GESMER UPDEGROVE LLP
Attorneys at Law

Consortium Standards Bulletin

*A **ConsortiumInfo.org** publication*

MAY 2007
Vol VI, No. 5

THE ENVIRONMENTAL ISSUE

Consortium Standards Bulletin is a free monthly electronic Journal sponsored by the Boston law firm of Gesmer Updegrove LLP. The current issue of the ***CSB*** and a subscription form may be found at www.consortiuminfo.org/bulletins. Questions or comments about these articles, the ***CSB*** or ConsortiumInfo.org may be directed to Andrew Updegrove at updegrove@consortiuminfo.org.

EDITOR'S NOTE

STANDARDS AND THE ENVIRONMENT

Standards are valuable tools, but standing alone they are value neutral.

That is to say, while public safety, the environment and other vital societal interests cannot be adequately protected without the use of standards, in and of themselves standards are simply objective measuring sticks. Absent an explanation of how a given standard relates to the big picture, it is only a collection of meaningless numbers and words.

Today we are faced with extremely complex concerns involving the natural world. Many of these concerns are of our own making, and arise from our ongoing abuse of the environment. These threats include the impact of global warming, the depletion of natural resources and the prospect of accelerating species extinctions. Our ability to assess our success or failure in addressing each of these conditions will be dependent upon metrology – the science of measurement – and the use of standards. Using the first tool we can measure rates of change, and through the second, we can apply the limitations that need to be imposed in order to reverse those changes.

I last wrote about standards and the environment in October of 2005, in an issue I called Standards for a Small Planet. Since then, global warming has become universally accepted as a scientific reality, and evidence of its impact has become increasingly evident. That impact has passed from the theoretical to the everyday, and the media is replete with news of the shrinking Arctic ice cap, melting permafrost throughout Alaska and Canada, and increasing desertification in China and elsewhere, among other changes with serious consequences.

The advent this week of the annual Group of 8 talks is an appropriate time to revisit environmental issues of global scope, and I expect to write about the development and use of standards in connection with environmental and resource issues with increasing frequency in the future. There is a great deal of important standards-related work being done in areas such as biofuels, alternative energy, and renewable resource management upon which to report, as well as much work that remains to be done.

But in this issue, I am taking a step upstream from the technical domain to address some of the larger questions that must be answered before real progress can be made in areas as challenging as global warming. Questions such as where the political resolve will come from to impose limitations that may also impact economic growth, whether existing domestic and international governmental structures are adequate to enact and enforce such restrictions, and whether citizens will be willing to accept limitations on their way of life.

I begin in my ***Editorial*** by suggesting that we would have a healthier attitude towards natural resource usage if we regarded ourselves as merely tenants upon the land. Perhaps we would be less heedless in our use and abuse of precious resources if we did not regard ourselves as their true owners.

I expand on this property theme in this month's ***Feature Article***, by suggesting a radical way of reorienting our thinking about legal ownership rights. While it would be naïve to expect that such a fundamental shift in laws could be enacted in practice, applying these changes in our thinking could lead us to be more willing to make the types of difficult and non-traditional decisions that may be necessary to address the otherwise intractable and serious problems we face today. Those decisions will inevitably require a degree of international cooperation that

has rarely been achieved in the past, and perhaps unprecedented cessions of national prerogatives as well.

In my ***Standards Blog*** selection for this month I depart from this issue's theme to provide some insight into one of the bigger technology stories in May: Microsoft's assertion, in a lengthy interview in Fortune Magazine, that it owns 235 patents that are infringed by Linux, OpenOffice and other important open source software, and its stated desire to use them to reap royalties from the marketplace. The story is perhaps less significant, in what it says about Microsoft's specific strategy than for what it reveals about the practical limitations that market realities impose today on the ability of a patent owner to assert its intellectual property rights.

I conclude in my ***Consider This*** piece with a meditation on property rights in some of the grandest resources of which we are stewards. This issue came together in my mind as I walked among the redwoods of California's Big Basin State Park, as apt a place as one might find to think environmental thoughts. It takes over four hundred years to produce a grove of mature redwoods. But a property owner can condemn such a forest with the stroke of a pen. 96% of all old growth redwoods have already met this fate, and only 2.5% of those that remain are protected. What rights, if any, may the wider world claim to preserve this species, based upon the common heritage we share in this unique and endangered resource?

The next time you think of your children, and of your children's children, consider what our responsibilities regarding such natural resources should be.

As always, I hope you enjoy this issue.

Andrew Updegrove
Editor and Publisher
2005 ANSI President's Award for Journalism

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EDITORIAL

THE "LANDLORD'S MAN" AND THE CONSERVATION OF NATURAL RESOURCES

Andrew Updegrove

The most intimidating and intractable issue the leaders of the Group of 8 will face when they meet in Heiligandamm, Germany this week may well be global warming, a reality that even the United States government no longer disputes. Absent from the meeting room will be China, which this year may surpass the United States as the world's most prolific emitter of greenhouse gases.

In the days immediately preceding the meeting both the United States and China made significant statements on the issue: the Bush administration proposed a remedial plan that would lie outside the Kyoto Protocol framework already agreed to by virtually every nation in the world except the United States. And China has adamantly rejected the ability of other nations to demand caps on the emissions of developing countries, including itself.

China, of course, is not even a member of the Group of 8. But the elephant in the meeting room will not so much be the inadequacy of the "first step" targets of the Kyoto protocol, or the refusal of the United States to ratify its participation in that accord, or even the absence of China at the table. The real issue is the lack of any legal structure within which the nations of the world can address global resource issues with the authority and certainty that global warming demands.

The problem is two fold: structurally, there is no existing mechanism that can force any nation to constrain itself except through voluntarily entering into a treaty. Nor is there usually a way to enforce treaty obligations that are not met. Since the First World War and the subsequent failure of the League of Nations, governments consistently refused to compromise their sovereignty in favor of anticipatory, binding joint decision-making, instead of traditionally retroactive, elective ratification.

The second leg of the problem has been recognized at least since the days of Aristotle, who recognized the following sad truth in his *Politics*: "that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest, and only when he is himself concerned as an individual."

Today, we refer to the manifestation of this human characteristic as the "tragedy of the commons." Or, more starkly stated, the impulse to get it while you can, before the other guy takes it first.

These two issues are inextricably linked, because by definition the tragedy of the commons cannot exist unless there are at least "two guys" that have the opportunity to exploit the same resource. But if a resource with multiple, non-custodial owners is subject to the control of a single governing body, then there is hope. Existing governmental dynamics, while imperfect, can be brought to bear to prevent over exploitation by multiple citizens. If the competing resource exploiters are nations, however, then the common resource is placed at great risk.

Consider, for example, the history of domestic environmental protection laws in the United States, in contrast to progress on global warming. Air, water, and endangered species, among other commonly shared resources, are all now protected by strict laws, backed by severe (and often criminal) penalties. What allowed effective action to follow public recognition of the gravity of these problems was the feasibility of collective action through a single guardian of the commons.

It is true that progress has already been made on global warming through traditional mechanisms, both international (Kyoto) as well as private (many corporations are now adopting "green" policies independent of government requirements). These efforts will likely continue and even increase. But the urgent question remains whether such necessary actions will be sufficient. In the fullness of time, if not our individual lifetimes, the output of green house gases must decrease on an absolute basis, rather than merely slow in growth on a relative basis. Otherwise, dire consequences will only be delayed, rather than

avoided. In such an event, the "the other guys" that we beat to the commons will simply be our children, rather than ourselves.

When referring to natural resources, it is fashionable to speak of ourselves as "holding them in trust" for future generations. But this concept has been demonstrably inadequate to protect resources from abuse, just as unsupervised trustees are too-often discovered in the real world to have violated their trust.

One way to envision a solution is to consider ourselves to be not the owners, but simply the tenants, of the land we possess and the climate we share. Tenants are required to maintain the leased premises in good condition, and may exercise only those rights that are expressly granted in the lease. In the case of property with commercially valuable renewable resources, the lease terms invariably either bar the usage of such resources entirely, or prohibit their utilization in excess of sustainable levels.

John Locke suggested that a similar approach should apply to natural resources held in common, recognizing an obligation to maintain "enough, and as good, left in common for others" after extracting one's own share of the common pie.

The problem is not, of course, that the moral obligation proposed by Locke is disputed in principle. What is lacking is the means – and the common will - to abide by it in practice. Perhaps what is needed is the presence of another incident of the example of tenantry: that unpopular figure of the agrarian past, often referred to in history and literature simply as: "the landlord's man."

The landlord's man functions as the eyes and ears of the often-distant landlord. The landlord of literature, of course, is the plutocrat that neither reaps nor sows, but nonetheless harvests a piece of the value created by the sweat of the farmer's brow. The heartless absentee landowner cares not a whit for the welfare of the tenant, but only about the preservation of the value of his land. The role of the landlord's man is not only to collect the rent, but also to preserve the intrinsic value of the landlord's land, cottages, hedgerows and, should the landlord be a sportsman, his foxes and fish as well.

