, standards can lower risk while expanding opportunities. And when the implementation of a standard infringes upon a patent, the singular owner of that patent may gain great monetary and other advantages as a result.

This ability of a single patent owner to influence so powerful a tool has always been problematic, and the rules of national and sectoral standard setting organizations, as well as those of global standards bodies like ISO, IEC and the ITU, have therefore sought to balance the rights of the property owner with the benefits to be

gained from standards. Less well recognized, however, is the impact that classes of patent owners can have over other classes that are "patent poor." The most obvious effect can be found in the ability of developed nations to benefit from the standardization process to a disproportionate extent when compared to developing countries.

The advantages of developed nations are many in this regard. The corporations headquartered within their boundaries are often powerful and multinational, with long traditions of research and development, as well as legal staffs trained to globally protect the intellectual property rights that these corporations create. The patent portfolios so accumulated provide assets that can be bartered in cross licensing transactions with the other well established companies that are their main competitors. The result is that smaller domestic, as well as emerging foreign competitors, are at a competitive disadvantage, and can find it difficult or impossible to enter the markets that the incumbents have come to dominate.

Well established companies are also more adept at participating in standard setting activities, whether they be hosted by consortia, national standards bodies, or *de jure* global organizations. Many national governments, especially in regions such as Europe, recognize the international trade advantages that can be gained through effective participation in such bodies, and incorporate standards strategy into their international trade policies. Global treaties, such as the Agreement on Technical Barriers to Trade under the the World Trade Organization, have also been drafted to prevent individual nations from erecting standards-based barriers intended to keep foreign goods from gaining access to domestic markets.

Today, information and communications technology (ICT) is becoming increasingly important in many ways. Not only does the revenue attributable to ICT products and services constitute an ever larger percentage of the global economy, but new job creation and the economic advantages that accompany such jobs form one of the greatest areas of opportunity for emerging and developing nations alike. But because most technology is patentable, many of the standards that must be created to realize the full potential of technological innovations will inevitably infringe upon patent claims. And therein lies the rub.

Because the corporations headquartered in developed nations are more likely to protect their new technology on a global basis and to participate most heavily in the standard setting process, these vendors are gaining significant, long term commercial advantages over their existing and potential competitors in developing nations. Due to the short life span of technology and the long-term monopoly granted by a patent, these advantages will be far reaching, and will replicate through successive generations of technology until the businesses based in emerging countries become similarly adept.

The result, as explored in greater depth in the [feature article](#) of this issue, is the likelihood that we will face more and more standards wars between opposing vendor factions based in developed and developing nations. Already, China is creating multiple "home grown" standards in order to level the playing field in product areas typified by heavy royalty requirements tied to globally adopted

standards. Chinese companies and universities are also dramatically increasing the filing of patents.

Such actions are understandable and predictable under current circumstances. Simply tightening up the Agreement on Technical Barriers to Trade would not appear to be the answer, as this would simply institutionalize the advantage of developed nations over developing countries, and would likely prove to be ineffective in any event. Nor does a spiral into mutually assured patent destruction through an increasing blizzard of global patent filings appear to be the right answer, either.

Instead, I suggest that the time has come for ISO, IEC and ITU, as well as for governments in general, to act to readjust the balance between the rights of intellectual property rights owners and those of standards implementers and end users. If standards bodies were to change their policies to require disclosure of patents and licensing terms at an earlier point in the standards development process, fewer royalty bearing standards would result. And if governments limited their purchasing to products that comply with royalty-free standards, then there would be greater incentives for patent owners to settle for the other benefits that can accompany inclusion of their technology in a standard in addition to royalties.

Absent such changes in policy, globalization will doubtless become an even more contentious process than it already is. And those in the developing world will have one more justification to accuse those in developed nations of being too focused on their own own welfare, to the disadvantage of those that are still struggling to share in the benefits of the modern world.

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