EICTA

European Industry Association | Information Systems Communication Technologies Consumer Electronics

EICTA Comments to IDA's European Interoperability Framework (Version 1.0 , November 2004)

Brussels 12 January, 2005

EICTA (the European Industry Association for Information Systems, Communication Technologies and Consumer Electronics) is very pleased to see Version 1.0 of the EIF, and congratulates IDA on finalizing this important document. In meetings with IDA and written comments, EICTA has been supportive of the efforts by IDA to improve eGovernment interoperability. Most aspects of the EIF are consistent with industry views of the nature of the relevant issues and the best way forward to address them.

EICTA seeks clarification from IDA of two points in the EIF: 1) continuing industry involvement in the EIF process that IDA has outlined; and 2) the scope and application of the definition of "open standards" as set forth in the EIF.

1. Governance and Industry Stakeholders

The EIF states in Section 1.4 that the Framework "will be subject to a continuous consultation process with Member States and other stakeholders." It also refers to an organizational structure ("management entity") for the IDABC Programme, and that infrastructure will be "the subject of a pilot study and discussed in a separate document." From Figure 2 in Section 1.4, it is evident that the IDABC Management Entity is separate from the "Member States" and the "Other Stakeholders."

EICTA very much appreciates IDA's stated intention to involve relevant stakeholders. Up to this point, EICTA has followed the work on the EIF to the extent possible, and responded in writing to the draft EIF. We appreciate that IDA foresees a more formal structured process in the future for stakeholder input. Such a structured process will help to ensure that stakeholders are encouraged to provide input on a timely basis and when most helpful to IDA and its member state experts.

EICTA anticipates that the continuing work on the EIF, including the annual updates and the related Architectural Guidelines, will involve both a systematic process and deeper levels of detail regarding technical, semantic, and organizational interoperability issues. In order to provide the level of participation and expertise that IDA would expect from industry, and in order for EICTA member companies to plan for both the process and the resources needed to meet IDA's expectations, we would very much appreciate it if IDA could clarify and elaborate on the intentions as stated in Section 1.4.

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If however IDA would prefer, EICTA is also willing to suggest a potential framework for such a process.

It is unclear whether the pilot study for an IDABC Management Entity would actually propose a structure for participation by an Industry stakeholders group, or if IDA will explore the structure of industry participation in some other way. We would like to be a part of the discussions to create an inclusive stakeholder consultative mechanism that would be appropriate for both IDA and industry, and would be happy to meet with IDA specifically on this subject.

2.Scope and Application of the Definition of "Open Standards"

EICTA's written comments on the draft EIF focused on the issue of Open Standards, as it was one of the very few issues that we had questions or concerns about in the draft.[1] EICTA acknowledges and appreciates an important revision made by IDA from its earlier draft: in the draft EIF, the definition of open standards included a clause stating that "the intellectual property rights to the standard are vested in a non-profit organization." This language has been changed in the final version, which no longer makes any reference to vesting of intellectual property rights in a non-profit organization. In addition, and consistent with EICTA's written comments to IDA, the current definition appears to distinguish copyright in a specification document from Essential IPR such as patents underlying the technical solution.

We note with some regret, however, that IDA has chosen not to adopt other aspects of the alternative text that EICTA proposed, and would therefore be grateful for some clarification of the reasoning behind the chosen wording, so that we understand the intent behind IDA's definition.

There are two aspects of the current definition that EICTA finds questionable:

"The intellectual property – i.e. patents possibly present – of (parts of) the standard is made irrevocably available on a royalty-free basis."

In our comments to the draft EIF, we stated:

> *EICTA very strongly believes that standards can be considered as "open" only if the cost aspects to the underlying patent [and potentially other intellectual property] rights have been sufficiently addressed. Absent particular reasons – such as evidence of existence of Essential patents held by parties not bound by the IPR licensing rules of the relevant standards body or forum – EICTA considers this condition as having been met if*
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> > *(a) the standard specification is issued by a standards organization operating under an IPR policy or licensing undertaking that binds its members; and*
> > *(b) members have an obligation to license Essential IPR to all parties complying with the standard specification on terms that are either "fair, reasonable and non-discriminatory" (RAND) or "royalty free" and otherwise RAND terms and conditions.*

[1] *See also* EICTA Interoperability White Paper, which describes the criteria of "open standards." http://www.eicta.org/

Royalty-free licensing of IPR is a possible solution that an industry forum producing a standard can adopt on a voluntary basis. The royalty-free licensing approach should however not be set as a generic requirement for "open" standards. Most IPR policies of standards bodies and industry consortia do not require royalty free licenses, leaving the question of royalties and other license conditions open under the general requirement of "fair and reasonable terms." These IPR policies have worked well and apply to most of the widely used open standards supported by industry today.