Perhaps what is needed today is an international landlord's man with the authority and (even) the coldness of the crofter's nemesis of yore. Indeed, we would be better served if such an authority existed, and if that authority came from a global authority in which we were represented, but from which we could not withdraw. Otherwise, the wastage of precious resources and the acceleration of global warming will go unchecked, and the property of the landlord will suffer great harm.

That would be a common tragedy indeed. Because after all, we have met the landlord – and he is us.

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FEATURE ARTICLE

PROPERTY RIGHTS IN THE AGE OF GLOBAL WARMING: A REEXAMINATION

Andrew Updegrove

Abstract: *The lesson of the "tragedy of the commons" is that property that is communally owned is doomed to over-exploitation. This often observed phenomenon is reinforced by current property laws and concepts. The challenges presented by global warming, the overexploitation of natural resources, and other environmental abuses that can only be solved through international cooperation underlines the urgent need to find new means to avert not only these but future common tragedies as well. In this article, I suggest ways to reorder our concepts regarding property that may, if embraced, make it more feasible for nations to realize more effective solutions to these seemingly intractable issues.*

Introduction: To date, existing governance systems have struggled in their efforts to address challenges such as resource depletion, accelerating species extinction, and global warming. In each case, these complex and difficult problems are placing unprecedented demands on the mechanisms available to deal with them. One reason for this difficulty is that in each of these examples, the traditional balancing of interests between individuals, society, and nation states does not easily permit the enactment of the types of laws needed to provide effective solutions.

In the case of resource depletion, global resources may at the same time be essential, finite, scarce, and extant only within a small number of countries that are often poor, and sometimes ruled by corrupt regimes. In such a situation, a consumer country has no way to enforce conservation on a country within whose borders those resources exist. And more often than not, the citizens of the consumer country are more interested in current gratification than in long-term conservation as well.

Similarly, in many countries around the world, the individual owner of the land upon which an endangered species lives cannot be compelled to protect (or even prevented from destroying) that species. In some countries where laws do exist to protect the envi ronment, inadequate enforcement and the daily realities of grinding poverty may leave ostensibly protected habitat vulnerable to commercial logging and harvesting by individuals for firewood. And despite the fact that all countries throughout the world share the same atmosphere and planet and that most have ratified the Kyoto Protocol, there is no way for the signatories to that treaty to compel the United States, which is the largest emitter of green house gases, to abide by the same rules.

At the national level, one reason why environmental abuse can, and does, occur is because the laws applicable to real property (i.e., land) recognizes more rights in the owners of such property than in those that may be affected by an owner's use of the same property. The law does, it is true, recognize the ability of government to restrict such rights in various ways. In recent times, laws have been passed in the United States (for example) to limit further losses of wetlands, and to protect the habitat of endangered species.

But the ability to enact and enforce such laws is limited to individual political units, while the threat to be addressed may extend outside, or lie entirely beyond, the borders of those affected. Over the last two decades, for example, individual American States as well as nations have clashed over the impact of acid rain on the lakes and ponds of the down-wind party to the argument. And today, entire Pacific island nations are helplessly witnessing the rise of waters that may literally submerge them. In each case, the impact of the emissions of the affected party may be inconsequential – as is also its ability to curtail the conduct that threatens it.

The degree of restriction needed to address such challenges may also extend beyond the political willpower of a democratically elected government, even when the problem to be addressed lies entirely within the borders of the political unit in question. An example of this dynamic can be found in continuing rampant population growth in parts of the United States that are rapidly depleting non-replenishing "fossil"

groundwater reserves deposited during the last ice age. In large part, such growth occurs because the pressure from developers and other businesses is greater than legislators are willing, or even inclined to withstand.

The fundamental clash once again involves the balancing of property rights, and the identity of the governments that are empowered to restrict and act in relation to those property rights. And again, it may prove to be difficult, or even impossible, for effective solutions to be found unless there is an incremental rebalancing, and in some cases a fundamental restructuring, of such rights.

In this article, I will suggest that increasingly serious environmental issues require us to revise our thinking in relation to both domestic as well as international law regarding the ownership and use of real property. I will also suggest a conceptual framework within which the rights of individuals, societies and nations may, I believe, be better and more effectively balanced.

Property law dynamism: Property rights are today carefully defined and codified in the written statutes of virtually every nation on earth. With rare exceptions (e.g., Cuba), these rights are based upon substantially the same macro political theories. Even where this is not the case (e.g., China), the trend of law is increasingly towards the global norm. And while the political philosophies of individual nations may vary on where the balance should be set as among the rights of state, society and individual, the laws relating to property ownership do not vary significantly between, for example, a left-leaning Scandinavian country and the more "rights of the individual" focused United States.

This consensus of national laws might suggest an attainment of legal perfection, were it not for the fact that the current regime of property laws manifestly fails to meet the needs of all citizens in important respects. In the case of real property, the redistribution of land continues to occur in some countries only through extraordinary and deeply troubling means (most recently in Zimbabwe). In the case of intangible property, existing copyright laws are proving inadequate to address (or at least enforce) traditional property rights in content during the age of the Internet. At the same time, and not coincidentally, wealth in many countries (including the United States) continues to become more concentrated in the hands of the rich at the expense of the poor.

The state of property law can properly be seen as, at most, a best approximation of the rules that a given society at a given point in time deems to be both necessary and acceptable to keep the peace, and to order its internal affairs.

In fact, property rights have been the subject of ongoing evolution throughout historical times. In all countries, individual (as compared to communal) rights in land were almost certainly unknown until indigenous cultures abandoned hunter-gatherer lifeways in favor of agriculture. In some societies, this transition did not occur until the twentieth century, and even in the sparsely populated Europe of the Middle Ages, large sections of territory were known only as "the Wild," with ownership in any individual - even the King - being notional at best. As recognized by American anarchist Benjamin Tucker, the concept of "property" does not become meaningful until the property in question becomes scarce enough to attract competition over its control.

Over time, consensus over property law was legally codified, but the duration of that consensus has decreased over time. Witness, for example, the longevity of the following property law regimes: Roman law (maximally, 753 BC to 476 AD), Feudal (some hundreds of years – there is no consensus on its exact duration), and nationally implemented communism (from first real-world implementation until the beginning of its collapse, less than 70 years).

Indeed, entirely new forms of property rights have only become codified into law in comparatively recent times. Patent laws were first enacted in European nations in the 15th century, while the need for the law of copyright did not, as a practical matter, arise prior to the invention of movable type (the first copyright law generally acknowledged as such was England's Statute of Anne, enacted in 1710). Similarly, microprocessor designs ("mask works") were first protected by statute in the United States in 1984, and laws relating to domain names are still evolving rapidly, as is the patent law as applied to software and genomics.

Nor have the political and economic theories defining and justifying property rights been static throughout modern times, with significant differences to be found among philosophers and theoreticians as diverse as Thomas Hobbs, John Locke, David Hume and Karl Marx – to name only a very few.

In consequence, the state of property law can properly be seen as, at most, a best approximation of the rules that a given society at a given point in time deems to be both necessary and acceptable to keep the peace, and to order its internal affairs. The logical extension of such a conclusion is therefore that as conditions change, so must property laws, or existing laws will become progressively less effective, and society will become less stable and more at risk.

Rights of property owners: At the most basic level of analysis, determining the parameters of property rights involves making a number of determinations, including the following (focusing primarily on rights in real property):

- ***Who is the owner?*** Corporate ownership is a comparatively recent legal innovation, while communal, state and individual ownership are ancient. More recently, the concept of ownership by no one if not by everyone has been recognized. For example, the oceans, other planets, space and Antarctica have all been designated by treaties and conventions as being areas where the signatory nations have agreed that national ownership cannot be asserted (or where such rights have been limited) and where various types of activities are prohibited.

- ***How long can ownership be maintained?*** Ownership of real property can be perpetual, subject to taking by the state for public purposes under applicable eminent domain laws. Other types of property, such as intangibles, have other rules: the copyright in a work under current law is sustainable for the life of the creator plus a designated number of years, after which it passes into the public domain, and patents can be enforced for a shorter period of time. But a trademark can be owned in perpetuity.

- ***What can the owner do with the property?*** At the highest level, property rights include the right of possession and the right of transfer. As a practical matter, the starting proposition is generally that an owner can do anything with its property that is not prohibited by law or restricted by a right granted to a third party, and can transfer that property to anyone at any time.

