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**COMMITTEE FOR TRADE, INDUSTRY AND ENTERPRISE DEVELOPMENT**

Centre for Trade Facilitation and Electronic Business (UN/CEFACT)

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Item 6 of the provisional agenda

**NOTE REGARDING INTELLECTUAL PROPERTY IN WORK CREATED BY UN/CEFACT**

Submitted by the UN/CEFACT Legal Rapporteur

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The present report is submitted to the Centre for consideration.

1. Consideration during the last year of particular potential UN/CEFACT deliverables has highlighted the question of the ownership of the intellectual property in the work produced by UN/CEFACT.
2. As with all other United Nations work, it is a fundamental principle that the product of that work should be freely available to the world community. This is an important principle because of the need to ensure that nothing produced by UN/CEFACT should be unavailable because of proprietary commercial rights for which payment of royalty might be required before general use could take place.
3. The participants in UN/CEFACT come from different backgrounds. Some are individuals; some are government officials, NGO officials or United Nations employees. However, the majority are employees of commercial companies from many different jurisdictions. Almost all employees will participate in the work of UN/CEFACT under the aegis of their contract of employment. The great majority of such employees will be subject to an express or implied provision in their contract of employment specifying that all work that they create will be the property of their employers. As a result, if they contribute to a UN/CEFACT deliverable, the intellectual property in the contribution they have made, whether solely or jointly with others, is likely automatically to be owned by their employer unless some other specific agreement has been made.
4. It should be borne in mind that across the world there are two generic types of intellectual property. "Hard" monopoly rights such as patents and trademarks are usually required to be formally registered, while "softer" rights such as copyright are not required to be registered in many jurisdictions. There are differences of approach, notably in the treatment of computer programmes and similar routines that in some countries can be registered as patents while in others are only capable of copyright protection.
5. Ownership of intellectual property rights carries with it the ability to prohibit use of such intellectual property without the consent of the owner or owners (in the event of joint ownership). In different jurisdiction, different laws apply to the rights of joint owners inter-se and different rules relate to the legal mechanisms necessary to transfer or licence intellectual property so created.
6. For these reasons, it is suggested that there is wisdom in establishing clearly the policy on intellectual property rights within UN/CEFACT to ensure that open unfettered use of the deliverables should be unequivocally clear. One solution would be to require a written acknowledgement and agreement by every employer of a contributor acknowledging that any intellectual property created will vest in the United Nations and UN/CEFACT so that there is no possibility of any legitimate challenge to UN/CEFACT in its free dissemination of its deliverable. Regrettably, such formal acknowledgement and disclaimer is almost certainly a counsel of perfection because to insist upon this would be likely to result in many employers of willing volunteers either to refuse to sign such documentation or, indeed to refuse to allow their staff to participate in the process at all.
7. As indicated earlier in this paper, it is important to distinguish between the transfer of

intellectual property rights and the licensing of such rights. In the event of a transfer (exactly the same as the sale of any other piece of property such as a motor car) ownership moves from the seller to the purchaser and, as a result, the seller has no right to use the intellectual property once transfer has taken place. The grant of a licence to use intellectual property is quite different in that the original owner retains the right to exploit the intellectual property rights in question (as long as the licence is not exclusive to the licensee) whilst at the same time allowing the licensee to use the intellectual property. It is also the case that the legal formalities for creating licences are in many jurisdictions informal so that creation of the licence can often be inferred without formal documentation.

8. Given the significant contribution made by many companies through the activities of their employees who are engaged in the UN/CEFACT process the most equitable solution would appear to be that the policy of UN/CEFACT should be that the participation of all contributors should be on the basis that they or their employer acknowledge that any intellectual property created by them as part of the contribution to a particular Working Group will remain the property of them or their employer, but will be subject to a non-exclusive licence in favour of UN/CEFACT. It would be a term of such a licence that UN/CEFACT is free to grant sub-licences on whatever terms it thinks fit. In effect, this is the equivalent of the manner in which certain software is distributed on a “shareware”, or royalty-free licensing basis.
9. One of the primary activities of UN/CEFACT is, of course, the development of e-commerce standards. An important principle in relation to the use of standard is that they should not be modified by users unilaterally. If the intellectual property rights in the standard are clearly owned by UN/CEFACT then in most jurisdictions this ownership carries with it the power to prohibit unapproved alterations. If, however, as is much more likely to be the case, UN/CEFACT is only a licensee in respect of the intellectual property rights in the standard created then that power to prohibit unauthorized alteration does not vest in the UN but will vest in the joint owners or owners of the work in question. This is not an ideal solution but it is probably the only practical solution for the reasons identified earlier in this note.
10. At the very least, however, it is respectfully suggested that there does need to be a policy statement by the Plenary of UN/CEFACT making clear the basis upon which participation in the work programmes of the working groups take place. Such a policy statement would at least be able to be used as a shield, if not a sword, against potential disputes with participants or their companies. If this suggestion finds favour with the Plenary, a possible form of such policy statement follows. The policy statement would be promulgated on the UN/CEFACT website and would make it clear that participation in the activities of a Working Group would constitute acceptance of the policy term.

## **PROPOSED POLICY STATEMENT**

It is the policy of UN/CEFACT that the results of its work must be freely available to all its members. To ensure this end, it is a rule that the only basis on which any contribution can be made to the work of any UN/CEFACT Group is that such contribution is supported by either:

- A. an agreement to the unconditional free transfer and assignment of all or any intellectual property rights in favour of UN/CEFACT that may be required in order to ensure the free and unfettered use of all deliverables produced from the work of UN/CEFACT; or
- B. the grant of an irrevocable royalty free licence of all such intellectual property rights in favour of UN/CEFACT of all intellectual property provided by any contributor and used in any deliverables produced from the work of UN/CEFACT;

So that in all cases there will be no obstacle to the use by any member of UN/CEFACT of the work produced by it.

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