CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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August 5, 2011

Donald S. Clark
Secretary
Federal Trade Commission
Room HB 113 (Annex X)
600 Pennsylvania Avenue, NW
Washington, DC 20590

Re: Patent Standards Workshop, Project No. P11 1204

Dear Secretary Clark:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, welcomes the opportunity by the Federal Trade Commission (FTC) to comment on the interface between standards, patents, and competition policy.

The Chamber appreciates the opportunity to submit its views on the functioning and benefits of the standards system. For the reasons outlined below, the Chamber believes the standards system is working well for consumers and competitors and respectfully urges the FTC to refrain from actions or recommendations that could undermine innovation, U.S. leadership internationally, or job creation.

Chamber core principles behind standards, intellectual property, and competition policy

The Chamber has long articulated core policy principles in the areas of standards, intellectual property (IP), and competition. While each of these three policy areas is well developed, it is the nexus of these three issues that has clearly caught the attention of competition enforcers both here at home and abroad.

At the heart of the debate is when does an IP holder who would require a license for use of its IP in a standard be viewed as taking a government granted monopoly (i.e. its patent or patents) and hard wiring itself through the standard setting process an anti-competitive advantage. This debate is acutely playing out largely in the information and communication technology (ICT) sector, and getting the balance right with regard to the interface between standards, intellectual property rights (IPR), and competition is critical to our economy, its growth, and our economic competitiveness.

The Chamber believes that achieving that balance must not undermine the Chamber's long advocated core policy principles in the area of standards, IP, and competition policy. For standards, the Chamber strongly endorses a voluntary, consensus, private sector driven approach with limited government involvement. With regard to IP, the Chamber has been a staunch defender of IP rights and believes owners of intellectual property need to be afforded the appropriate accompanying rights. Further, governments have a duty to protect and respect those rights and not undermine such rights, both to maintain rule of law as well as to incentivize future innovation.

Finally, the Chamber favors the limited use of competition enforcement on a case by case basis over regulation to correct for distortions to the competitive process to preserve self-regulated markets. Well functioning markets are ultimately good for the efficient allocation of resources, which translates to the maximization of consumer welfare and, upon occasion, competition enforcement is needed to restore balance to the market. However, competition enforcement that is designed to safeguard markets must be transparent, predictable, reasonably stable over time, and consistent across jurisdictions.

Nexus Between Competition, IP, & Standards Policies

For a large part of the antitrust history of the United States, a perceived tension prevailed between the antitrust and intellectual property paradigms. This tension produced an expanded roster of *per se* offenses, culminating in the U.S. Department of

Justice's publication of the "nine no-nos."[1] As antitrust policy has evolved in more recent times, however, there has been an increasing recognition by enforcement officials and commentators that the disciplines are complementary and actually harmonious. Properly implemented, both make a major contribution to consumer welfare.[2]

Controversy, however, has arisen on several fronts, stemming in part from concerns over the proliferation of patents and other mechanisms for the protection of intellectual property and the ease with which such protections can be secured from the government. The issue was thoroughly vetted in the joint U.S. Department of Justice/Federal Trade Commission roundtables on the intersection of antitrust and intellectual property and discussed in the "*IP1*" report.[3]

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[1] "In the 1970s the Antitrust Division announced a "watch list" of nine specified licensing practices that the division viewed as anticompetitive restraints of trade in licensing agreements." The list soon came to be known as the "Nine No-No's" and was first outlined by Bruce Wilson in "Patent and Know-How License Arrangements: Field of Use, Territorial, Price and Quantity Restrictions" (Boston, Nov. 6, 1970). "Briefly, most of the Nine No-No's involve attempts by patent holders to extend their patent monopolies to unpatented supplies, to gain control over improvements of their innovations, to determine prices for resale of their patented products, or to engage in market allocations." Richard Gilbert and Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, Brookings Papers: Microeconomics 1997, at 284 - 285.

[2] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY §1.0 (1995) [hereinafter IP Guidelines] ("The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare"), *at* http://www.usdoj.gov/atr/public/guidelines/ipguide.pdf and Christine A. Varney, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Promoting Innovation Through Patent and Antitrust Law and Policy*, Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Fed. Trade Comm'n, and the Dep't of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation, Alexandria, Va. (May 26, 2010), at 2 ("Today, it is widely recognized that patent and antitrust drive innovation in different but complementary ways."). Both sources cite *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("The aims and objectives of patent and antitrust laws . . . are actually complementary, as both are aimed at encouraging innovation, industry, and competition."). Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Recent Developments in Antitrust and Intellectual Property Law*, Presentation to the American Conference Institute's Third Annual In-House Counsel Forum on Pharmaceutical Antitrust New York, NY (May 16, 2007) at 2. ("Antitrust and intellectual property laws are complements because both seek to protect and encourage innovation and growth.")