- ***What can an owner not do with its property?*** Rights in property can be restricted through various means. Zoning laws restrict the uses to which land can be put, easements can be granted to third parties that convey rights that may (for example) restrict development, permit utilities or access routes to be placed across the property, and to grant exclusive rights to extract specified, or all, minerals. In each case, although the owner remains entitled to freely transfer the property in question, these restrictions will "run with the property," and bind successor owners to the property, so long as appropriate easements have been properly recorded in real property registries. Government imposed restrictions, such as zoning laws, burning bans, and watering restrictions require no such recordation.

- ***Who has the power to restrict a property owners rights?*** There are three types of parties traditionally entitled to affect a real property owner's exercise of its rights: governments (national, state and local), third parties to whom the owner has granted rights of use or enforcement, and abutting or nearby neighbors that bring claims under laws protecting them from "nuisances" or other abuses occurring on the land of another that affect the use, value or enjoyment of their own property.

- ***What are the limits, if any, on those restrictions?*** Property rights are precious, and are often protected not only by statute, but also by national constitutions that impose limits on the degree to which even governments can restrict them. For example, the 5th Amendment to the United States Constitution provides that: "No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation," a limitation extended to the several states through the 14th Amendment, which provides that: "No State shall…deprive any person of life, liberty, or property, without due process of law…"

The current problem: As can be seen from the above brief summary, legal systems do not generally recognize the rights of either a property owner or the state as being absolute. Instead, an active and dynamic balancing occurs at multiple levels: a constitution imposes gross parameters that can only be changed by overwhelming national consensus, while governments are free to react to current developments through the enactment, amendment, and retiring of laws within these constitutional parameters, and individuals can utilize the courts not only to enforce the laws of nuisance and their rights under easements, but are also entitled to challenge the application or constitutionality of the laws themselves.

The result is a system that is subject to constant organic, but usually incremental, change. Under normal circumstances, this type of gradual evolution is adequate to meet the needs of society. But when the demands upon that system change dramatically, what then?

Given that the Kyoto Protocol, with all of its flaws, represents the ultimate mechanism to address global warming that existing systems are capable of delivering, what is to be done?

The challenge of global warming provides an instructive example of how current systems can be inadequate to provide effective solutions to natural resource concerns. While global warming is now accepted as a scientific fact, the two largest contributors to global warming continue to be largely unrestricted: the United States, because it has refused to become a party to the Kyoto Protocol, and China because it is subject to far less restrictive terms, in order to permit it to more easily achieve equal economic status with those countries that have created the lion's share of the greenhouse gases already released into the atmosphere. Moreover, there are no punitive consequences provided for those countries that fail to meet the targets required by the treaty.

Meanwhile, global warming continues apace. Given that the Kyoto Protocol, with all of its flaws, represents the ultimate mechanism to address global warming that existing systems are capable of delivering, what is to be done?

Let us consider the same property related questions discussed above in this context in search of an answer.

Who is the owner? Now that units of atmosphere with acceptable levels of green house gases have become "scarce," to apply Tucker's analysis, a property interest should be recognized in those that wish to protect themselves by avoiding further increases in such gases. But before there can be a protectable interest, there must be a valid and acknowledged authority to recognize that interest, and to regulate it. As a result, it becomes necessary to define who is the "owner" of the atmosphere, before we can find a solution.

Now that global warming has been identified, laws relating to green- house gases will need to exist for so long as a global warming threat remains. In other words, indefinitely.

It would appear obvious that if anyone can claim to have an ownership interest in the atmosphere, then everyone must have a claim to be such an owner. It next logically follows that if everyone owns the atmosphere, then everyone should have an equal right to use the atmosphere, and have an equal say over how it should be protected. Since the atmosphere is mobile, and a unit of atmosphere over Siberia today may be over Montana a few days later, then it must be true that everyone has an undifferentiated, joint ownership interest in the entire atmosphere.

There are more subtle, but important, ownership question as well: Are individuals the personal owners of the atmosphere by virtue of "homesteading" their personal space, with their governments acting merely as their representatives for practical purposes? Or is a nation the pro rata proxy owner of the atmosphere on the behalf of all of its citizens, in the manner of public lands held on behalf of all?

These questions are also meaningful in constitutional terms, since it could be argued that the U.S. government could not permit an individual's property interest in the atmosphere to be damaged by a corporation" without due process of law," or perhaps that in order for the government to issue an emissions permit to a power plant, the plant owner would first be required to pay "just compensation" to all individuals whose allocable shares of the atmosphere might be damaged by the operations of the new plant.

How long can ownership be maintained? Given that one cannot opt out of the effects of global warming (or breathing, for that matter), rights in the atmosphere are presumably perpetual. Now that global warming has been identified, laws relating to greenhouse gases will need to exist for so long as a global warming threat remains. In other words, indefinitely.

What can the owner do with the property? In the case of global warming, there are two property-related issues: what can be done to the atmosphere itself, and what can one do on one's property that would affect the atmosphere.

How does one value the impact of global warming? Does it merit action, and mild sanctions, equivalent to the penalties relating to excessive run off of fertilizers that cause algal blooms in waterways, or the more severe penalties that might relate to toxic wastes that can cause serious harm to health?

With regard to the first property question, traditional law is complex, but for current purposes suffice it to say that a "tenant in common" can exercise full property rights with respect to that property, subject to certain duties to the co-owner discussed below. With respect to the second, the law is clearer, since laws relating to the regulation of polluters are well developed in many countries. This assumes, however, that efforts to stem global warming are justified and addressed in the same way that traditional pollution has been addressed.

What can an owner not do with its property? A co-owner has various rights against a co-owner under traditional law, including not only the right to recover damages to the value of its property interest, but also the right to share in the income produced by that property (raising interesting questions as a global market in carbon credits begins to grow). Depending upon who is deemed to be the owner of what, it becomes fair to ask whether the owner of a Prius could have a monetary claim for damages against the owner of a Hummer (or its manufacturer) – and whether someone who doesn't own a car at all could bring a claim against the otherwise ostensibly "green" owner of the Prius.

Who has the power to restrict a property owner's rights? Global warming obviously requires global remediation. But there is no global body that represents everyone. The United Nations is the closest approximation of such an authority, but the United Nations has no power to compel any member nation to become a signatory to a treaty, and enforcement mechanisms under existing treaties have all been weak to nonexistent.

Moreover, unlike water pollution or most air pollution, the legal basis for regulating emissions that lead to global warming might also be seen to be new and unique. Global warming, after all, is not "local" to either the polluter or the polluted, nor is the point impact of greenhouse gases. In fact, the deleterious effects of greenhouse gases does not arise until years later, when those gases become globally dispersed at high altitudes.

What are the limits, if any, on those restrictions? How does one value the impact of global warming? Does it merit action, and mild sanctions, equivalent to penalties relating to excessive run off of fertilizers that cause algal blooms in waterways, or the more severe penalties that might relate to toxic wastes that can cause serious harm to health? Will the answer to this question given by someone the lives, for example, in coastal Bangladesh or Point Barrow Alaska, on the one hand, and Geneva, Switzerland or Denver Colorado, on the other, be likely to vary?

A framework for a solution: More effective solutions might be found if several core tenets relating to property rights were to be significantly modified.

Changing the rules: Those differences would result from making several radically different assumptions.

- ***Deal with title and possession separately:*** Only the rights appurtenant to the possession of real property need be affected by new rules. No change would be needed to the right to own land, or to exclusively enjoy the economic returns from permitted uses of that property, or the right to ultimately transfer that property. But the uses to which that property could be put would

become subject to new levels of regulation to a greater or lesser extent, depending upon the resource or concern at issue.

- ***Ignore political boundaries:*** Resource boundaries are usually only coincidentally the same as political boundaries. As a result, those that have an interest in a resource, those that are likely to affect a resource, and those that may be impacted by the abuse of that resource will only by accident fall neatly within the boundaries of any single governmental authority. Consequently, existing legal authorities may be ill suited to make the best decisions relating to the resources that lie within their boundaries, or unwilling to collaborate on common solutions with neighboring countries, especially at times when relations between them are strained. Similarly, they may not be the best motivated to enforce those decisions.

- ***Invert the concept of ownership:*** There are already so many exceptions to the unfettered right of ownership that traditional concepts may be more misleading and harmful than instructive and useful. A given piece of property may already be subject to zoning restrictions, burning bans, watering bans, historic preservation restrictions, and even gated community restrictions on whether children can visit for extended period of time, leaving very little freedom to the individual owner at all.

  At the same time, local opinions relating to rights of use in public as well as private land can vary dramatically. For example, those that live in the Pacific northwest of the United States may feel that their right to lumber public lands cannot be taken away, because it would decrease job opportunities. Others living in many western American states believe that their right to raise cattle on leased public lands should be inviolate, lest the character of their communities change. Similarly, while it is considered to be perfectly acceptable to hike on ranched Bureau of Land Management land in Arizona, some ranchers that lease BLM land in New Mexico believe that it is within their rights to greet "trespassers" with a shotgun in hand.

