Written comments of Knowledge Ecology International (KEI) regarding the World Intellectual Property Organization's Taxonomy Analytical Study for the Project on Open Collaborative Projects and IP-Based Models (CDIP/8/INF/7)

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At the 2007 General Assembly of the World Intellectual Property Organization (WIPO), member states adopted 45 recommendations that constitute the "WIPO Development Agenda". The sixth session of WIPO's Committee on Development and Intellectual Property (CDIP) approved a "Project on Open Collaborative Projects and IP-Based Models (CDIP/6/6 REV) based on Recommendation 36 of the WIPO Development Agenda which states:

> "To exchange experiences on open collaborative projects such as the Human Genome Project as well as on intellectual property models."

Antecedents of WIPO's Project on Open Collaborative Projects and IP-Based Models.

In examining the antecedents of Recommendation 36 on open collaborative projects, the International Bureau should pay heed to a letter from 69 prominent scientists, economists, academics, activists and other actors (including Nobel laureates Joseph Stiglitz, Sir John Sulston and Harold Varmus) addressed to Dr. Kamil Idris (former Director-General of the WIPO) on 7 July 2003 requesting WIPO to convene a meeting in 2004 to examine open collaborative models[1]. Specifically, the letter requesting the meeting stated,

> In recent years there has been an explosion of open and collaborative projects to create public goods. These projects are extremely important, and they raise profound questions regarding appropriate intellectual property policies. They also provide evidence that one can achieve a high level of innovation in some areas of the modern economy without intellectual property protection, and indeed excessive, unbalanced, or poorly designed intellectual property protections may be counter-productive. We ask that the World Intellectual Property Organization convene a meeting in calendar year 2004 to examine these new open collaborative development models, and to discuss their relevance for public policy.

Initially, the International Bureau seemed willing to convene such a meeting as reported in Nature[2] and the Washington Post[3] but after objections from the United States of America in 2003 regarding the

1 Sign-on letter from 69 scientists and economists to Kamil Idris, Director General of the World Intellectual Property Organization requesting that WIPO host a meeting on open and collaborative development, July 7, 2003, www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf.
2 Declan Butler, "Drive for patent-free innovation gathers pace, *Nature,* Volume 424, 10 July 2003.
3 Jonathan Krim, "The Quiet War Over Open-Source", *The Washington Post,* August 21, 2003.

mission of WIPO,[4] the meeting was canceled. The dispute over the 2003 request was widely reported, and stimulated a public debate on the mission of WIPO. This was discussed in a one day Trans Atlantic Consumer Dialogue (TACD) meeting in Lisbon on the WIPO Work Program, and was one of the motivations for the 2004 proposal for the WIPO development agenda.

On 26 August 2004, the governments of Argentina and Brazil submitted a formal proposal to the International Bureau "relating to the establishment of a new development agenda within WIPO requesting that the proposal be distributed and added to the agenda of this session of the WIPO General Assembly, pursuant to Rule 5(4) of the WIPO General Rules of Procedure" (WIPO/GA/31/11). This submission, intent on integrating the development dimension into all aspects of WIPO's activities, including norm-setting activities and technical assistance programs, launched an intensive three year negotiation, and ultimately to the establishment of the WIPO Development Agenda. Contained within the original Argentina/Brazil proposal in the section IV on the "Development Dimension and Intellectual Property Norm-Setting: Safeguarding Public Interest Flexibilities" was the following:

> In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software. (Ibid)

In their subsequent elaboration of the original Argentina/Brazil proposal to establish a development agenda for WIPO, the group of Friends of Development submitted a proposal to WIPO (IIM/1/4) which stated,

> WIPO should be open to examining non-intellectual property-type and/or non-exclusionary systems for fostering creativity, innovation and the transfer of technology, for example, open collaborative models for research, open and free software development, and compensatory liability systems and the development of technology for the public good, while recognizing the benefits and costs of each system.

WIPO's implementation of the project on open collaborative projects should integrate the original spirit which engendered Recommendation 36 by conducting an in-depth examination of alternative models to foster creativity, innovation and the transfer of technology that are not predicated upon monopolistic and/or non-exclusionary systems. This goes beyond the initial work by the Secretariat, which has largely focused on crowd sourcing innovation strategies that do not involve the production of knowledge as a public good.

As noted earlier by the Friends of Development, the individual recommendations of the Development Agenda should not be compartmentalized in silos but rather be treated as cross-cutting issues. Although Recommendation 36, is grouped in Cluster D on Assessment, Evaluation and Impact Studies, it is inextricably linked to Cluster B on "Norm-setting, flexibilities, public policy and public domain" and Cluster C on "Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge".