3 FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW (2003), available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf. The FTC released this "IP1" report which made recommendations for the patent process in October 2003 after joint FTC/DOJ hearings. The agencies then jointly issued the "IP2" report in 2007 which made recommendations for antitrust law. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), *available at* www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

Appropriately, the report conceded that the regulation of the patent process is generally beyond the scope of antitrust and that the antitrust agencies can and should, at most, engage in advocacy to address what they perceive to be the flaws in the patent administration system. In short, other portions of government (including those with statutory authority) have the authority to develop and administer the grant of IPR more so than the antitrust agencies.

As for standards, the benefits of industry standards are widely recognized and expressly acknowledged in statements from the private sector, antitrust agency leadership, and the courts.[4] Standards have been developed and are operative in a wide range of industries including communications and technology, pharmaceuticals, public health and safety, and industrial products. These standards have promoted interoperability, cost reduction, and simplification of transactions. The implementation of standards developed in the private sector has enhanced output of downstream products, and, where intellectual property is involved, maximized its dissemination and provided for a return that incentivizes investment in research and development.

As stated by the U.S. Patent and Trademark Office, tens of thousands of standards are approved annually (as International Standards or American National Standards)

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[4] *See, e.g.*, Varney, supra note 2, at 5-6 ("There is no doubt that standard setting creates enormous benefits for businesses and consumers alike. Standards can reduce the costs of producing products and can foster public health and safety. Compatibility standards—which have become increasingly prevalent—enable interoperability and interchangeability among complementary products by ensuring that products from a variety of suppliers will work together. These standards make networks—like the Internet, mobile telephones, and the other products that are revolutionizing our world—both possible and more valuable") and ABA SECTION OF ANTITRUST LAW, ANTITRUST AND ASSOCIATIONS HANDBOOK (2009), at 141 ("Standard setting by an association … may bring substantial precompetitive benefits to the market. The benefits may include lower information costs, increased compatibility and interoperability of complementary technologies, expanded use of technologies to the advantage of consumers, and enhanced entry by new participants in relevance markets. *See Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 500 (1988); *see also Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 308-09 (3d Cir. 2007) (private standard setting maximizes consumer welfare); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst*., 851 F.2d 478, 487 (1st Cir. 1988) (trade association's promulgation of a standard lowers information costs and creates a better product); XIII PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2230b (1999) (discussing consumer benefits flowing from standard setting); *see generally* Gerald F. Masoudi, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, Address at the High-Level Workshop on Standardization, IP Licensing and Antitrust, Tilburg University, Brussels, Belgium (Jan. 18, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/220972.htm; Hill B. Wellford, Counsel to the Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Issues in Standard Setting*, Remarks at the Second Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute, Beijing, China (Mar. 29, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/222236.htm.").

and "thousands more are adopted by industry associations, consortia and other (SSOs) on a global basis."[5] The work of private organizations in the development of standards has produced outcomes that enhance overall efficiency, invoke the expertise of the most competent technological resources, provide the flexibility for adaptation to rapidly changing science or technology, and avoid the prospect of governmental decisions in selecting winners and losers with political overtones.[6]

The inclusion of proprietary intellectual property in an industry standard adopted by an SSO can result in the optimum technological or scientific outcome. Inventors are incentivized to compete to develop the best solution to a standard's objective of enhancing the implementation and optimal output of compliant products with the assurance of appropriate protection of their intellectual property.

The availability of this intellectual property to standards implementers and the terms of such availability have drawn increasing attention from antitrust enforcement officials and courts in recent years in the United States and globally. In the U.S., the issue has been the focus of litigated cases [*Qualcomm*, *Rambus*],[7] consent decrees [*Dell Computer*, *Unocal*],[8] agency reports,[9] official statements,[10] and business review letters.[11]

This increased attention is derived in part from the pressure from the healthy existence of divergent interests from participants in the standards development process. Pure inventors are interested in securing a return through licensing terms to

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[5] *See* U.S. PATENT AND TRADEMARK OFFICE, Statement by the United States on Patents and Standards at World Intellectual Property Organization ("WIPO") Patent Committee Meeting (Mar. 2008) at 2.