  There are already so many exceptions to the unfettered right of ownership that traditional concepts may be more misleading and harmful than instructive and useful.

  In fact, it might be more realistic and appropriate in a world supporting over 6 Billion people, and thousands more every day, to invert the concept of ownership. Instead of stating that, "An owner may exercise all rights except for those that have been legally restricted," the law might better provide instead that, "An owner has only those rights that have been legally and locally recognized." Such rights would never logically include the right to deplete or pollute groundwater, apply fertilizers or chemicals that can seep into aquifers to be carried into public waterways by runoff, cause air pollution, destroy scenic vistas, threaten endangered species, or curtail access to public lands, except to the extent that they had been explicitly negotiated and permitted in a non-discriminatory fashion. And yet today, many of the actions just named can be taken by landowners to a greater or lesser extent without violation of current law.

- ***Regard ourselves as co-owners:*** The uses that can be made or based upon land are having greater and greater general impact as population increases, and densities increase. It is common to say that we hold land and resources "in trust" for those that are yet unborn, but such statements are at best expressions of good intentions by those that feel a moral responsibility. Resources would be better protected – as would be the interests of our descendants – if future citizens were regarded as having current legal rights as co-owners, and if government was obligated to protect these rights, then much more meaningful resource protection systems might be designed and enforced.
- ***Applying these rules:*** If these new rules were applied to the questions posed earlier, surprisingly different answers would be suggested, as well as quite different legal rules, authorities and remedies.

- ***Who is the owner?*** Applying the above concepts to natural resources would result in a very different regulatory model. For example, with respect to water pollution and aquifer depletion, the "owners" of that water would be those that live within the watershed in question. No one would have the right to pollute the water in the watershed absent the permission of the watershed

authority (which might be international – rather than local, if the watershed spanned a national border), and all would have to agree on how the right to tap the underlying aquifer would be apportioned once desired usage exceeded the recharge capacity of the watershed. In some cases, water sharing treaties already exist, such as the accord entered into in 1944 between Mexico and the United States, relating to the waters of the Colorado, Tijuana, and Rio Grande Rivers.

With respect to air pollution, the owners would be those affected under normal climactic conditions. Those living in Pennsylvania, for example, would therefore have legal rights to object to industrial pollution emanating in Ohio that could cause acid rain, and a legal mechanism would need to be provided to protect the rights of downwind interests (e.g., the legislature of Ohio would be bound to give due regard to a petition brought by the Pennsylvania environmental protection authorities, or those same authorities could bring suit in a Federal court to bring redress).

But with respect to global warming, the same Pennsylvania citizen would look to a global authority for protection. As earlier suggested, ownership of the atmosphere and the oceans would be universal, and legal mechanisms would be needed to permit anyone, anywhere, to protect their interests by bringing suit against a point source.

Who would be included in the definition of "owner" of a certain resource would necessarily reflect the beliefs and values of the times and the societies involved, and the answers would therefore change and evolve over time. For example, should residents of Tennessee have an equal say with those living in towns adjacent to redwood groves growing on federal land in California, when it comes to logging policies relating to the same trees? Should the answer differ if those trees were growing on California state lands, despite the fact that redwoods can be regarded as part of our common cultural heritage? And if citizens in Tennessee lay claim to heritage rights in California redwoods, should citizens of Portugal have an equal claim to their preservation as well? Should it be possible to create a World Heritage Site – even without the consent of the country within which it is located – and to bind the host country to protect that site once it was created?

- ***How long can ownership be maintained?*** The temporality of ownership would be radically different, if the rights of future generations were to be legally recognized. Perhaps just as "strict liability in tort" laws have extended liability in the United States to everyone in the production and distribution chain of consumer products, and U.S. "Superfund" laws render anyone that has handled hazardous wastes liable for cleanup costs, regardless of fault, future generations might be entitled to bring claims against then current owners of property that had been exploited in the past in order to remediate the damage done. The effect would be to curb current abuses, lest the resale value of property be negatively impacted.

- ***What can the owner do with the property?*** Only that which is allowed under applicable statute and specific permits. In effect, a better analogy would be to think of the owner as a lessee that is permitted to enjoy the use of the property subject to the reserved rights of the lessor.

- ***What can the owner not do with its property?*** No uses would be permitted that would (a) depreciate the value of the interests of co-owners of the same property, (b) harm third parties, or (c) adversely affect the interests of future generations. To the extent that impermissible uses were engaged in, those damaged could bring suit for recovery, whether the affected party was a neighbor, or in some cases a resident in a foreign country. International treaties would secure these rights.

- ***Who has the power to restrict a property owners rights?*** Because resource boundaries would rarely match political boundaries, new governmental bodies would be needed, with new powers. Depending on the resources involved, those bodies would necessarily be local, regional, national and international. Existing governmental units would presumably serve as, or appoint, representatives to international bodies, and would also be bound to enforce the decisions and laws enacted by those bodies, acting as their agents.

- ***What are the limits, if any, on those restrictions?*** Where the resources or impacts in question were international, these limits would presumably be defined in the treaties creating those bodies.

Case study: a new approach to global warming: Applying the approach above to global warming would yield a very different result from the Kyoto protocol. The first step would of course be by far the most challenging: a sufficient number of nations would need to enter into a treaty under which they agreed in advance to abide by the eventual decisions made, or at least be willing to ratify the treaty upon completion. That treaty would provide for the following:

- ***Binding application:*** Because ownership in the atmosphere would be acknowledged to be universal rather than national, the legal authority of a global body would be appropriate and acknowledged. The rules passed by that body would be binding upon all signatory countries, and new rules passed, and amendments to old rules, would be similarly binding.

- ***Effective and representative governance:*** The global body would require a structure and rule set that was recognized as being representative, fair and effective. This would provide a novel, radical and difficult challenge, but one that would be no more so than the founders of the United States faced when they sought to unite thirteen colonies with very different interests, and had no more recent European model to rely upon than that of ancient Greece.

- ***Right of appeal:*** Just as the Founding Fathers balanced the powers of the Presidency against those of Congress, and constrained the authority of both through the Supreme Court, an appeals mechanism would be required to provide reassurance to those called upon to ratify participation, and avenue for relief in the case of actual abuse, and a vehicle for evolution and refinement of the equities of the new system through accretive interpretive case law.

- ***Obligatory enforcement:*** The federal governments of member nations would be best equipped to function as the agents of the global body to enforce its rules. As such, they would be subservient to the global body, and would not have authority to mitigate or make exceptions, except within such a framework as had been agreed upon by the global body.

- ***International accountability:*** The global body would have the power to sanction a failure of a national member to enforce the rules. That sanction could be applied directly, perhaps through fines, or indirectly, perhaps by authorizing other members to impose trade sanctions.

Summary: Is such a system workable? The answer is difficult to predict. Within the boundaries of an existing nation, such a plan could certainly be implemented and in some respects already has been. Internationally, the answer in the short term is likely to be "no," if past experience indicates the current limit of the willingness of nations to subject themselves to the authority of international bodies.

Perhaps only if we begin a fundamental reexamination of property rights will we be able to agree upon the types of compromises required to permit our continued use and enjoyment of natural resources – and indeed this planet – on a sustainable, long-term basis.

The observation must naturally follow, however, that if the past must control the future, then the future may prove to be grim. Ultimately, the threats to the interests of individual countries that may result from a failure to agree to such a system may outweigh the unprecedented cession of hegemony that the system described would require.

One way to ease the way and hasten the day when global warming and other resource-related concerns can be effectively addressed may therefore be to begin to reexamine traditional attitudes towards property rights. That reexamination would involve not just the rights of the owner of property to have unrestricted control over it, but of nations to have unconstrained authority over their lands and citizens. If such a shift in our attitudes towards the ownership of vital natural resources can be readjusted, I believe that our ability to successfully confront global warming will dramatically increase.

Perhaps only if we begin such a reexamination will we be able to agree upon the types of compromises required to permit our continued use and enjoyment of natural resources – and indeed this planet – on a sustainable, long-term basis. If this should indeed be the case, then the time to begin is certainly now.

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STANDARDS BLOG

THROUGH THE LOOKING GLASS WITH MICROSOFT'S BRAD GLASS

Wednesday, May 16, 2007
Views: 10,051

> *'I can't believe that!' said Alice . 'Can't you?' the Queen said in a pitying tone. 'Try again: draw a long breath, and shut your eyes.' Alice laughed. 'There's no use trying,' she said. 'One can't believe impossible things.' 'I dare say you haven't had much practice,' said the Queen. 'When I was your age, I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'*

As I expect you are already aware, *Fortune Magazine's* Roger Parloff has authored an in-depth, and extremely well written, article called Microsoft Takes on the Free World. The article appeared on Sunday, and immediately unleashed a torrent of secondary commentary, interviews and analysis, and not a few blogging rants as well.

