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VIA Email to: oir_a_submissions@omb.eop.gov

March 16, 2009

Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Attn: Mabel Echols, Room 10102, NEOG
725 17th Street, NW
Washington, DC 20503

Re: OMB Federal Regulatory Review, Office of Management Budget, Executive Office of the President, Request for Comments, 74 Fed. Reg. 8819 (February 26, 2009) (“OMB Notice”)

Dear Sir/Madam:

Valley View Corporation is a small company that consults to the Information, Communications, and Entertainment (“ICE”) sector of our economy. Its President, Dan Bart, has been active in that sector for over 40 years. He was a Senior Attorney as well as holding various technical management positions for more than 28 years at GTE Corporation. He recently retired after more than 13 years from the Telecommunications Industry Association (“TIA”) (www.tiaonline.org), where he oversaw the TIA Standards and Technology Department, as Senior Vice President, Standards and Special Projects, and also as Chief Technology Officer (“CTO”) and Advisor to the TIA President. He has served on the American National Standards Institute (“ANSI”) Board of Directors for more than a decade, is currently on the ANSI Board, ANSI Executive Committee, and Chair of the ANSI IPR Policy Committee. These comments however are only on behalf of Valley View Corporation, but derive from his many years of experience in the industry and working with OMB and other federal agencies.

In the OMB Notice, the Office of Information and Regulatory Affairs (“OIRA”) advises it has reviewed federal regulations to ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical “second opinion” on agency actions.

The OMB Notice further advises that President Obama has directed the Director of OMB to produce a set of recommendations for a new Executive Order on Federal regulatory review. Among other things, he stated that the recommendations should offer suggestions for the following:

- The relationship between OIRA and the agencies;
- Disclosure and transparency;
- Encouraging public participation in agency regulatory processes;
- The role of cost-benefit analysis;
- The role of distributional considerations, fairness, and concern for the interests of future generations;
- Methods of ensuring that regulatory review does not produce undue delay;
- The role of the behavioral sciences in formulating regulatory policy; and
- The best tools for achieving public goals through the regulatory process.

The OMB Notice concludes that because “there has been an unusually high level of public interest, and because of the evident importance and fundamental nature of the relevant issues, the Director of OMB invites public comments on the principles and procedures governing regulatory review. These comments will be read and considered seriously. . . .”

Although such a Notice will likely produce useful inputs to OMB on a vast range of topics, Valley View Corporation will focus its comments in only a few areas where it believes it has some knowledge and useful experiences for OMB’s consideration.

National Technology Transfer and Advancement Act (“NTTAA”)

The National Technology Transfer and Advancement Act, Public Law 104-113, (1996) states Congressional guidance to federal agencies. As noted on the excellent and informative National Institute of Standards and Technology (“NIST”) Web site (<http://ts.nist.gov/Standards/Conformity/nttaa.cfm>) on the NTTAA:

The Act directs NIST to bring together federal agencies as well as state and local governments to achieve greater reliance on voluntary standards and decreased dependence on in-house standards. To illustrate, when government agencies discovered a need for a standard, they had, in the past, created and adopted unique, proprietary standards when voluntary consensus standards already existed that effectively addressed those needs. The result was an unnecessary government standard that created confusion and added expense for those who had to comply with it. In order to prevent this kind of occurrence, **the Act requires that federal agencies adopt private sector standards, particularly those developed by standards developing organizations (SDOs), wherever possible in lieu of creating proprietary, non-consensus standards.** NIST encourages and supports federal agencies in their efforts to comply with the Act. **(Emphasis added)**

The Act further encourages federal agencies to participate in the SDOs to make sure their needs are being met and to use products and services based on those standards in their procurements. ANSI administers a program founded on principles of openness, transparency, access to embedded intellectual property, appeals rights, etc., that helps

ensure American National Standards are developed as “**Open Standards**” to serve these federal needs.