4 Declan Butler, "Business backlash kills off software meeting, *Nature,* Volume 424, 28 August 2003.

Analysis of WIPO's implementation of Recommendation 36 of the Development Agenda

WIPO's document, CDIP/6/6 REV, describes the International Bureau's thematic project on Open Collaborative Projects and IP-Based Models as a thirty-month project costing 895,000 Swiss francs (734,000 Swiss francs related to non-personnel costs and 161,000 Swiss francs to the personnel costs). In WIPO's implementation of Recommendation 36, a multi-stage process is envisaged, namely:

1.Elaboration of a Taxonomy-Analytical Study with the help of external consultants;
2.Convening of an Open-ended Meeting with Member States;
3.Organization of an Experts Meeting structured around specific issues to exchange best practices on open collaborative projects

According to document CDIP/6/6, in stage 3, WIPO will organize an Expert Meeting to exchange best practices on open collaborative projects such as the Human Genome Project, the European Commission's Open Living Labs Project, the Prize Proposals submitted by the Governments of Bangladesh, Barbados, Bolivia and Suriname to the WHO Expert Working Group on R&D Financing (EWG), and other private firms' experience such as Innocentive, the Merck Gene Index and Natura.

The proposals by the governments of Bangladesh, Barbados, Bolivia and Suriname to the WHO EWG emanate from the Development Agenda's kindred spirit at WHO, the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property which in Element 5.3(a), Application and management of intellectual property to contribute to innovation and promote public health, states,

> explore and, where appropriate, promote a range of incentive schemes for research and development including addressing, where appropriate, the de-linkage of the costs of research and development and the price of health products, for example through the award of prizes, with the objective of addressing diseases which disproportionately affect developing countries.

WIPO's Taxonomy Analytical Study (CDIP/8/INF/7) is deficient in its treatment of innovation inducement prizes limiting its scope to milestone prizes, the least transformative and least controversial i of medical innovation prize proposals. Prizes for end products[5] that replace product monopolies, or the open source dividend prizes, that induce open source sharing of knowledge, materials, data and technology are more innovative and more transformative, particularly as regards access to knowledge goods, including to new medicines and diagnostic devices. By ignoring demands that product prices be de-linked from R&D costs, and that prizes induce greater sharing and access to knowledge, the WIPO project has sought to avoid the most interesting issues.

We encourage the International Bureau to use the good offices of its Chief Economist to conduct economic analysis of innovation inducement prizes[6] as a potential incentive mechanism to de-link the costs of R&D from the price of health technologies, and to stimulate sharing and access to knowledge. This will undergird an honest implementation of the original spirit that engendered Recommendation

5 *"*Overview of the Prize Fund for HIV/AIDS Act*"*, *S. 1138*.
6 March 7, 2008. "Selected Innovation Prizes and Reward Programs", *KEI Research Note 2008:1*.

36, in advance of WIPO's convening of an open-ended meeting with member states and the organization of an Experts Meeting on open collaborative projects.

The meeting on open collaborative projects to product knowledge as a public good[7] should address several topics, including free and open software, open standards for the Internet, and the impact on innovation to these big open public biomedical databases. The meeting should also look at the medical innovation prize fund proposals[8], including the open source dividend proposal, and both the milestone and the end product prizes, that provide for the possibility of making new drugs and vaccines very inexpensive on the margin.

A great place to start with experts is to look at the 69 persons who signed the original letter to WIPO on this topics, and those working the closest on medical innovation inducement prizes that feature open licensing of IPR for end products and the open source dividend.

7 2005. James Love and Tim Hubbard,"Paying for Public Goods,"in *Code: Collaborative Ownership and the Digital Economy*. Edited by Rishab Aiyer Ghosh. MIT Press, Cambridge, 2005. (pp. 207 229). in Code evaluates methods of rewarding the production of knowledge, when the knowledge is available to everyone as a public good. The examples focus on the use of competitive intermediaries to reward producers of recorded music, software and biomedical inventions.

8 2009. James Love and Tim Hubbard, "Prizes for Innovation of New Medicines and Vaccines," *Annals of Health Law*, Vol. 18, No 2, pages 155-186, Summer. Written for the incoming Obama administration, to address the daunting task of stimulating medical innovation, controlling costs, and ensuring that people have access to new products at affordable prices. Four options are discussed for reward new medical inventions, each building upon the others, and departing further from the status quo.The first option is to retain almost everything about the current system, but to replace the exclusive rights to make or sell a product, following approval by the Food and Drug Administration (FDA), with mega cash prizes that are linked to the impact of the product on health care outcomes. The second option builds on the first, but allocates a portion of the prize money to non-affiliated and non-remunerated parties whose open and freely-licensed research, data, materials, know-how or technologies were instrumental in the success of the final product. The third option builds on option two by setting aside some of the money for investments and prizes that would be made in the translational or early phases of development, to be managed by competitive intermediaries, who will be resourced on the basis of their measurable and objective contributions to products that actually succeed. The fourth option would eliminate patent thickets by removing the exclusive right to use inventions in upstream research in favor of a system that gives the freedom to use inventions so long as the patent owners receive remuneration.