As well it might. That's because Parloff reported that Microsoft General Counsel Brad Smith and other senior Microsoft executives allege that Linux, OpenOffice and other open source software violate no fewer than 235 Microsoft patents – and that Microsoft thinks it's time that those that distribute and use this software should start paying royalties. When a company like Microsoft makes statements like that, people naturally stop and listen.

But that doesn't automatically mean that they should take the statements at face value, and especially when they are so contradictory. For example, what does one make of the fact that Microsoft wants royalties, but doesn't want to sue anyone to get them? And if Microsoft really believes that it has so many patents that are being infringed by Linux, why has it waited so long to assert them?

And given the differences between Linux and Windows, why has Microsoft never asserted any of its patents against the many other operating systems – including Unix - that have existed over the years, each of which presumably infringed upon some subset (presumably major) of those same patents?

Then there are the practical considerations: the fact that it would be infeasible for Microsoft to actually sue myriad vendors and customers; the fact that many of the its patents (perhaps most) would not stand scrutiny; that many distributors own patents that Microsoft is presumably infringing as well; the likely hostility that European regulators would have for such a gambit. And so on.

As a result, I believe that the marketplace is rather rapidly going to come to the conclusion that the actual risk of anyone being sued by Microsoft on these patents – ever – is, as scientists like to say, "vanishingly small." One example of a well-written article (by IDG News Service's Elizabeth Montalbano) that heads in this direction is here. IBM's Bob Sutor, at his Open Blog, provided a more concise commentary, brushing the Microsoft statements aside as "same old, same old." Bob's entire comment read as follows: Again. How Tiresome.

It's tempting to simply echo Bob's comment. But perhaps it's useful to dig a bit deeper (this time in Q&A form), and talk about what patents really mean in the world of high tech today – which isn't necessarily what you'd expect. But first, a disclosure: I provide legal counsel to the Linux Foundation and am on its

Board of Directors (and before was counsel to and a Board member of the Free Standards Group), and I am also counsel to OASIS, the developer of ODF. However, the opinions and statements below, as always, are mine and mine alone, and are not made on behalf of these or any other clients of mine.

That said, let's get started. Let's talk about the patents first, for context.

Q: What do you think these patents relate to?

A: We don't know, other than to the extent that Microsoft has disclosed its beliefs in that regard. According to Parloff's article:

> [Microsoft licensing chief Horacio] Gutierrez refuses to identify specific patents or explain how they're being infringed, lest FOSS advocates start filing challenges to them. But he does break down the total number allegedly violated - 235 - into categories. He says that the Linux kernel - the deepest layer of the free operating system, which interacts most directly with the computer hardware - violates 42 Microsoft patents. The Linux graphical user interfaces - essentially, the way design elements like menus and toolbars are set up - run afoul of another 65, he claims. The Open Office suite of programs, which is analogous to Microsoft Office, infringes 45 more. Email programs infringe 15, while other assorted FOSS programs allegedly transgress 68

Q: Those all sound like pretty old technologies and programs. Why the big deal now?

A: Glad you asked. Presumably there's nothing new at all, on the infringement side, or on the patent side. The only things that have changed are market conditions, which most notably include the threat to Microsoft's market share posed by the challengers noted. Don't forget that Linux is based on Unix, which has been around, for all practical purposes, forever. To the extent that patents on the important bits were filed, they would have been filed long ago by those that controlled Unix at the time. To the extent that they weren't made the subject of patents, they would constitute "prior art," and could be cited against the validity of any patents filed by Microsoft thereafter based upon the same inventions.

Q: Wouldn't a lot of these patents be getting to the end of their life as well?

A: Good point. Many presumably are, if they haven't expired already. As time goes on, more and more of the core functionalities will be up for grabs.

Q: So many other companies (IBM, Apple, and so on) have products and patents in each of those areas, too, don't they?

A: Absolutely. And some of those companies have been filing patents at a far greater rate than Microsoft for decades. Presumably they have many patents that Microsoft's products would necessarily infringe. The graphical user interface for Windows, you may recall, was loosely based upon Apple products, and there was a big dispute between Apple and Microsoft over whether Microsoft had the rights to adopt its GUI. It claimed it acquired the rights under an existing license, not that it wasn't violating Apple's patents.

Q: Sure. You can't patent something that someone else has already patented, can you? So if these companies got there first, before Microsoft, then you could get the rights you needed to develop your software from them, right?

A: Bingo. And in fact, there are several projects already in existence to do just that. One is called the Open Inventions Network. It was formed (and invested in) by IBM, NEC, Novell, Philips, Red Hat and Sony in 2005. OIN's mission is to:

> [R]efine the intellectual property model so that important patents are openly shared in a collaborative environment. Patents owned by Open Invention Network are available royalty-free to any company, institution or individual that agrees not to assert its patents against the Linux System. This enables companies to make significant corporate and capital expenditure investments in Linux — helping to fuel economic growth.

Another effort to create a patent "safe haven" is the Patent Commons, which is hosted by the Linux Foundation. Here's how it describes its mission:

> The Patent Commons Project is dedicated to documenting the boundaries of The Commons -- a preserve where developers and users of software can innovate, collaborate, and access patent resources in an environment of enhanced safety, protected by pledges of support made by holders of software patents. Our Library is a central, neutral forum where patent pledges and other commitments can be readily accessed and easily understood

Yet another is the Open Source as Prior Art project (which also receives support from the Linux Foundation). Together, these efforts are directed at defining, expanding, protecting and maintaining a patent "safe haven" within which open source software development and use can take place.

Q: But if Microsoft has patents that really would be infringed, why doesn't it just come out and cite them?

A: There are two reasons that people always talk about, and a third one that in this case really matters. Let's briefly review them.

The first one is that once you name a patent and say someone else is infringing it, then if you sue them and win, they can be held liable for treble damages – roughly speaking, three times the value of your lost sales after you put them on notice of their violation. That would make you think that Microsoft would want to name the patents immediately, wouldn't it?

The second reason, though, is that once a patent owner does name the specific patent claims it says you are infringing, you can go to court, and ask the court to determine whether those claims were validly issued or not. As you saw above, there are a lot of companies that are willing to invest time and money in protecting Linux and other open source software. So as soon as Microsoft named a patent, those companies could, if they wished, go to court (or subsidize someone else to go to court) and try to kill it. They could also start changing the software to try and "design around" the infringement.

But the third reason, as we'll discuss at greater length below, is that the patents don't really matter very much anymore anyway, except for the "Air Wars" (a/ka/ FUD) value of making people worry about infringement.

Q: All right, so I think I'm getting the picture. Operating systems and productivity software have been around for a long, long time, and many companies have patents in these areas. So, probably no single company – even Microsoft - could safely build products in any of these areas without infringing the patents of other companies. If that's true, how do they do it? Do patents mean anything at all any more?

A: Ah – that's the question, isn't it? And that brings us to the point where we need to follow Brad Smith as he steps through the looking glass to try and figure out what's really going on here. You'll notice that in the *Fortune* article, Smith says that Microsoft decided that pursuing cross licenses was the route they decided to take, after considering whether to start suing people, or just throwing in the towel.

Q: Yes, I remember that. So what's cross licensing all about?

A: A cross license is what two different companies enter into when they both have something the other wants. In this case, that would be the patents underlying the same products. Cross licenses can be limited (to a single small set of patents), or domain specific (e.g., relating to a single product type), or they can even be company-wide. There is a vast, invisible web of patent cross licenses of all types that run everywhere throughout the technology industry.

Q: How do they come about?

A: Sometimes they are arrived at peacefully. For example, standard setting is in part basically an exercise in cross licensing, to the extent necessary to permit a standard to reach the marketplace on acceptable terms to adopters. And sometimes they are the result of truces that follow years of head bashing, and involve large payments to settle outstanding litigation. If you think about it, you'll recall

reading about these from time to time. An example is the rapprochement reached between Microsoft and Sun in 2004. They buried the hatchet in many areas with that agreement, while reserving their independence to compete in other areas.

Q. Got it. So let's get a bit more specific. What's going on with the new Microsoft announcement? What are they focusing on? What are they trying to achieve?

A: Sorry – I've got to do a bit more explaining first. When you get to this level of activity, you have to think of what's going on as international diplomacy, not just commercial activity. The stakes are huge, the number of players is enormous, and everything is interlocked. You can't just charge around like a bull in a China shop, no matter how big a bull you are.

Like diplomacy, you're also dealing in perceptions as much as with facts. If Microsoft really did have killer patents, the usual thing would be to pick out a few small targets and sue them, overwhelming them with your legal assault, spending them into the ground. If you're feeling insecure about your patent, you might settle quickly, asking for a very low royalty - or even no royalty at all - from the "infringer." As part of the settlement, the little company agrees not to disclose terms. Then, of course, you announce to the world that you've "won," and that your patent has been tested and stood up to the challenge.