OMB itself has played a very important parts in implementing the NTTAA, in the guidance it provided to agencies and the public via OMB Circular A-119; *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*. (<http://ts.nist.gov/Standards/Conformity/upload/fr-omba119.pdf>)

In its review, OIRA should recognize the success of the NTTAA, and NIST and OMB in partnership in guiding federal agencies in their use of voluntary consensus standards, their agency’s participation in the development of those standards, their agency’s use of those standards in their regulatory roles, and the use of those standards in their agency’s procurement activities for goods and services. For example, DHS has recognized the Project 25 Suite of standards from the TIA as an important way to help achieve interoperability among first responders at the federal, state, local, and tribal levels. This will help advance the President’s priority (www.barackobama.com/issues/technology/) to:

Modernize Public Safety Networks: Barack Obama is committed to improving the information and communications technology used to support public safety from the antiquated 1970s and 1980s-based technology currently used by agencies around the country to a modern system that will enable us to respond to emergencies and natural disasters such as Hurricane Katrina. Obama and Biden will implement policies to:

- Spur the development and deployment of new technologies to promote interoperability, broadband access, and more effective communications among first responders and emergency response systems.

The NIST NTTAA Web site FAQs advise that **OMB Circular A-119** provides that:

"The use of [voluntary consensus] standards, whenever practicable and appropriate, is intended to achieve the following goals:

- a) Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation.
- b) Provide incentives and opportunities to establish standards that serve national needs.
- c) Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards.
- d) Further the policy of reliance upon the private sector to supply Government needs for goods and services."

These benefits can accrue to state and local governments as well. For example:

- Governments become "friendlier" for their suppliers of goods and services to deal with since the suppliers need not be concerned with modifying manufacturing processes, inspections or certifications in order to satisfy a unique set of technical requirements contained in a superfluous government standard.

- Governments can save tax dollars by
 - Avoiding costly and time-consuming efforts in creating and updating proprietary technical standards.
 - Purchasing off-the-shelf goods manufactured to voluntary consensus standards rather than purchasing goods manufactured to specific government standards at significantly higher cost.
- Companies wishing to supply products and services to governments in more than one jurisdiction would experience less confusion and frustration stemming from trying to meet several different compliance standards for the same product or service.
- Technical standards can enable or constrain trade not only at the federal but also at the state and local levels. Therefore, creating and choosing the right technical standards can lead to an environment that encourages global trade which can keep local companies competitive

In its review of guidance to agencies that will meet the President's priorities, and goals, the OMB Director should just reaffirm and note the successes that the NTTAA and OMB Circular A-119 have brought to the agencies and the public they serve.

Use of Open Standards in Agency Regulations and Procurements.

Valley View Corporation is aware that there has been, over the last several years, a lot of "confusion" and attempts to "re-define" what the term **OPEN STANDARD** means or should mean, as well as confusing that term with a form of implementation of some standards called "Open Source." For those not familiar with the differences and without a grasp of the standards development processes and how they function, it can be confusing and complex, and many individuals end up becoming misinformed. As an aid in understanding the appropriate meaning of the terms "**Open Standards**" and "**Open Source**" such as open standards from the International Telecommunication Union ("ITU"), the International Organization for Standardization ("ISO"), the International Electrotechnical Commission ("IEC"), ANSI-accredited SDOs such as the TIA, etc., many organizations, including ANSI, have produced "White Papers" or statements about Open Standards and how to avoid the confusion with Open Source. Valley View filed comments with the European Commission at its Workshop on IPR and ICT Standards on just this "Open Standards/Open Source" issue last November, citing to many of the sources for such clarifying guidance, via Web links to that material.

http://ec.europa.eu/enterprise/ict/policy/standards/ws08ipr_en.htm

A **copy** of those Valley View Comments to the EU in addition to ANSI's Comments to the EU are included with this set of Comments to the OMB.

Conclusion

OIRA should become informed about these issues as it develops its policy recommendations to the President. Valley View is available to assist in that education process.

Respectfully submitted,

Dan Bart
President and CEO
Valley View Corporation
Member of the ANSI Board
Chairman of the ANSI IPR Policy Committee

Attachments

- 1) Valley View Comments to the EU November 19, 2008 Workshop on IPR and ICT Standards
- 2) ANSI Comments to the EU November 19, 2008 Workshop on IPR and ICT Standards

Comments to the 19 November Workshop

Valley View Corporation

Valley View Corporation is a small consulting company to the Information, Communications, and Entertainment (“ICE”) sector. Its President and CEO, Dan Bart, has more than 40 year’s experience in this sector, and that includes working in the areas of standardization, Intellectual Property Rights (“IPR”) protection, Standards Development Organization (“SDO”) IPR Policies, and education efforts related to these topics. These comments are on behalf of Valley View Corporation to aid the European Commission, and do not necessarily represent the views of any particular client of Valley View Corporation.

