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Consortium Standards Bulletin

A ConsortiumInfo.org publication

May 2003

Vol I, No. 5

UPDATES

CSB ARTICLE SPURS ACTION TO PROTECT CONSORTIA (H.R. 1086)

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Abstract: *Spurred by a flurry of reaction to the April issue of the Consortium Standards Bulletin and with ANSI's help, language has been added to the Congressional Judiciary Committee Report accompanying H.R. 1086, to prevent the Bill from restricting anti-trust protections to a handful of government-recognized SDOs.*

In the April issue of the Consortium Standards Bulletin, we detailed and analyzed several key implications of Congressional Bill H.R. 1086, currently under review, which addresses the eligibility of many standard setting consortia for a measure of immunity from antitrust penalties under the National Cooperative Research and Production Act (NCRPA).

We were delighted by reaction to the article, which suggests that its appearance helped a number of organizations, as well as individual companies, recognize and more fully understand the scope and potential consequences of the Bill, as it would affect them and the standards setting community as a whole.

We are especially pleased to report that the article initiated a dialogue with the American National Standards Institute (ANSI), which has been actively involved in the Congressional initiative and the drafting of H.R. 1086. ANSI subsequently agreed to propose the inclusion of language addressing our concerns, regarding its potential to negatively impact consortia, in the report submitted by the House Judiciary Committee in connection with the Bill. The language, drafted by Lucash, Gesmer & Updegrove, states that H.R. 1086 should not be interpreted to imply that consortia are not eligible for NCRPA coverage.

We are grateful to ANSI for its cooperation in submitting this language for inclusion in the Committee report and pleased to partner with ANSI for the benefit of the entire standard-setting community. The House has not yet voted on H.R. 1086, and should the outcome be less than favorable, there will still be opportunities to influence debate when the Bill reaches the Senate floor. Standard setting is still a relatively new and unknown arena, but an extremely important and burgeoning one. While it has traditionally received little public or governmental attention, recently it has gained considerable attention by the media (Bluetooth, W3C, etc.), the Federal Courts (*Rambus v. Infineon*), the FTC (*Rambus antitrust suit*), and Congress (H.R. 1086). We encourage continued involvement by consortia and their members in encouraging Congress to act favorably toward standard setting in any industry-recognized venue.

NEW W3C PATENT POLICY REAFFIRMS ROYALTY-FREE PRINCIPLES

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Abstract: *The new patent policy adopted by the World Wide Web Consortium (W3C) seeks to ensure that recommendations and standards developed by the organization will be implemented on a Royalty-Free basis. The final draft of the policy, following several years of closely watched debate, may have a significant impact on the intellectual property rights policies of standard-setting organizations across the board. While the Federal Trade Commission's antitrust hearing against Rambus Inc. is still continuing, Rambus has already gained one advantage. Recently, Administrative Law Judge Stephen McGuire ruled that the attorney-client privilege bars some information from being introduced, which the FTC had sought to present, including communications among Rambus management and its outside legal counsel.*

On Tuesday May 20th, the World Wide Web Consortium (W3C) ratified its new Patent Policy in a meeting in Budapest. The new policy governs the intellectual property protections of W3C's Internet technology standards with the expressed goal of ensuring that "Recommendations produced under this policy can be implemented on a Royalty-Free (RF) basis." (See link to W3C's policy below) The final draft of the policy, following several years of closely watched debate, may have a significant impact on the intellectual property rights policies of standard-setting organizations across the board.

The new policy requires that participants in the development process of W3C standards and recommendations disclose patented assets and patent applications. Likewise, those viewing and reviewing technical drafts must also disclose knowledge of any applicable patents. The policy seeks to ensure that, aside from exception cases, standards and recommendations by the W3C can be implemented on a royalty-free basis.

The policy also outlines specific procedures to address the situation whereby a third party, unassociated with the W3C, unexpectedly discloses an applicable patent. According to the policy, each "exception" case will be investigated by a Patent Advisory Group (PAG) formed on an ad hoc basis in reaction to the specific issue. PAGs will include representatives of the W3C member companies involved in developing the specification, as well as legal staff representing the overall interests of the consortium, and may include legal staff representing member organizations. In investigating and resolving exception cases, a PAG may recommend legal analysis, alteration of specification elements to avoid royalty claims, consideration of licensing term alternatives, or abandonment of the work effort or of the specification if already issued.

The new patent policy has been widely accepted and endorsed by W3C's membership. It replaces a less defined policy that did not include adequate provisions to prevent royalty-bearing patent claims from inhibiting the development of interoperable Internet standards.

But finalizing the terms of the patent policy involved a process that took several years, often characterized by contentious debate. The W3C debate of royalty-free standards also evokes passion on both sides of the ongoing conflict between some software providers and open-source advocates. Software providers often stand to gain significant revenues from royalty-bearing patent claims. Open source communities, on the other hand, benefit from a development environment and technology that are open and accessible. W3C's new policy, which is built on a specific royalty-free basis but still includes provisions for exception cases, represents a compromise.

W3C's closely watched and long anticipated patent policy reinforces the openness of the Internet by guaranteeing and firmly endorsing the desirability of royalty-free standards and recommendations.

Mandating royalty-free standards and specifications is a bold step that could encourage other standard setting organizations who are seeing the implementation of their standards threatened by potentially prohibitive royalty claims.

Daniel Weitzner, W3C Technology and Society Domain Leader and chair of the Patent Policy Working Group, told an InternetNews.com reporter: "For a number of members, [the vote] reflected substantive support for this policy. I think it also reflected a sense that this was certainly a hard-fought compromise. I think even for those members who might have preferred a different policy, they were willing to support this because they saw it was a policy that the entire consortium could live and work with."

We have consistently made a similar point to our consortium clients, in testimony in Washington, and at ConsortiumInfo.org (see <http://www.consortiuminfo.org/ipr/>) that intellectual property policies must represent reasonable compromises in order to facilitate standards creation and adoption. Efforts by any single member, or group of members, to steer a policy to one extreme or another will inevitably undermine the ability of all members to achieve the goals for which the organization was formed.

To view W3C's Patent Policy, see <http://www.w3.org/Consortium/Patent-Policy-20030520.html>

For additional articles detailing and analyzing the policy, see the following:

W3C Adopts Patent Policy, <http://www.internetnews.com/dev-news/print.php/2210201>

W3C Readies New Tech Patent Policy,
<http://www.computerworld.com/printthis/2003/0,4814,81309,00.html>

W3C Makes Patent Ban Final, <http://news.com.com/2100-1032-1008800.html>

IN MEMORIAM

On May 21, 2003, INCITS Director Kathleen (Kate) McMillan passed away, following a courageous battle with cancer. Kate served the standards community since 1988 and guided the INCITS Secretariat through several transitions during her years as Director. We offer our sincere condolences to her family, friends and colleagues. Her colleagues at INCITS have shared the following sentiments with us: "[Kate McMillan's] loyalty, intelligence and generous spirit were matched only by her sense of humor. We will miss her."