This perspective is shared by many long-standing and well-respected standards organizations worldwide. For example, ETSI, ITU, and several other standards organizations acting in the Global Standards Collaboration[2] recently resolved to "strongly support the adoption of effective intellectual property policies that are transparent, widely accepted and encourage broad-based participation and the contribution of valuable technical solutions by respecting intellectual property rights, including the right of the intellectual property holder to receive reasonable and adequate compensation for the shared use of its technology."[3]

The eEurope 2005 Action Plan requires that the EIF "be based on open standards." EICTA fully supports this objective. If IDA wishes to make a choice only to use those open standards that are royalty-free for its specific and targeted interests, that may be justified for the deployment of pan-European eGovernment services. In fact, IPR policies of certain standards organizations, such as W3C, choose the adoption of royalty-free terms in open standards[4], and there are many widely deployed open standards (e.g. HTTP, HTML, and XML) that are royalty-free.

We fear, however, that excluding specifications and standards for which relevant IPR's are licensed on reasonable and non-discriminatory, but royalty bearing, terms could automatically exclude many widely deployed standards such as GSM, MPEG, 3GPP, SNMP, and IEEE 1394, that are subject to IPR licensing that is not royalty-free. Although a wide deployment of a standard does not guarantee interoperability per se, it is clear that an automatic exclusion of any royalty bearing standard from an IDA definition of "open standards" is not practical at this time and may be counterproductive when building a functional "open" IT infrastructure. While we certainly understand that IDA may wish to have a policy preference for using those open standards that are royalty free, we believe it is both impractical and damaging to establish royalty free licensing terms as a minimum condition. The effect of a requirement for royalty-free licensing would be to disqualify some standards and specifications from standards setting bodies such as ITU, DVB, ISO, IEEE, IETF) as open standards simply because they allow for RAND-based royalties to be charged to implementers of the standard by essential patent holders.

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2 *See* http://www.gsc.etsi.org/.

3 http://www.tta.or.kr/gsc/upload/GSC9-14B_IPR_ResolutionFINAL.doc

4 *See* http://www.w3.org/Consortium/Patent-Policy-20040205/. Even the W3C policy, however, allows for a RAND licensing exception under which royalties could be charged in certain circumstances. *See id.* Section 7 ("Exception Handling").

In addition, IDA added the condition that intellectual property in an open standard be "irrevocably" available. We do not understand the intent here. Perhaps IDA is seeking long-term certainty over intellectual property licensing, and does not want to see an IPR licensor contribute IPR on a royalty-free basis to a standard but later change to royalty-based licensing after the standard is in wide use. It is not the common practice of IPR licensing in standards to change in this manner. However, there is a very common and widely used term in RAND licensing called "defensive suspension," by which the IPR licensor grants a license, but that license *could* be revoked if a licensee sues the licensor for patent infringement with respect to the licensor's compliant implementation of the same standard. For example, the IPR policies of various major developers of open standards (*e.g.*, W3C[5] and WiFi Alliance[6]) specifically allow for the use of defensive suspension provisions by licensors, and various open standards (*e.g.*, DomainKeys,[7] RObust Header Compression (ROHC),[8] Scalable Vector Graphics (SVG),[9] and Simple Certificate Enrollment Protocol (SCEP))[10] are covered by patent licenses that include defensive suspension provisions. Such defensive suspension provisions are, in fact, a very useful tool to ensure that standards remain "open".

Could IDA please clarify that 1) IDA does not believe that these and other standards like them are disqualified as "open" standards simply because patented technology covering them is subject to a defensive suspension licensing provision, and 2) IDA will utilize open standards even if the IPR licensor uses a reasonable defensive suspension provision.

"There are no constraints on the re-use of the standard."