One of the key issues in discussions of “**Open Standards**” is whether the “Open” in “Open Standards”, refers to the openness and transparency of the “process”; or does the proposed definition for “Open Standard” mean **the document** itself must be freely available, possibly having a major impact on SDOs who support their standards activities through the sale of copyrighted documents; or does the proposed definition for “Open Standard” mean that patent holders who hold essential patent claims related to the standard **must make their patented technology freely available**? Some groups wants all information to be FREE, and thus deprive copyright holders, like SDOs, of some of their rights, including the right to sell their works, as well as having any IPR embraced within a standard, available on a compensation-free or royalty-free (“RF”) basis.

Valley View believes these elements of some of the proposed “Open Standard” definitions **are contrary** to ANSI, TIA, ITU, ETSI, CEN, CENELEC, ATIS, ISO, IEC, IEEE, etc., RAND/FRAND IPR Policies, thus, would **eliminate literally tens of thousands of standards from being deemed “Open Standards,”** under such ill-advised re-definitions.

Many organizations have adopted their own positions or views on what is an “**Open Standard,**” and some of those organizations may file their own Comments with the Commission.

ANSI

In May 2005, ANSI issued a Critical Issues paper on “**Open Standards**” and efforts to redefine the term “**Open Standard.**”

<http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/Critical%20Issues%20Papers/Open-Stds.pdf>. ANSI has filed its own Comments with the Commission.

ETSI SOS

ETSI launched a series of Workshops to discuss and share views on “Standards, Open Standards and Interoperability” (“**ETSI SOS**”). At **SOS II**, the **GSC-10** view on an “**Open Standards**” definition was agreed. portal.etsi.org/docbox/workshop/2005/sos_interoperability/sos3/.

The Director General at ETSI summed up at SOS III why the SOS effort at ETSI:

- “Intensive activity from policy makers
- Study on ICT standardization in EU (DG ENTR)
- Communication on Interoperability (DG ENTR)
- Revision Directive 98/34 (DG ENTR)
- EU Interoperability Framework for e-gov (IDABC, DG ENTR)
- ICT Task force (DG INFSO/DG ENTR)
- Consultation on patent system in EU (DG Internal market)
- And in other regions as well (US Congress, FTC, DoJ ...)”

The Conclusions from ETSI SOS II at the Closing Session by Karsten Meinhold, ETSI General Assembly Chairman, Chair ETSI IPR Reform Committee, and Co-Chairman of the SOS Workshop were: **For “Open standards” the GSC Resolution 10/4 is way of addressing the issue of “Open Standards” in an acceptable way, and every SDO should adopt this text having in mind that:**

- it is valid in the ICT scope
- it gives a characterisation of “open standards” through a minimum set of characteristics
- in a given context, actors can precise their practical applications.
- [See document SOS2_17]”

GSC

The **Global Standards Collaboration (“GSC”)** meetings are by-invitation events which bring together the top Standards officials from the USA, Canada, the EU, China, Japan, Korea, Australia, and the International Telecommunication Union (“ITU”). At GSC-10 GSC adopted **a Resolution on “Open Standards.”** (GSC Resolution 10/4). At GSC-13 (Boston 2008) this Resolution was **reaffirmed.**(GSC-13/24).

[http://docbox.etsi.org/workshop/gsc13/gsc13_closing_plenary/GSC13-CL-35%20All%20Approved%20GSC-13%20Final%20Resolutions%20\(single%20.pdf%20file\).pdf](http://docbox.etsi.org/workshop/gsc13/gsc13_closing_plenary/GSC13-CL-35%20All%20Approved%20GSC-13%20Final%20Resolutions%20(single%20.pdf%20file).pdf)

GSC-13/24 Resolves:

1) that the Participating Standards Organizations (PSOs) **define an “open standard”** to include the following fundamental elements:

- the standard is developed and/or approved, and maintained by a collaborative consensus-based process;
- such process is transparent;
- materially affected and interested parties are not excluded from such process;
- the standard is subject to RAND/FRAND Intellectual Property Right (IPR) policies **which do not mandate**, but may permit, at the option of the IPR holder, licensing essential intellectual property without compensation; and
- the standard is published and made available to the general public under reasonable terms (**including for reasonable fee** or for free). (**Emphasis added**)

ITU-T

The ITU-T advises: “The ITU-T has a long history of open standards development. However, recently some different external sources have attempted to define the term "Open Standard" in a variety of different ways. In order to avoid confusion, the ITU-T uses for its purpose the term "Open Standards" per the following definition:

"Open Standards" are standards made available to the general public and are developed (or approved) and maintained via a collaborative and consensus driven process. "Open Standards" facilitate interoperability and data exchange among different products or services and are intended for widespread adoption.”

www.itu.int/ITU-T/othergroups/ipr-adhoc/openstandards.html.

