STATEMENT BY THE
FREE SOFTWARE FOUNDATION EUROPE (FSFE)
TO THE 13th SESSION OF THE
STANDING COMMITTEE ON THE LAW OF PATENTS (SCP)
(Geneva, 23-27 March 2009)

Mr Chairman,

We consider it a fortunate coincidence that this SCP discusses the issue of standardisation and patents today, on Document Freedom Day, the global day for document liberation and Open Standards during which hundreds of groups around the world highlight the role and impact of Open Standards for interoperability, competition, innovation and political sovereignty. Please allow me to also clarify that our comments on the report arise from our background in Information Technologies, and should be taken in that context.

Document SCP/13/2 provides a good starting point and correctly identifies the central role of standards in enabling economies of scale and competition on a level playing field. This could be supplemented with a perspective on innovation facilitated through standards by providing a broad basis for future innovation ideally available to all innovators. All of these benefits depend upon wide public access of standards which the British Standards Institution (BSI) defines as "*an agreed, repeatable way of doing something. It is a published document that contains a technical specification or other precise criteria designed to be used consistently as a rule, guideline, or definition. [...] Any standard is a collective work. Committees of manufacturers, users, research organizations, government departments and consumers work together to draw up standards that evolve to meet the demands of society and technology. [...]*"

Standards always imply wide public access, an openness of the standard in both setting of the standard as well as access to the standard. It is therefore important to realise that an Open Standard would necessarily have to meet higher standards of openness than those provided by article 41 of document SCP/13/2. It is furthermore important to add that "de facto standards" are typically not standards, but vendor-specific proprietary formats that were, as the secretariat correctly pointed out in the introduction to this discussion, "strong enough to impose themselves on the market." It is for this imposition on the market that "de facto standards" are commonly used to describe monopolistic situations and corresponding absence of competition, which conflict with the basic purpose and function of standards.

It was during the referenced November 2008 workshop by the European Commission that Mr Karsten Meinhold, chairman of the ETSI IPR Special Committee highlighted that "*IPRs and Standards serve different purposes: IPRs are destined for private exclusive use, Standards are intended for public, collective use*". While both exclusive rights and standards are regulations motivated by the public interest, upholding one necessarily deprives the other of its function. This fundamental conflict is the basis for the common practice of participants in standardisation to assign copyright to standardisation bodies to facilitate broad usage of resulting standards.

There is no such common practice in standardisation with regards to patents, leading to a variety of attempted remedies, some of which are described in the report. It would be beneficial for the report to also add approaches such as public patent grants for standards, like the Adobe Public Patent License on the PDF standard, or the Sun OpenDocument Patent Statement. The grant by Adobe in particular is of interest for its retaliation clause against legal usage of patents against wide adoption of the standard.

The report could furthermore be expanded with an assessment on the effectiveness of the various attempted remedies, most of which in our experience fail to provide a level playing field for competition.

As the necessity for approaches such as ART+P, advocated for instance by Nokia, demonstrates, accumulated reasonable royalties can easily become exorbitant. Or, to quote Ms Susy Struble of Sun Microsystems from her presentation at the United Nations Internet Governance Forum (IGF) in Athens: *"One person's RAND is another person's bankruptcy."*

The lack of reliability of assurances to license upon request, such as (F)RAND, and the lack of safety from third party patent claims after a standard has been published and become the basis of the market, are some of the reasons for the current crisis in IT standardisation, which is discussed also with contributions by various large U.S. Corporations, such as IBM, Google, Oracle, Sun Microsystems and Red Hat. For further reference we recommend the work of the Open Forum Europe (OFE) industry association and its Special Interest Group on Standardisation.

Other issues are raised by the system inherent bias against Small and Medium Enterprises (SME), which constitute the overwhelming majority in many economies, including the European Union and most developing nations as well as countries in transition. Current practice of licensing conditions furthermore excludes whole sectors of the market from implementation of some standards. The most severe example for this practice is the exclusion of innovation, products and companies based on the Free Software model, also known as Open Source.

In November 2008 Gartner projected that all companies will be using software based on this model by November this year. Exclusion of an entire and central sector of the IT industry seems both unreasonable and discriminatory, and is arguably in violation of the Common Patent Policy of ITU-T, ITU-R, ISO and IEC, which states the principle that "*a patent embodied fully or partly in a Recommendation | Deliverable must be accessible to everybody without undue constraints.*"

FSFE believes that it would be most useful for the SCP to analyse the various approaches on the grounds of their inclusiveness of the entire IT industry and all innovators, and identify the minimum requirements that are necessary to uphold standards as drivers of competition, innovation and economies of scale.

--- Statement by Georg C.F. Greve, Free Software Foundation Europe, President