Next, you point to that victory to intimidate others into paying you royalties as well. If the royalties you ask for aren't too high, many will simply agree to pay up rather than risk being sued. And note that it only takes a single patent claim to block someone from selling a product, unless it pays up. The most famous example of this strategy is the Lemelson series of bar code patents, which reaped more than $1.5 *billion* in royalties over a period of many years before two companies, Cognex and Symbol Technologies finally decided that they weren't going to knuckle under. They went to court to challenge the Lemelson patents, and refused to settle. The court found that Lemelson had improperly extended the patent filings before asserting them as "submarine patents," and that some of them should never have been issued to begin with. Cognex rightly claimed a great victory for the marketplace.

Q: Good for them! But why isn't Microsoft suing a few little guys here? With that many patents, surely you'd think they would have a few good ones, right?

A: Ah - but maybe that doesn't even matter. Let's assume that Microsoft has existing cross licenses with many of the companies that are promoting Linux (it does). Let's also suppose that many of those cross licenses cover operating systems and office productivity software (I don't know that this is true, but I assume it must be). Now who do you sue? If you decided to sue a few little guys, how would you prevent one of the big guys with cross licenses from simply granting a license to the targets you picked? And how about if some of those cross licenses were up for renewal, or you wanted to expand them? How much do you want to incense the owner of the patents that you need access to? Finally, even for big companies, the costs of patent infringement law suits are huge, the results uncertain, and the time between filing suit and finally winning (or losing) is *very* long.

Q: So big companies don't actually have that much freedom to use their patents to exclude competition, do they?

A: Exactly. In fact, patents today among the Big Boys are a sort of barter commodity, rather than singular weapons. Or you can think of them as Carbon Credits – something that you move around to make your life easier while continuing with business as usual.

In this sense, then, the much greater value of patents is defensive and not offensive - you get them to preserve your freedom of strategy and movement. Sophisticated companies now largely take this view. They have patents so that other companies can't stop them from doing what they want to do, not so that they can stop other companies from doing what they don't want them to do. Starting to get the Looking Glass part now?

Q: I think so. So we've turned the system upside down and inside out: I don't get a patent to create a monopoly, but to prevent you from creating one, right?

A: You're catching on much faster than Alice. That's it exactly. Once a patent "thicket" have developed in a product area, where everyone owns some patents, no one can stop everyone else from selling products there. All you can do is negotiate terms.

Q:. Got it. So can we get back to Microsoft now?

A: Yes, Grasshopper, you are now ready to receive enlightenment.

Q: Please…

A: Sorry. The Q&A format just went to my head. So let's look at what's actually been going on. Microsoft has announced three Linux cross license deals so far: with Novell, Dell and Samsung. In each case, it's refused to reveal the terms. It's also refused to identify the patents. So we're looking at a black box, where we don't know what value, if any, is actually being paid to Microsoft in exchange for Microsoft agreeing to cross license rights in operating system software.

Q: The Novell deal does look awfully one-sided. Most of the cash seems to be going to Novell, not the other way around.

A: Yes indeed. The *Fortune* article says Microsoft explains this by saying that Novell has valuable network computing patents that Microsoft patents may infringe, and since Microsoft sells so much more than Novell, it needs to pay more. But Novell has been moving away from its network computing business for years, and Microsoft hasn't (to my knowledge) announced anything new in this area that would create an urgent demand for access to such patents. Why did those patents suddenly become so valuable to Microsoft right now?

Q: So we don't know what value each party is actually placing on the Microsoft patents?

A: None at all. Cross licenses often cover an incredible range of activities that can go far beyond simple patent licensing. Look at all the territory that the Novell-Microsoft pact covers. Or go look more closely at the old Microsoft-Sun agreement I linked to above: it settled litigation, set the stage for technical collaboration, included Microsoft support for Java, Windows certification for Sun servers, and much more. As you can see, patents can be just the nominal invitation to the party, and the public announcements cover only what you want the world to know – or, more to the point, what you want the world to think.

Q: OK, so boil all this down for me, would you?

A: I'll try. Here's what I think the *Fortune* article, and Microsoft's statements, really mean:

1. Microsoft has said it won't sue customers. That's good, and makes sense. So customers can rest easy.

2. Microsoft probably can't sue many of the companies it needs to worry about most, because existing cross licenses with those companies would prevent it. Note that Microsoft hasn't said a word about its patents being infringed by AIX or Solaris, for example. These cross licenses would presumably protect Linux distributions offered by the same vendors as well.

3. The agreements that Microsoft has already signed with customers and distributors may assign little, if any, value to the patents. It's possible that the value actually went in the other direction, with Microsoft paying more to get the other party to agree to include public mention of open source patent licensing at all.

4. Microsoft is clearly feeling threatened. It's no coincidence, to my mind, that it has suddenly linked OpenOffice with Linux in this story. Windows and Office provide the lion's share of Microsoft's revenues and profits, and it needs to defend them with everything it's got.

5. Within the next week or so, the industry will be treating this as "so what" news. Lots of journalists and bloggers already are.

A: So has anything really changed?

Q: To my mind, not much at all. Going back to my diplomacy analogy, it's like the US moving another carrier group into the Persian Gulf when things get hot, to let the local regimes know that it's keeping a close eye on things. Is it going to attack? No. It's just signaling.

But I think that in this case, Microsoft may be making a misstep. By focusing so much attention on this issue, it causes more articles – like this one – to be written to dispel the FUD. And it spawns more patent-focused efforts like those noted above to support open source software development and use. The result is that instead of cowing the little people, it helps pull back the curtain.

And then you find that all-powerful Oz (and his patent portfolio) doesn't look so all powerful, after all.

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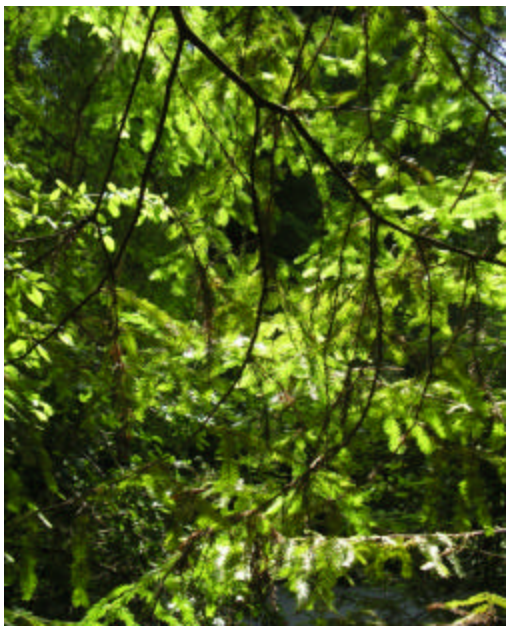
CONSIDER THIS

‡ ‡ ‡**June 6, 2007**

#49 Walking Among Great Trees: A Meditation on Heritage

Heritage is an interesting concept. It includes perceptions of both past and present, and shared as well as individual experience. The boundaries of heritage are elastic, comprehending anything and everything that, taken together, contributes to who and what we feel we are.



For most, the concept of heritage includes elements as disparate as the national ideals held by our forebears, our common literary and artistic heritage, and the great cities, architectural icons, and natural wonders of our nations. Our perceptions of heritage help bind us with our families, our neighbors and our fellow countrymen, each in a different way. But in each case, the tie that binds us together is our shared values, experiences and reference points. In a real sense, it is how we tell "us" from "them." And in consequence, each of us has a sense that we have some sort of inchoate claim of ownership upon the tangible as well as the intangible things that by their connotations have somehow become part of our heritage.

These feelings are so universal, and arise so naturally, that they seem incontestable. But if they are so obvious, why do we not have legal rights in our "heritage?" How is it, then, that the wrecker's ball, the developer's bulldozer, and the logger's skidder can take away something in a day that we have taken for granted for a lifetime?

How indeed? And is this as it should be? When something treasured is lost, questions occur to us, such as whether the laws should change to better prevent the loss of our heritage the next time around. But as quickly may occur another concern: what protections should there be for those that have traditional legal rights in the same property?

The elements of heritage can take many forms. They can be intangible, such as our history, and therefore subject to the ownership claims of no one. Or they can be owned by individuals but widely available, such as works of literature still under the protection of copyright. Or they can be in the physical possession of individuals that reserve them for their personal enjoyment (such as a great painting that passes from a museum into private ownership).

I find the relationship between heritage and property rights to be both interesting and important, in part because the validity of a communal claim that is widely felt can at the same time have no legal basis, and therefore no protection at all. Unlike most property rights that inevitably find their way into statutes, heritage rights to tangible property of value are more honored in the breach, either by outright donation to trusts by the title owners of the property in question, or through purchase by non-profits or the government itself. In each case, no one needs to explain why such a transaction should occur, even in the case of the expenditure of public or tax-exempt funds to secure the property for common enjoyment or protection.