The ITU-T also looked for attributes such as:

- **Collaborative process**
- **Reasonably balanced**
- **Due process**
- **Intellectual property rights (IPRs)**
- **Quality and level of detail**
- **Publicly available**
- **On-going support**

TIA

The Telecommunications Industry Association has also adopted its own paper on Open Standards, and it has filed its own Comments with the EC related to that paper.

http://www.tiaonline.org/standards/about/documents/TIA-IPR_20080620-003_TIA_OPEN_STANDARDS-CLEAN_R4.pdf

WIPO

WIPO Report on International Patent System

Pursuant to the decision by the 34th WIPO General Assembly held in September/October 2007 to submit a Report on the International Patent System to the Standing Committee on the Law of Patents (“SCP”), a document was submitted by the Secretariat as a working document for the twelfth session of the SCP, held from June 23 to 27, 2008. That **WIPO Report** also discusses “Open Standards”

WIPO Report, paragraph 121

121. Among technology standards, there is particular interest for “open standards”. While **there is no universally accepted definition of that term, all open standards** have the following common characteristics: (i) the specification is publicly available without cost or for a reasonable fee to any interested party; (ii) any IP rights necessary to implement the standard are available to all implementers on RAND terms, either with or without payment of a reasonable royalty or fee; and (iii) the specification should be in sufficient detail to enable a complete understanding of its scope and purpose and to enable competing implementations by multiple vendors. **Some** define open standards as publicly available technical specifications that have been established in a voluntary, consensus-driven, transparent and open process, **others** appear to add to this definition the requirement that an open standard has to be available **royalty-free**. The defenders of the first definition favor patent policies on a RAND basis, which they believe to maximize flexibility through a commitment to license combined with the right of patent holders to receive reasonable and adequate compensation for their sharing of their technology, and trust in the co-existence of this model and a royalty-free model. **They also question how, in a royalty-free environment, investments in research and development could be maintained in the long run and how a broad participation in standard-setting processes could be maintained.** On the other hand, the advocates of the latter approach are convinced that society as a whole would benefit from the open and royalty-free access to standards, as it is the case, for example, in the Internet context, which had been established precisely in order to allow the free publication and retrieval of information from the web. According to them, this model would best ensure interoperability, greater innovation and consumer welfare. In addition, they argue that, even where a royalty-free policy is adopted, the benefit of standardization may outweigh the loss of royalty income in certain technologies, simply through greater quantities of a certain product being sold. **(Emphasis added)**

WIPO Report, paragraphs 122 and 314

122. In this context, the notion of “open source” is often mentioned, but it **should not be confused with open standards**. . . . When governments and other users are in the process of selecting a specific technology to meet their needs for interoperability and/or free use of that technology, in addition to the open or proprietary nature of any software involved, factors such as overall costs, the maturity of the technology, and the support offered, should be taken into account. **(Emphasis added)**

314. Given the **different levels of development**, there might be **no answer that fits all**. Development is a long-term goal, and the determination of how the international patent system could contribute to development may require long-term strategies. **(Emphasis added)**

Conclusion

Valley View believes the EC should recognize the consensus view on the Open Standards definition.