In our comments on the draft EIF, we suggested that this statement be incorporated into a clause regarding the publication and availability of the text of the standard. The final EIF now has a distinct clause on publication and availability: *"The standard has been published and the standard specification document is available either freely or at a nominal charge. It must be permissible to all to copy, distribute and use it for no fee or at a nominal fee."*

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5 *See* W3C Patent Policy, Section 5.6, http://www.w3.org/Consortium/Patent-Policy-20040205/ ("With respect to a Recommendation developed under this policy, a W3C Royalty-Free license shall mean a non-assignable, non-sublicensable license to make, have made, use, sell, have sold, offer to sell, import, and distribute and dispose of implementations of the Recommendation that:…. may be suspended with respect to any licensee when licensor is sued by licensee for infringement of claims essential to implement any W3C Recommendation.")

6 *See* WiFi IPR Policy, Section 3.2, http://www.wi-fi.org/OpenSection/pdf/Wi-Fi_IPR.pdf ("It is acknowledged that references in this Policy to a license agreement containing reasonable and nondiscriminatory terms may include a license agreement with reasonable defensive suspension provisions.").

7 *See* http://www.ietf.org/ietf/IPR/yahoo-ipr-draft-delany-domainkeys-base.txt (Yahoo patent disclosure and licensing declaration to IETF).

8 *See* http://www.ietf.org/ietf/IPR/ericsson-ipr-rfc-3843.txt (Ericsson patent disclosure and licensing declaration to IETF).

9 *See* http://www.w3.org/2001/07/SVG10-IPR-statements (Apple patent disclosure and licensing declaration to W3C).

10 *See* http://www.ietf.org/ietf/IPR/cisco-ipr-draft-nourse-scep-10.txt (Cisco patent disclosure and licensing declaration to IETF).

However, the final EIF maintains a separate clause specifying that there are no constraints on re-use of the standard. The meaning of this clause is unclear to us, but apparently IDA does not intend it to relate to publication and availability as we had suggested.

Of course, the intent of open standards is to enable broad deployment or implementation, and we support that goal entirely. This goal is also achieved by encouraging IP licensors to contribute technology to an open standard. As noted above, the IPR policies of standards organizations typically permit IP licensors to utilize RAND terms in licensing their IP, and some of those well-established terms could in some cases be construed as limiting constraints on the use and re-use. Such common RAND terms include field-of-use restrictions,[11] reciprocity requirements,[12] and restrictions on sublicensing.[13] Constraints on the re-use of standard can also be used by standards setting organizations to prevent the creation of "derivative" standards by third parties or ad-hoc groups which seek to develop related but different standards resulting in the "splintering" of a widely recognized open standard into related, but different standards which may not be fully interoperable.

RAND provisions that are generally negotiated between licensor and the licensee are consistent and allowed by standards policies of different standards organisations such as W3C[14], ITU[15], and the WiFi Alliance[16]. These organizations' IPR policies and related guidelines make it clear that such terms are acceptable RAND provisions. Each of these RAND provisions strikes a balance of interests between IP licensors and licensees -- a balance that encourages participation in and contributions to standards efforts, while seeking to resolve patent issues in the final specification so as to promote widespread adoption.

It might help to consider some specific common open standards that are covered by such RAND restrictions. For example, licensing the open standards Session Initiation Protocol (SIP),[17] Dynamic Host Configuration Protocol (DHCP),[18] WLAN protocol[19],

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[11] **A field-of-use restriction is a provision specifying the particular purpose for which the license is granted and for which the patented technology may be used by the licensee.**

[12] **A reciprocity requirement is the quid pro quo required of the licensee to grant a license to any patents the licensee may own that are essential to implement the same standard.**

[13] Under a restriction on sublicensing, the licensee that receives a license from the patent owner can not, in turn, grant a license to another third party that wishes to redistribute a product including the patent owner's technology, although any such third party can obtain its own license directly from the patent owner.

[14] *See* http://www.w3.org/Consortium/Patent-Policy-20040205/, Section 5 ("With respect to a Recommendation developed under this policy, a W3C Royalty-Free license shall mean a non-assignable, non-sublicensable license to make, have made, use, sell, have sold, offer to sell, import, and distribute and dispose of implementations of the Recommendation.") .

[15] *See* http://www.itu.int/itudoc/itu-t/patents/policy/pd-form.pdf (including reciprocity and field-of-use restrictions directly in patent licensing declaration options on ITU-T patent disclosure form, indicating that *all* licenses relating to ITU-T standards contain such restrictions).

