



International Chamber of Commerce

The world business organization

**ICC Statement on Patents and Standards
To WIPO Standing Committee on the Law of Patents: Fourteenth Session**

Intervention made by Ivan Hjertman on behalf of ICC at meeting of the WIPO Standing Committee on the Law on Patents (SCP/14)

January 25, 2010 to January 29, 2010, Geneva

Thank you, Mr. Chairman

The International Chamber of Commerce notes with appreciation the document prepared by the WIPO Secretariat for the WIPO Standing Committee on the Law of Patents (WIPO Document SCP/13/2) entitled “Standards and Patents” and presented at its Thirteenth Session, March 23 to 27, 2009.

ICC takes this opportunity to observe that companies seek to both harmonize the way in which goods and services are designed through standards and to gain part of the return on investments through patent protection.

Companies owning patents essential to the standard might seek to get a return on their investments through patent licenses, charging royalties in exchange for agreeing to share their proprietary technology with all implementers. Without that possibility patent owners may be reluctant to participate in standards-setting activities and contribute their technologies to new standards that are being developed. Companies’ viewpoints on the inclusion of patented technology into standards may vary depending on whether the company is a patent holder, an implementer of the standard, or potentially both.

Companies generally are concerned about the costs associated with implementing the standard. The existence of many patent holders who own essential patents on a single standard who likely will seek compensation for use of their technology can heighten this concern. There also is a concern if there is a patent holder who is not willing to license his essential patented technology to all implementers on reasonable terms.

To ensure a wide dissemination of standardized technologies while maintaining incentives for innovation, several approaches are pursued to prevent possible conflicts. Most standards bodies seek the early disclosure of the existence of essential patents, and they request that the patent holders declare their willingness

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to offer licenses to all implementers on (fair), reasonable and non-discriminatory terms and conditions ((F)RAND). Potential implementers can then contact the patent holder and discuss detailed licensing terms, which often would be customized to address all of the implementer's specific needs.

The rationale is that there is a possibility that, once the standard is finalized, the patent holder may seek unreasonable licensing terms and the implementer will be pressured to accept them. This scenario is called "patent holdup" or "patent ambush". Historically – and as noted by the WIPO Secretariat in the document it prepared – patent holdup has rarely occurred, in part because most participants are interested in the standard's success and widespread implementation so they are motivated to act reasonably.

More recently some participants have required more transparency early in the standardization process ("ex ante" or before the standard is completed) of the maximum amount of patent royalties that may be charged on standard compliant products and/or services in connection with the patent holder's essential patent claims. Due to a number of reasons, the "ex ante" approach has not succeeded in some technology areas, e.g. telecommunication. Most standards bodies that have considered this "ex ante" approach have permitted the voluntary ex ante disclosure of licensing terms to the standards body, but they have not required it. Some companies prefer to negotiate a customized license that may address issues beyond just the essential patent claims, and some patent holders do not actively seek licences from implementers.

We believe that the "scope of the exclusive patent right is carefully designed under national patent laws in order to strike a balance between the legitimate interests of right holders and third parties." We also note that there have been suggestions to exclude subject matter from patent protection or provide broad exceptions and limitations to the enforcement of patent rights to address concerns about patents and standards. We disagree with those suggestions and believe that neither the international patent system nor its national implementation requires changes to address concerns about patents and standards. We find support for this position in the observation made in the WIPO Secretariat paper that "no national legislation includes a specific provision limiting the right conferred by a patent the exploitation of which is essential for the implementation of a standard."

We further observe that some have suggested more aggressive use of commercial and competition law as a legal mechanism to challenge the abusive or otherwise illegal conduct of any patent holder or of any collective group of implementers. In this vein, we agree with the statement in the paper prepared by the WIPO Secretariat that "collaborative standard-setting activities, if properly conducted, may have competitive advantages to society at large" but that "if a standard-setting process is manipulated

or disguised so that the participants, who are often competitors, could gain unfair competitive advantages vis-à-vis other competitors, such a process is likely to fall under the scrutiny of a competition authority.”

We look forward to working with the WIPO Secretariat and the WIPO Member States in work under the SCP on patents and standards – both in specific relation to WIPO Document SCP/13/2 as well as the important issues raised in that document.

Thank you.