

The Open Standards International Symposium

Yale Law School, New Haven, CT, February 3, 2007

Review by Ken Krechmer

This symposium was sponsored by Microsoft and SUN and led by:

- Jack Balkin, Professor of Constitutional Law and the First Amendment, and Director, Information Society Project, Yale Law School, introduced the conference.
- Eddan Katz, the Executive Director of the Information Society Project and Lecturer-in-Law at Yale Law School.
- Laura DeNardis, 2006-2007 visiting fellow in the Information Society Project at Yale Law School.

By design, this conference attracted a broad and diverse group of participants (approximately 60 people). The different speakers discussed their views on open standards in four panel groups: technology, economics, politics and law.

Technology Panel

Moderator: Geoffrey Bowker Professor & Executive Director, Center for Science, Technology, and Society, Santa Clara University

Speakers:

Ken Krechmer, Lecturer, University of Colorado, Boulder, Position paper: Open Standards Requirements.

Jason Matusow, Senior Director, IP & Interoperability, Microsoft Corporation

Peter Strickx, General Manager, Architecture & Standards, Fedict, Belgium.

Carl Cargill, Chief Standards Officer, Sun Microsystems, Inc.

The technology panel divided on expected lines. Carl Cargeill (SUN) supports no IPR on open standards. Jason Matusow (Microsoft) desires open standards that have IPR and other restrictions. Peter Strickx (Fedict) suggests open standards are those that allow only one standard for one function world wide. Ken Krechmer (University of Colorado) defined open standards using ten parameters, and discussed the importance of open interfaces for open standards.

Economics Panel:

Moderator: Manon Ress, Director, Information Society Projects, Consumer Project on Technology.

Speakers:

Rishab Ghosh, Senior Researcher, United Nations University, Maastricht Economic and Social Research Training Centre on Innovation & Technology. Position Paper: Free/Libre/Open Source Software: Policy Support.

An Baisheng, Deputy Division Chief, WTO Department, Ministry of Commerce, People's Republic of China. Position Paper: Intellectual Property Right (IPR) Issues in Standardization.

John S. Wilson, Lead Economist, Development Economics Research Group, International Trade, The World Bank. Position Paper: A Quick Look at Regulation and Information Technology.

Sherrie Bolin, President and CEO, The Bolin Group (a standards conference and publishing company). Position paper: Standardization as a Business Tool

Bob Sutor, Vice President, Standards and Open Source, IBM Corp.

Rishab Ghosh argued that open standards, properly defined, allow “natural” monopolies to form in a given technology, while ensuring full competition among suppliers of that technology. This is a distinct economic effect that deserves to be distinguished by the use of a separate term, hence “open” rather than “ordinary” standards – referred to as “semi-open” in this paper.

An Baisheng discussed some of the difficulties in China regarding other countries' IPR associated with standards. He noted that a group of Chinese engineers identified problems with a specific patent in a patent pool and the patent holder agreed to withdraw the patent from the patent pool. However the total royalty charge the patent pool charged remained the same.

John Wilson offered a positive view of trade and how it increases GDP in even the poorest counties.

Sherrie Bolin discussed standardization as a business tool and how it should be managed.

Bob Sutor addressed standardization from a high and pragmatic level and how it is seen internal to IBM. IBM examined 37 cases where IBM IPR could be used in an external standardization process and concluded that it made the most sense to IBM to offer the IPR royalty free. This was the genesis of IBM's current approach to IPR in standards.

Politics Panel:

Moderator: Alexander Galloway, Assistant Professor, Culture & Communication, New York University.

Speakers:

Huang Rengang, Minister Counselor of the Permanent Mission to the WTO, People's Republic of China.

Linda Garcia, Professor & Director, Communication, Culture & Technology, Georgetown University. Position Paper: Bringing the Public Interest into Standard Setting.

Vittorio Bertola, At-Large Advisory Committee, ICANN; President & CTO, Dynamic Fun, Position Paper: The Age of Mass Standards.

Natalie Sunker, Republic of South Africa, Deputy Director, Intellectual Property, Policy & Legislation, Department of Trade and Industry. Position Paper: Political Issues--South Africa.

Victoria Espinel, Assistant USTR, Intellectual Property & Innovation, Office of the U.S. Trade Representative.

Huang Rengang offered a view of China's political concerns noting that the TBT (Technical Barriers to Trade) directs countries to use standards but does not address how IPR within standards is itself a barrier to trade.

Linda Garcia offered a governmental view noting successes and failures of standards setting organization as well as the US government. She suggested that the US government needs to look harder at how to address standardization issues as standardization is fundamental to the public good.

Vittorio Bertola offered his view of the importance of the independent nature of the Internet.

Victoria Espinel noted the need for both commercial and legal consideration of IPR issues to find an appropriate solution.

Natalie Sunker described the South African view of standards noting that while South Africa protects IPR, it receives very little value from IPR.

Law Panel:

Moderator: Daniel Benoliel is a lecturer at the Hebrew University, at Jerusalem and the Haifa University Law Faculties in Israel. He teaches Patent law, Biotechnology law and Foreign Trade law. 2004-2005, he was a Visiting Fellow with the Information Society Project.

Speakers:

Andrew Updegrove is a co-founder and partner of the Boston law firm of Gesmer Updegrove LLP. Since 1988 he has worked with over 70 consortia, accredited standards development organizations and open source consortia, and has assisted many of the largest technology companies in the world in forming such organizations.

John Morris, Director, Internet Standards, Technology, and Policy Project, Center for Democracy and Technology. Position Paper: Injecting the Public Interest into Technical Standards.

Amy Marasco, General Manager for Standards Strategy, Microsoft.

John Palfrey, Executive Director, Berkman Center for Internet & Society; Clinical Professor of Law, Harvard Law School.

Robin Gross is founder and Executive Director of IP Justice, an international civil liberties organization that promotes balanced intellectual property law and protects freedom of expression (www.ipjustice.org).

Daniel Benoliel offered that standards are not a topic but a prism through which the full spectrum of many others legal topics may be seen.

Andrew Updegrove offered the view of ICT standardization (compatibility standards) as a process under stress. The migration from industrial age standards to information age standards is part of this cause. He offered three solution directions including to force a single standard, use ex ante procedures to identify IP in advance and use profiles (adaptability standards) to allow variation.

John Morris, as a public advocate of the use of standards, explained the difficulty of bringing public views to standardization organizations. He noted the need for better public interest awareness in the standardization community.

Amy Marasco addressed the legal aspects of standards and standardization supporting a market oriented solution rather than a government oriented solution.

John Palfrey offered a broad legalistic view of how to identify and utilize open standards.

Robin Gross raised the issue of tying in the digital music player business and the use of consumer and anti-trust laws to address these issues. She noted that this action is already starting in Europe (e.g., iTunes actions).

Summary

Overall this conference suggests that the compatibility standardization and related IP system is not working well. This is indicated by:

- The difficulty of achieving "interoperability"
- The rise of consortia
- The rise in patent litigation
- The lack of third world IP input into the standardization process
- The demands on commercial companies like Microsoft and Apple to give away their IP where they have market control
- The weakness of RAND policies to resolve IPR issues

Solutions directions proposed are:

- Technical: utilize profiles or adaptability standards.
- Legal: patent policy changes or ex ante provisions and greater assertion of existing law to fix current problem.
- Policy directions include expanding trade regulations to address IPR impact, greater government involvement and copyright exemptions on public standards.