Comments to the 19 November Workshop American National Standards Institute (ANSI)

To: The European Commission
(ENTR-ICT-STANDARDISATION@ec.europa.eu)

From: Ms. Patricia Griffin, Vice President and Legal Counsel
American National Standards Institute (ANSI)
Tel: +1 212-642-4954
Email: pgriffin@ansi.org

Re: Contribution to 19 November Workshop on IPR in ICT Standardisation

On behalf of the American National Standards Institute (ANSI) Intellectual Property Rights Policy Committee (IPRPC), we respectfully submit ANSI's Critical Issues Paper on Open Standards as a contribution to the 19 November Workshop on IPR in ICT Standardisation. This contribution is offered specifically for consideration when addressing the definition of Open Standards as the current definition used by the European Interoperability Framework ("EIF") for pan-European e-Government Services conflicts with ANSI's definition. As stated in the ANSI paper:

The term "open standard" has been used recently to describe a standard that may be copied, used and distributed for no fee and/or whose embedded technology is irrevocably available on a royalty-free basis. This definition has created some confusion among standards developers and users because it is contrary to the definition of "open" and "openness" long held by the American National Standards Institute (ANSI) and many other recognized standards bodies who understand the term to describe a collaborative, balanced and consensus-based approval process for the promulgation of domestic or international standards.

A copy of ANSI's Critical Issues Paper on Open Standards is attached for your review and can also be downloaded from ANSI's public Web site at:

<http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/Critical%20Issues%20Papers/Open-Stds.pdf>

We thank you for the opportunity to provide ANSI's position on this proposal and look forward to the outcome of the discussions regarding our contribution. Please contact Ms. Griffin if you have any questions or concerns.

Title: Current Attempts to Change Established Definition of “Open” Standards

Issue: The term “open standard” has been used recently to describe a standard that may be copied, used and distributed for no fee and/or whose embedded technology is irrevocably available on a royalty-free basis. This definition has created some confusion among standards developers and users because it is contrary to the definition of “open” and “openness” long held by the American National Standards Institute (ANSI) and many other recognized standards bodies who understand the term to describe a collaborative, balanced and consensus-based approval process for the promulgation of domestic or international standards.

Background: Historically, ANSI and many U.S.-based developers of voluntary consensus standards have used the terms “open” or “openness” to characterize a process that has certain important features. These include:

- consensus by a group or “consensus body” that includes representatives from materially affected and interested parties;
- broad-based public review and comment on draft standards;
- consideration of and response to comments submitted by voting members of the relevant consensus body as well as by the public;
- incorporation of approved changes into a draft standard; and
- availability of an appeal by any participant alleging that due process principles were not respected during the standards-development process.

These same features are central to the policies of well-recognized regional and international standards bodies such as the International Telecommunications Union (ITU), International Organization for Standardization (ISO), International Electrotechnical Commission (IEC), European Telecommunications Standards Institute (ETSI) and the WC3 Consortium. Further, these features are endorsed in Annex 4 of the Second Triennial Review of the WTO/TBT Agreement.

By contrast to these well-established notions of standards organizations that develop “open” standards, other incompatible definitions of the term “open standard” exist, both within the standardization industry and within certain industrial sectors. For example, recently the European Commission’s Interchange of Data Between Administrations (“IDA”) released a document which seeks to establish a European interoperability framework to support the delivery of electronic government services. In that document, entitled *European Interoperability Framework of Pan-European E-Government Services*, the IDA stated that an “open standard” is one that is “available to all interested parties” and subject to copying, distribution and use “for no fee or at a nominal fee” and whose intellectual property is “irrevocably available on a royalty-free basis” with “no constraints on the re-use of the standards.”

But using the term “open standard” to define a specification whose sole quality is that is unconditionally and freely available to those who wish to implement it is misleading for two reasons.

First, it ignores the fact that essential patent holders have the right to decide how they will license their intellectual property. The terms and conditions used in the development of “open standards” should balance the interests of those who will implement the standard with the interests and voluntary cooperation of those who own intellectual property rights that are essential to implementation of the standard. Such terms and conditions should readily promote, and not unreasonably burden, accessibility to the standard for the communities of interested implementers. To achieve such balance, the payment of reasonable license fees and/or other reasonable and nondiscriminatory license terms may be required by the intellectual property rights holders. This balance of licensing rights (rather than waiver thereof) is consistent with an open standard. The word “open” does not imply “free” from monetary compensation or other reasonable and nondiscriminatory license terms.

Further, an open standard may involve the payment of a fee to obtain a copy of the standard. Such fees are sometimes used to offset the costs associated with managing open standards development process.

Additional Information

- *ANSI Essential Requirements: Due process requirements for American National Standards (2005 edition)*
- American National Standards Institute - Introduction

ANSI Policy Body Addressing Issue

Intellectual Property Rights Policy Committee

Contact

Patricia A. Griffin
Vice President and General Counsel
American National Standards Institute

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