Nonetheless, because tangible elements of heritage can have great value, there is tension between their status as property subject to individual ownership, and the rights of others that feel a close personal attachment, and even a shared entitlement, to that property. The sphere of those that feel so entitled can be very large and even surprising as well, especially when the property in question is threatened.

Recall, for example, the global outcry when the Taliban in Afghanistan threatened to blow up, and then did destroy, the monumental Buddhas of Bamyan in 2001. Those on the other side of the world, from

other cultures and practicing other religions, could hardly claim any individual or national rights in such statues in any national, let alone traditional property sense. But the sense of shock, anger and loss was palpable for many that felt that in some way their lives and, for want of a better word, their heritage had been violated. The best explanation for such a widely felt reaction may be that the more precious and incredible the work of art or architecture at risk, the more likely we are to feel that somehow the icon in question is inextricably tied up in the reality of who we are. Or perhaps because it reveals what humans have been capable of accomplishing in the past, and therefore provides hope that much can still be expected from us in the future, however dreary the evening news.

So also it is with natural wonders as well. Millions of Americans visit natural wonders such as the rain forests of Costa Rica and the Great Barrier Reef of Australia every year. There is even a word for such travels now: "ecotourism." Despite the location of these natural treasures beyond our national boundaries, we would find it no more acceptable for our ability to experience their beauty to be withdrawn than would Europeans accept a decision by our government to reserve the Grand Canyon for the appreciation of Americans alone.

I have said that the law does not recognize heritage rights, but this is not completely true. There is an emerging recognition that even if such rights do not exist in a legal sense as claims superior to the owners of property, there should nonetheless be a means by which heritage rights can be recognized and secured for the public benefit. Nationally, laws such as the Antiquities Act of 1906, signed into law in the United States by President Theodore Roosevelt, permit a president to set aside public lands as National Monuments, in order to protect antiquities and other resources.

The concept of a global heritage in both natural as well as architectural resources has also been recognized, through the creation of the *Convention Concerning the Protection of World Cultural and Natural Heritage*, which was adopted by the General Conference of UNESCO on 16 November 1972. Today, over 180 nations are party to this agreement, and as of 2006, over 830 cultural, natural and mixed sites had been granted status under the treaty as "World Heritage Sites."

Perhaps the most interesting and important legal aspect of this treaty is that it implicitly recognizes that we have a moral duty to generations unborn. Given the propensity of those living today to exhaust finite resources and emit greenhouse gases as if there was (literally) no tomorrow, we may ultimately come to believe that those not yet born have real legal rights, and not just moral entitlements. Perhaps we may even conclude that our descendents, like orphaned minor children, are in need of a court-appointed guardian to protect their patrimony.

For now, though, the ability to conserve heritage sites in most countries depends upon the willingness of owners to cooperate with conservation efforts. Property owners who are otherwise sympathetic but not disposed (or financially able) to make charitable donations have therefore been compensated for the lost value of the restrictions placed upon their properties. As a result, many worthy sites have been preserved, sometimes from government action. But by no means have all national treasures been saved. After all, while the Grand Canyon continues to amaze, equally spectacular vistas just upstream on the Colorado River were lost to view when the Glen Canyon Dam was built, creating Lake Powell. Hard though it may be believe it today, the Grand Canyon itself narrowly escaped the same fate. And indeed, the treaty that created the World Heritage Site process arose from the intent of Egypt to flood countless Egyptian antiquities through construction of the Aswan High Dam. Only through an international funding and engineering effort, monumental in its own right, were a significant number of these treasures saved.

But what if an owner is not disposed to cooperate? Does a canyon here or a forest there, more or less, make a difference? And if so, where does one draw the line? Property rights are understandably precious, and the sanctity of land ownership is part of our heritage as well. The world over, attachments to the land are fierce, and the very ability to survive can be inextricably linked to the possession of even a few acres. Popular movements in some developing nations continue to wrestle with entrenched oligarchies, seeking the redistribution of land to the poor. And in years past, countless millions of (mostly) Europeans left all – including much of their own heritage – behind to seek land in the Americas.

Where then, do we find the balance? Where is the dividing line between the heritage rights of the many, and the property rights of the few?

Perhaps the best place to look for answers may be in a quiet place. Perhaps a walk in the woods is the place to consider such questions, as I did recently. Not just any woods, of course, but a woods conducive to thinking deep thoughts about our heritage in the natural world.

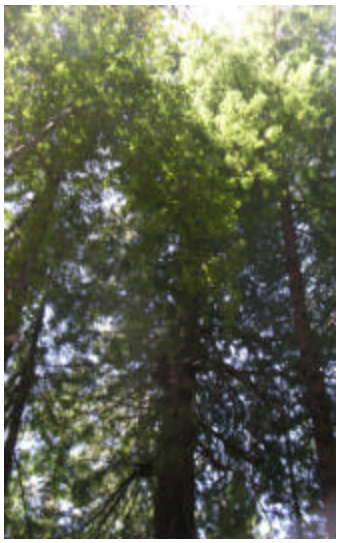
One such forest can be found in California's Big Basin State Park, which was created in 1902 by those concerned over the rampant logging of old growth redwood groves. Through progressive purchases, it now comprises over 18,000 acres of redwood forest and other habitat, and includes the largest continuous stand of these great trees south of San Francisco. That city is only a short drive away, and the park offers over 80 miles of trails to those seeking an oasis of tranquility and transcendant natural beauty to relieve the strains of modern life.

A red wood grove is a place of stillness. Winds do not reach the forest floor, nor much direct light. Only the quiet clicking of insects filters down, and the occasional distant squawk of a Steller's Jay, offended by some unseen intruder. At intervals, narrow streamlets trickle silently and sinuously through the accumulated forest debris, barely cutting into the alluvial soils beneath.

In the near distance overhead, an understory of tan oak and shrubbier trees, none thicker than your leg, scatter their branches. That sparce tracery is dappled by what little light penetrates the redwood canopy far above, and in turn dapples with shadow the occasional glade below. And everywhere, in groups of five, ten, or a hundred, stand the enormous columns of the great trees themselves.

The trunk of each redwood has a character all its own. Some are striated with near-parallel ribs of thick, protective bark. The bases of others seem cramped by gnarled, encirlcing tendons, resembling great and ancient hands that have seen too long a lifetime of hard use. Others sport neat nets of interlacing lines spreading at the base, and narrowing into orderly, parallel lines as they ascend. Some trunks are grey; others reddish brown. Where lightning has sparked a fire, they may sport a tortoise shell pattern of charred black on brown, reminscent of circular, printers' woodblocks, already inked and ready to roll their images upon some enormous unseen surface, recording the price of their survival.

Mature redwoods rise eighty or a hundred feet before spreading their first branch. Then the trunks vanish into the canopy of proliferating greenery, attaining a height that can only be guessed. Except, that is, when your trail strikes a diagonal up the side of one of the deep, fog-filled ravines in which redwoods thrive, nurtured by the moisture wafted in from the sea and protected from the wind through most of their height by the ridges that enfold them. On such a trail, you can sometimes appreciate the full grandeur of a redwood, as you look both down and up from your vantage point. More than a hundred and fifty feet in each direction, perhaps, you can at last glimpse the giant from base to crown.



Redwoods and their close cousins, the Giant Sequoias, may lay claim to being some of the only living things that never die of simple old age. Instead, they are ultimately rent by lighting or overthrown by the wind. Or they simply fall, when their incredible mass proves too much for the superficial root system that strives for purchase in the shallow soils in which the redwoods grow.

When they do meet their end, they begin a long and gentle progress of return to the earth. At first, they may stand awhile as tilted snags, supported by their neighbors. But after a period of days or years they inevitably complete their downward journey. The largest startle in their enormity, looking vastly larger in the horizontal, in full view, than ever they could rising vertically into the pervasive canopy above. Over time, a fallen tree literally sinks into the earth, its hollowed, shattered end sometimes emerging at an angle for a time, extending like the savage jaws of some monstrous sea creature of the Silurian age. Along the backs of many fallen trees sprout lines of saplings, rooted in the fog-dripped moss that grows wetly on their bark. Centuries on, the straight line laid out by seedlings that survive will mark the resting place of the nurse tree that in death nurtured them from their birth.

Today, less than 4% of the old growth redwoods survive that astonished the first white explorers. And a scant 2.5% of this 4% is protected from logging. That small number of acres is itself subject to natural dangers, including storms, fire, and the floods that can be magnified in intensity by the increased runoff from logged over areas uphill – which sometimes has eradicated entire coastal groves.