[16] *See* http://www.wi-fi.org/OpenSection/pdf/Wi-Fi_IPR.pdf (WiFi Alliance IPR Policy allowing conditions for reciprocity, field-of-use, defensive suspension, and non-sublicensing).

[17] *See* http://www.ietf.org/ietf/IPR/CISCO-peterson-sip-identity.txt (Cisco patent disclosure and licensing declaration to IETF for SIP). *See also* http://www.ietf.org/ietf/IPR/ATT-SIP (AT&T patent disclosure and licensing declaration to IETF for SIP).

XML Configuration Access Protocol (XCAP),[20] Internet Key Exchange (IKE),[21] and Scalable Vector Graphics (SVG),[22] among countless others, involve field-of-use restrictions and reciprocity requirements. The WS-Security standard has a joint declaration from IBM, Microsoft, and Verisign (at OASIS) that expressly offers a non-sublicenseable license on request,[23] and all EPCglobal radio frequency identification standards may involve a prohibition on sublicensing.[24].

We are not aware of any standards body that mandates that all essential patents be subject to "unconditional licenses". Standards promulgated by standards bodies that often are cited as examples of well-recognized, "open standards" developers (such OASIS, W3C, IETF, IEEE, ETSI, ISO, IEC, ITU and those accredited by ANSI) would not meet the criteria set forth above if the common conditions on IP licenses were viewed as "constraints on re-use of the standard."

EICTA is confident that IDA is not attempting to redefine "open standards" in a way that excludes or undermines these longstanding and widely used RAND provisions. However, the document is not explicit and leaves room for different interpretations. We therefore ask for IDA's clarification regarding how this clause should be interpreted in light of common practice. Specifically, does IDA intend to exclude standards using common RAND terms as being "open standards"? Could IDA explain in more detail what it intends by the clause "There are no constraints on re-use of the standard"? We suggest that IDA may have intended to ensure that there are no unreasonable constraints on the implementation of a standard, thereby ensuring that a standard can be employed widely by a maximum number of vendors, but as outlined above, a prohibition with respect to constraints on the re-use of a standard could be counter-productive.

EICTA looks forward to IDA's clarification of the intent behind the chosen wording regarding Open Standards in the EIF. EICTA appreciates the time and effort that goes into the many aspects of the EIF and looks forward to further co-operation with IDA as active participants in the EIF process.

[18] *See* http://www.ietf.org/ietf/IPR/MOTOROLA-DHCP (Motorola patent disclosure and licensing declaration statement to IETF for DHCP); http://www.ietf.org/ietf/IPR/apple-ipr-rfc-2131.txt (Apple patent disclosure and licensing declaration to IETF for DHCP).

[19] *See* http://www.ietf.org/ietf/IPR/telecom-italia-ipr-wlan-access.txt (Telecom Italia patent disclosure and licensing declaration to IETF for WLAN).

[20] *See* http://www.ietf.org/ietf/IPR/NOKIA; http://www.ietf.org/ietf/IPR/nokia-ipr-draft-ietf-xcon-cpcp-xcap-00.txt (Nokia patent disclosure and licensing declaration to IETF for XCAP).

[21] *See* http://www.ietf.org/ietf/IPR/certicom-ipr-rfc3526-rfc2409-ikev2.txt (Certicom's patent disclosure and licensing declaration to IETF for IKE).

[22] *See* http://www.w3.org/2001/07/SVG10-IPR-statements (Apple patent disclosure and licensing declaration to W3C for SVG).

[23] *See* http://www.oasis-open.org/committees/wss/ipr.php.

[24] *See* http://www.epcglobalinc.org/action_groups/031223EPCglobalIPPolicy12152003A.pdf, Section 3.2 ("Participant and its Affiliates shall … grant to the extent that it owns or has a right to grant, a nonexclusive, nontransferable, non-sublicensable, worldwide royalty- free and otherwise reasonable and non-discriminatory license upon request in, its Necessary Claims").

EICTA MEMBERSHIP

EICTA, founded in 1999 is the voice of the Information and Communications Technology and Consumer Electronics Industry in Europe. It is composed of 51 major multinational companies and 32 national associations from 24 European countries. In all, EICTA represents more than 10,000 companies all over Europe with more than 2 million employees and EUR 200 billion in revenues.

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