

Moving towards open standards

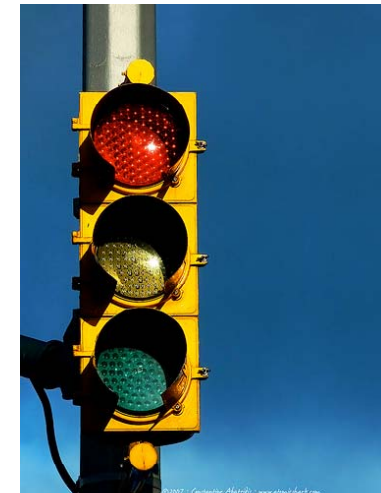
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This presentation

- The intersection between IP and standards
 - Copyright
 - Patent rights
- What are open standards?
- Achieving open standards
 - Policy
 - Strategic management of IP rights
 - Licence models

What are standards?

- “A published document which sets out specifications and procedures designed to ensure that a material, product, method or service is fit for its purpose and consistently performs in the way it was intended.”
 - Standards Australia (2008) Submission to the Review of the National Innovation System
- Examples:
 - Colour of traffic lights
 - Shape of electrical plugs
 - Digital file formats such as mp3 and PDF



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Why are standards important?

- Standards are designed to ensure consistency across devices, platforms and systems.
- As such, they are essential to the interoperability of technologies and the rapid adoption of technologies by users.
- Standards are vital to our ability to innovate.

Intersection between IP and standards

- Like law, standards have a norm creating function
- But there is an apparent tension between IP law and standards
- Standards foster harmonization and compatibility through shared and common systems
- IPRs stimulate the development of the new and the different by creating exclusivity in the market

P Drahos and I Maher, "Innovation, competition, standards and intellectual property: policy perspectives from economics and law", *Information Economics and Policy* 16 (2004) 1-11

Intersection between IP and standards

- To further complicate, standards can attract IP protection
- Standard specifications (the documents describing the standard) attract copyright protection
- Technical standards can encompass technology that is the subject of patent protection
- How do we manage this intersection?

Copyright and standard specifications

- Standards are developed by Standard Setting Organisations (SSOs) through participation of members
- Members may contribute material (e.g. textual or diagrammatic material) to the development of the standard specification
- SSOs often require members to assign copyright to the SSO in any material contributed

Copyright and standard specifications

- SSOs then assert copyright ownership in the final standard specification
- They charge licence fees for the rights to reproduce, adapt, publish and digitally communicate the standard

Copyright and standard specifications: Issues

- The licence fees can be substantial
- Allowances not usually made for:
 - participants who contributed some of the material (for which they are now required to pay to use);
 - publicly funded material contributed by government bodies; or
 - users who lack the economic means to pay the fee

Copyright and standard specifications: Issues

- Rights of reuse granted are often:
 - unclear; and/or
 - restrictive
 - For example, modifications to the standard specification are usually prohibited

Patent law and technical standards

- Standards may incorporate technology which is covered by a patent or for which a patent has been applied
- SSOs often have policies requiring members and/or participants to disclose relevant patent interests
 - Where these are disclosed, the SSO can attempt to develop a standard that does not include the patented technology or may negotiate with the patent owner to incorporate the technology in the standard

Patent law and technical standards

- Problems?
 - Disclosure requirements cannot extend to non-members or non-participants (contractual)
 - What if members/participants do not disclose?
 - *Qualcomm Inc. v. Broadband Corp.*
 - SSOs do not conduct patent searches
- Patented technology may be inadvertently (by mistake) or knowing (by necessity) incorporated into a standard

Patent law and technical standards

- Patent owner is entitled to charge licence fees (or royalties) whenever those who implement the standard use the patented technology
- SSOs ask patent owners to licence on “reasonable and non discriminatory” (RAND) terms
 - But what does RAND actually mean?
 - Example: CSIRO and wifi technology

Open Standards

- Increasing recognition of the importance of “open standards”
- But there is no common understanding of what “open standard” means:
 - Open and transparent development process?
 - Open from a legal (IP) perspective?
 - Standard is openly available to access – specification document available freely or at nominal charge?
 - No or few constraints on reuse?
 - Patent rights licensed on RAND terms?
 - All of the above?

Moving towards open standards

- Some steps that we believe will encourage the development of more open standards:
 - Adopt clear policies and definitions
 - Utilise multi-tiered licensing approaches
 - Engage in strategic management of legal rights
 - Explore open content licensing
 - Governments should endorse open standards and engage in education about standards

Adopt clear policies and definitions

- SSOs should adopt Copyright and Patent Policies that clearly set out:
 - What the SSOs considers to be an “open standard” and how “open” the relevant standard is under copyright and patent law
 - Whether participants are required to disclose patent interests; consequences of failure to disclose; on what terms a patent holder will be required to licence their patent; what happens if the patent holder refuses to licence their patent on reasonable terms
 - Includes what the SSO considers to be RAND terms and what is expected from the patent holder

Adopt clear policies and definitions

- SSOs should adopt Copyright and Patent Policies that clearly set out:
 - How copyright material contributed by participants is dealt with; what rights are granted in the final standard specification and on what conditions these rights are granted; what fees will be charged for access and use of the standard specification; whether users are permitted to annotate or modify the specification; and how open content licences are dealt with

Utilise multi-tiered licensing approaches

- Special categories of users:
 - Participants and especially participants who have contributed copyright material to the standard specification
 - Government and public bodies who have contributed publicly funded material
 - Users who do not have the economic means to pay licence fees
- May be offered special licence terms:
 - More extensive rights of access and use; and/or
 - Charged no or significantly lower licence fees

Engage in strategic management of legal rights

- Participants should:
 - have a clear understanding of the SSO's Copyright and Patent Policies
 - ensure that their understanding of “open standard” and “RAND” accords with the SSO's
 - understand what legal conditions attach to their participation in the standard's development
 - know the terms on which they want to contribute material to the standard

Engage in strategic management of legal rights

- Users should:
 - Understand what rights they are being granted to use the standard (i.e. what they can do with the standard) and any conditions attaching to that use
- Organisations may wish to adopt their own policy that they will only contribute to the development of open standards

Explore open content licensing

- Open content licensing involves making copyright material available on liberal terms to ensure that it is readily accessible and available for reuse
 - For example, Creative Commons licences
- OCL can be applied to material contributed to a standard specification by participants, or to the final standard specification

Explore open content licensing

- OCL are a potential mechanism for ensuring that open standards remain open from a copyright perspective
 - E.g. via the Share-Alike term
 - The CC BY-SA licence has already been used by IEEE for its XSD Schema and Microsoft for its RSS “Longhorn” Simple List Extensions specifications

Government support and education initiatives

- Governments can endorse the development of standards that are “open” both in terms of development process and legal rights of access and reuse
- Governments can engage in education initiatives about the importance of standards to promote interoperability and innovation and the legal implications surrounding standards

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