Some remaining forests are too small to remain viable in the long term. The accelerating fragmentation of the groves that remain also lessens the long-term survival likelihood of the fauna that call these unique ecosystems home.

The ready accessibility of magnificent groves of trees, such as the Big Basin forest, and the far smaller John Muir forest north of San Francisco, create a false sense of security, as does the enormity of the trees themselves. How could such impregnable giants, lying within state and national parks, be endangered?

And yet they are. Consider the following somber assessment, from the World Wildlife Organization Web site:

Redwood National Park is the only hope for survival of functioning redwood ecosystems, yet even this is questionable given their size and surrounding land use. Jedediah Smith and Del Norte Redwood State Parks are two smaller reserves. Muir Woods and Big Basin towards the south are too small for realistic prospects of long-term conservation of this unique community….

The last Redwood groves on private land, mostly in the Headwater Forest area near the van Duzan River, are under imminent threat of cutting by Pacific Lumber. Compromising agreements between State and Federal agencies and this company leave in doubt the survival of these last remnants. It is unfathomable with the knowledge and resources we have today that there would be any question of total protection of the last remaining groves of these globally unique ecosystems, and unconscionable that the government and citizens of this country have let the destruction continue to this point.

And so we return to the central question of what is to be done. How do we balance the rights of the property owner to its property and the right of future generations to walk among the redwoods?

One way to respond to that question might be to answer this one: how would you explain to a grandchild what it was like to walk among the redwoods, and also why they would never be able to so as well?

How much better to look forward to sharing this precious heritage with the same child, and witness the first dawning wonder reflected in her shining eyes?

Comments? updegrove@consortiuminfo.org

Read more ***Consider This…*** *entries at:* http://www.consortiuminfo.org/blog/

FEATURED MEETING:

AN OPEN INVITATION TO ATTEND

GLOBAL STANDARD SETTING 2007:
AN INTERACTIVE DISCUSSION

Hosted by Gesmer Updegrove LLP
40 Broad Street, Third Floor
Boston, MA 02109
617-350-6800

June 20, 2007 8:30 am – 4:00 pm

On June 20, the third in a series of annual events focused on bringing together leaders of both accredited and non-accredited standards developers will be held, sponsored by the American National Standards Institute (ANSI).

ANSI represents U.S. interests in a number of important global standards organizations, and accredits those traditional standards development organizations (SDOs) that are formed to primarily benefit U.S. interests. Consortia, on the other hand, are not accredited by any national or international authority, and seek to set global standards, and many are headquartered in the United States. Since SDOs are formed to represent national interests, while consortia are created to serve the interests of an international membership, the paths of these two communities cross constantly in the trenches, but almost never in a formal fashion, except through the many one-on-one liaison relationships established between SDOs and consortia that address the same or adjacent technical areas.

Despite these differences, SDOs and consortia have far much in common, including the fact that their memberships characteristically overlap heavily. They also share common concerns relating to intellectual property rights management, governance, member recruitment and retention, and promotion of their work product. At the same time, each has competencies that the other usually lacks, and experience that its peers of both types could benefit from sharing. The goal of this year's event will be to not only gain from another exchange of ideas, but also to explore avenues for ongoing communication in a more structured and frequent basis.

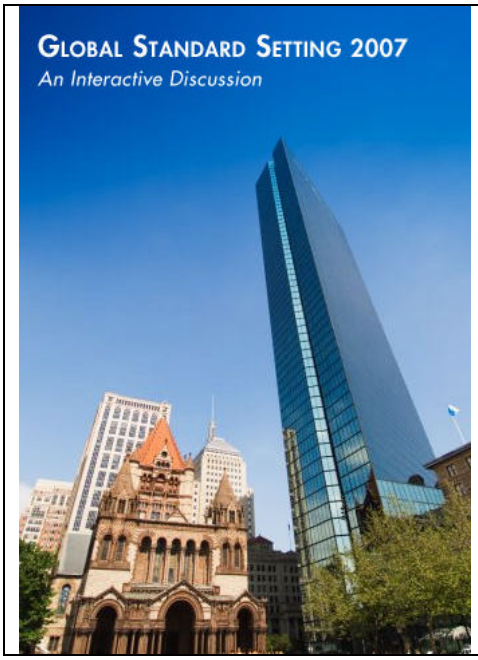
This year's event has been designed to be highly interactive, and will feature brief panel presentations analyzing problems faced by all types of standard setting organizations (SSOs), followed by lengthier, facilitated discussions involving all attendees. A final discussion period has been set aside to discuss ways in which consortia and accredited organizations can engage more frequently and productively to address matters of common concern.

Attendance: Participation is limited to senior management, Board members and other qualified representatives of both accredited and non-accredited SSOs, to ensure a high-level peer-to-peer exchange of issues and ideas. There is no charge to attend, but space is limited and will be allocated on a first-come, first-served basis.

Invitations: If you would like to attend this meeting, please register at this address.

Location: 40 Broad Street, Boston (ten minutes from Logan Airport and South Station).

Agenda: The agenda for the event is under continuing development and subject to changes.



Global Standard Setting 2007:
An Interactive Discussion

Wednesday, June 20, 2007
8:30 am – 4:00 pm

Hosted by the
American National Standards Institute

Venue
Gesmer Updegrove LLP
40 Broad Street
Boston, MA 02109

Registration
Online

2007 Open Forum for Standards Developers

Tuesday, June 19, 2007

6:00 – 8:00 pm	**Social Event – Networking Reception**	Legal Seafood – Long Wharf (255 State Street)

Wednesday, June 20, 2007

8:00	**Registration/Continental Breakfast**	
8:30	**Welcome, Meeting Purpose and Objectives**	**Andrew Updegrove** Chair, ANSI Consortium Outreach Group; Partner, Gesmer Updegrove LLP; Meeting Host
8:55	**ANSI Welcome**	**Joe Bhatia** President and CEO, ANSI
9:00	**Self-introduction of participants** Reasons for attending and expectations	**All**
9:15	**Discussion Topic One:** **Intellectual Property Rights and Global Standards Setting** Standard setting today is increasingly impacted by intellectual property issues that are common to both accredited and non-accredited SSOs. The panel chair will review the range of IPR issues facing SSOs, after which the panel will examine one of the key issues under discussion today: *ex ante* disclosure of terms during the standard setting process.	**Panel Chair** Earl Nied Chair, ANSI Patent Group (Intel)

9:25	**Panel Presentation** *Ex ante* disclosure: The Current Debate	**Presenters** Gil Ohana, Wilmer Hale Richard Taffet, Bingham McCutchen **Panelists** Scott Peterson, HP Chuck Powers, Motorola
9:55	**General Discussion**	**Panel; Attendees**
10:45	***Coffee Break***	
11:00	**Discussion Topic Two:** **Going Global** SSOs of all types are going global and seeking worldwide recognition for their specifications and standards. How do organizations that have worldwide memberships build their recognition as developers of globally relevant standards? Are there common paths toward achieving international recognition and acceptance? The panel chair will review some of these trends, after which individual panelists will share some of their solutions and adaptations.	1) Panel Chair: **Ron Silletti** **IBM; member of the Executive Committee of the ANSI Board of Directors**
11:10	**Panel Presentation**	**Panelists and Presenters** Philip C. Wennblom, Institute of Electrical and Electronics Engineers (IEEE) Amy Marasco, Microsoft Patrick Gannon, Organization for the Advancement of Structured Information Standards (OASIS) Steve Bratt, World Wide Web Consortium (W3C) Michael Bechauf, Web Services Interoperability Organization (WS/I)
11:40	**Open/General Discussion**	2) Panel; Attendees
12:30	***Lunch and One-on-One Discussion***	**3)**

	Thoughts on Collaboration (during lunch)	**4)** Robert W. Noth **Chairman of the Board, ANSI** **(John Deere)**
1:15	**Discussion Topic Three:** **The Business of Standard Setting and Best Practices** Standards need SSOs to develop them, and SSOs need members, money, and more. The panel chair will review some of the challenges SSO face today as businesses, after which a range of SSO managers (small, medium and large), both dedicated and outsourced, will discuss how they are facing those challenges.	**Panel Chair** Karl Best Kavi Corporation
1:25	**Panel Presentation**	**Panelists and Presenters** Drew Azzara, ASTM International Jeff Burnett, Open Geospatial Consortium Chris Dubay, National Fire Protection Association Jeff Ravencraft, USB Implementers Forum Andy Freed, Virtual, Inc.
1:55	**General Discussion**	**Panel Facilitator; attendees**
2:45	***Coffee Break***	
3:00	**Topic Four:** **Next Steps** A general discussion among all attendees on how all types of SSOs and ANSI can work together most productively.	**Facilitator:** Andrew Updegrove
3:45	**Summary of Significant Insights from Day's Discussion**	Robert W. Noth
4:00	**Adjourn**	