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Open Letter to ANSI

Patricia A. Griffin
Vice President and General Counsel
American National Standards Institute
1819 L Street NW
Washington, DC 20036

Dear Ms. Griffin:

You recently authored an ANSI Critical Issue Paper regarding "Current Attempts to Change Established Definition of 'Open' Standards."* Since I've been leading some of those current attempts, I welcome this opportunity to respond.

I agree wholeheartedly with the collaborative processes you referred to in your description of the terms "open" or "openness." It is indeed important for standards organizations to seek consensus on standards; conduct broad-based public reviews; respond to comments and suggestions; publish draft standards; and provide opportunities to appeal on due process grounds.

You may be surprised to learn that many open source projects—and all the leading ones—follow those same rules in the conduct of their development activities. Open source is not so very different from open standards after all. We can all benefit from your clear articulation of the process rules for open standards, and I am certain many of us support them. We're on the same side of this aspect of your "critical issue."

Where many of us differ with ANSI's position is with respect to the licenses for the standards that result. Under your formulation, you would have us ignore other impediments to the free implementation of industry standards in order to protect two so-called rights:

(1) The rights of holders of "essential patents" to decide how they will license their intellectual property as long as they somehow "balance the interests" of implementers and patent holders and do not "unreasonably burden" access to the standards.

(2) The rights of the standards organizations to make money by sale of copies of the standards.

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* http://public.ansi.org/ansionline/Documents/Standards%20Activities/Critical%20Issue%20Papers/Open-Stds.pdf.

Your first point ignores the nearly universal outcry, at least within the software industry, that the current patent system is broken and demands reform. Often (to use your phrases but not your emphasis) “essential patents” are improvidently granted, and the current legal system for resolving these disputes “unreasonably burdens” the public’s right to conduct its business in standard ways unimpeded by royalties and commercial licensing regimes. To hold industry standards hostage to such capricious things as software patents is to risk our very ability to communicate with each other. It is a risk that many of us look to standards organizations such as ANSI to help ameliorate by proposing effective and enforceable patent disclosure and mandatory licensing policies where appropriate.

Furthermore, not all commercial interests can be fairly balanced; for example, “balancing” is impossible when open source software demands freedom and patented software demands royalties. So since, as you point out, some patents are currently only available for a fee, why shouldn’t we at least distinguish clearly among them? Call standards without patent encumbrances “Open Standards” and the others something else. We’re talking about a proper name here, so that the world can fairly know what it risks when it implements industry standards.

As to your second point, the courts do not always agree with you. In parts of the United States, for example, standards organizations cannot prevent the free copying and distribution of certain kinds of mandatory industry standards. (Veeck v. Southern Building Code Congress Int'l, Inc., F.3d 791 (5th Cir. 2002), cert. denied 123 S.Ct. 2636.) At least some standards organizations can no longer charge unreasonable fees to read and implement their standards.

But in any event, most people don’t object to standards organizations selling specifications, even for open standards. What we demand, though, is the right freely to make copies and, if necessary, derivative works, from the copies we buy. As long as document prices for standards are “reasonable and non-discriminatory”—a promise you repeatedly make anyway—standards organizations should be able to give the world the freedom to build upon the intellectual content of their standards and still recover their overhead costs.

Regards,

Lawrence Rosen