

ebXML – the legal perspective

by David Marsh

In the February 2003 issue of *myITadviser*, Richard Sarson wrote an excellent article identifying the standards issues regarding the development of ebXML. Richard's point is that the UK needs to make its influence felt internationally in supporting the development of an ebXML standard. My concern is that there are a number of potential legal hurdles to be overcome before an ebXML standard can be safely available for use.

Before attempting to analyse the legal problems that I envisage, it is appropriate to give my simplistic lawyer/layman's understanding of what XML actually is. How and why is it new and different? The fundamental change is that it does something which the existing internet standard, HTML (Hypertext Mark-up Language), does not do. The big difference is that when I look at a page received from the internet in HTML form as a human being I can read and understand what I am seeing. However, the computer which I am using cannot read the text and cannot, therefore, automatically acquire the data contained in the message. If the message is an order or an order confirmation there is no automatic interaction between the incoming HTML message and my stock control system. This is, of course, not the case in the closed world of EDI using the UN/EDIFACT standard. The benefits of avoiding re-keying are very significant and the interaction between incoming

messages and the 'back office' systems are capable of producing very significant business process advantages.

XML, and ebXML in particular, will enable all the data elements of a message received from the internet to be recognised by the receiving system so that an incoming ebXML standard message will have all the functionality of a UN/EDIFACT 'closed world' EDI message.

However, as I said at the beginning of this article, there are a number of potential legal hurdles which need to be overcome before an ebXML standard can be safely available for use. These problems fall into two general categories. The first relates to how an ebXML standard would actually work. The second relates to the intellectual property rights associated with the standard.

Issues in implementing the standard

If I wish to send a UN/EDIFACT standard message, then I will have to use a specific format which has been approved under the UN/EDIFACT standard. Of course, I can do that because UN/EDIFACT is the United Nations approved standard and it will (or certainly should) go without saying that if the UN approves and supports a standard then it must be an open and free standard available to any user without the need to pay a proprietary owner for a licence to do so. UN/EDIFACT is freely available to be used without paying any royalty or fee to anyone.

The development of electronic commerce over the past thirty years has resulted in a rather interesting change in the structure of technical standards. Originally a standard was a norm which identified the way in which a particular business process should be conducted. There was no perception that implementing a standard might, itself, involve the need to obtain consents in the form of licences or other forms of intellectual property authority from owners of proprietary rights embedded in the

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standard process itself. All of that has changed because of the coming together of the technology within electronic business and the means of implementing that technology in a standard way coupled with the enormous growth, particularly in the USA, of business process patents. These are patents filed mainly by IT companies trying to obtain monopoly protection of parts of a standard system which they claim to have invented.

Whilst the free and open use of new IT technical standards is a laudable and, arguably, an absolutely essential policy principle for the United Nations, its implementation in the real world is not free of uncertainties and commercial concerns. Like all standard making bodies the United Nations has fundamental principles governing the basis for the contributions of potential participation in the development of standards. To put it relatively simply, if anyone wishes to contribute to the development of the United Nations-based electronic business standard then they are only permitted to do so if they agree that if they bring new technology to the process, then they must do so on the basis that they freely and readily agree to grant to the United Nations, for the benefit of the potential user base of the standard, such intellectual property licence as is necessary to ensure the free and open use of the standard by all those who wish to do so.

As a general principle, the above analysis seems clear enough but it is vitally important that all those who do contribute to the creation of international standards must be aware of and must agree to this basis on which their contributions are made.

Problems with 'road block' patents

The basis upon which contributions are made is a problem of real pressing practical concern simply because in the last twenty years there has been a significant development of business process patents. These are perfectly legitimate attempts by developers of electronic business in the world IT industry, particularly in the USA, to file applications for patent protection (and remember that this means an absolute monopoly right for twenty years) for electronic business processes. In many circumstances such patents may claim monopoly rights for aspects which may be an essential and, indeed, vital part of the development of the standard.

I describe such patents as 'road block patents'. If they stand in the way of the development of the standard they create a significant problem which can only be resolved by negotiations with the patent owners for a licensing regime in favour of the UN and the users of the standard. Such negotiations will permit the use of the ebXML standard without users being afraid that they could be at the wrong end of an action for infringement of a patent supported by a

patent owner with significant resources and therefore able to afford expensive litigation to enforce the patent monopoly.

If that causes you some concern then you need to be aware that it is also quite important that the essence of the ebXML standard involves using messages which can be identified by the receiving computer because of the use of tags. The tags in question are invisible attachments recognisable by the computer receiving the message. It should immediately be apparent that the only way that these tags can be recognised is if they come from a standard ubiquitous generally available database. In addition, because of the nature of ebXML and its operation in the real world, the database must be completely up-to-date and available online '24/7'.

Intellectual property concerns

The issues surrounding the use of tags immediately begs a number of questions to a cynical lawyer like me. Who owns the intellectual property in the database? Who will pay for the database to be kept up-to-date? Who will be responsible if the database is in error? Who will pay – and, if so, how much – for the cost of accessing the database in order to use the standard and read the ebXML message? These are all major issues which need to be addressed as a matter of urgency before it is possible for the United Nations to endorse and approve a stable ebXML standard in a form which permits open use world wide without cost to potential users. I cannot offer solutions to these problems yet but I can confirm that they are currently being addressed within the UN and, even though there presently are no clear solutions, there is a clear awareness of the nature of the problem.

The major commercial contributors to the development of the ebXML standards are also aware of these potential barriers to the development of an ebXML standard. However, there are competing interests involved and it is essential to strike a balance between the proprietary rights of the contributors, their willingness to support an open standard and their legitimate need to obtain a return upon their investment in the development of the technology.

Where to from here?

I might come in for criticism because I have only identified the problem rather than offered nice clean solutions. However, the present timeline for the development of an ebXML standard is too immature for there to be neat resolutions of these issues. I am confident that solutions can be found but doing so will take time and effort. It will also require considerable co-operation between those working in the UN standards process and the leaders of the world's IT industry.

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The Author

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