[6] *See, e.g.,* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, *Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be?,* Remarks Before the YSC Gould School of Law 2010 Intellectual Property Institute, Los Angeles, CA (Mar. 23, 2010) at 8 ("The challenge … from an antitrust perspective is to develop rules within the current common law framework that both reflect a dynamic, long-term view, but which incentivize innovation").

7 *Qualcomm Inc. v. Broadcom Corp*., 548 F.3d 1004 (Fed. Cir. 2008), *cert. dismissed* 129 S. Ct. 2182 (2009); *In re* Rambus Inc., FTC Dk. No. 9302, Liability Opinion (2006); *rev'd*, *Rambus Inc.v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied sub nom*. FTC v. Rambus, 129 S. Ct. 1318 (2009).

[8] *Dell Computer Corp*., 121 F.T.C. 616 (1996); *In re Union Oil Co*., 140 F.T.C. 123; 2005 FTC LEXIS 116 (July 27, 2005).

[9] *See e.g.,* IP2, *supra* note 3.

[10] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford Univ., Stanford, Calif. (Sept. 23, 2005); Varney, *supra* note 2.

[11] DOJ Business Review Letter to Inst. of Electrical and Electronics Eng'rs, Inc. (IEEE) and its Standards Ass'n (IEEE-SA), 2007 DOJBRL LEXIS 4 (Apr. 30, 2007) ("IEEE letter"); DOJ Business Review Letter to VITA, 2006 DOJBRL LEXIS 5 (Oct. 30, 2006) ("VITA letter").

reward research and development efforts and incentivize innovation. Pure implementers view royalty rates and other terms as a cost to be kept to a minimum. Vertically integrated invention and implementation interests have mixed incentives, one of which may be to accept reduced royalties and obtain profit from sales of the product in which the IP is embedded.

Notwithstanding the increased antitrust focus, the incidence of antitrust challenge is appropriately, relatively rare, as having a diverse set of interests at the standard setting table represents a proxy for market forces, something that should be endorsed by competition regulators as the ingredients for a functioning market. As explained by the USPTO:

> "Today, more than 16,455 standards are approved as International Standards (with about 1800 more in the pipeline) and 11,500 of these as American National Standards. Thousands more are adopted by industry associations, consortia, and other Standard Setting Organizations on a global basis . . . Yet the number of disputes that result in litigation per year is typically in single digits, and the vast majority of these cases involve specific fact patterns. In other words, there is NOT a crisis, as claimed by some, in standard setting."[12]

Governance Practices of Standard-setting Organizations (SSO)

SSOs effectively employ sound processes. SSOs typically have broad memberships and thus collective incentives to find the optimal balance between the interests of IP holders, who need fair compensation; manufacturers, who need access to technology; and price sensitive customers, whose patronage is needed by both IP holders and implementers. The notion that the interest of consumers is not well represented, as espoused by some, underestimates the heterogeneity of an SSO's membership and competition with firms using different standards. Notably, different SSOs have adopted different rules - a fact that both demonstrates their diversity and suggests the wisdom of letting the problem be solved by market and SSO competition.

SSOs have developed practices that have been tested over time and continue to be refined based on how best to achieve the proper balance between IP holders,

[12] USPTO, *supra* note 5, at 2.

manufacturer and customers interests. Such important SSO governance practices include the need for transparency, the inclusion of all interested stakeholders, and the clear recognition that those stakeholders each are motivated by their own self-interest. Governance principles for SSOs also require that they be unbiased, offer an unrestricted approach, remain open to the adoption of more than one standard and remain grounded in a voluntary compliance obligations. Typically, there often is a requirement for good faith disclosure with regard to any underlying intellectual property rights that are essential to the use of a potential standard.

In addition, a number of standard-setting bodies have policies that are "participation-based," where all participants agree in advance that they will license IPR that is technically essential to practice the final standard that is adopted on fair, reasonable, and nondiscriminatory (FRAND) terms with compensation or FRAND terms without compensation. In some SSOs, parties have the ability to opt out of FRAND commitments provided that they disclose early in the process any IPR that may be essential to the standard being developed as well as their intentions to opt in or out of FRAND obligations. Timely disclosure of the IPR and the IPR owner's intention to opt out of FRAND obligations provides other stakeholders the ability to consider alternatives. This happens typically because a third party contributed the technology to the standard and the patent holder does not agree. ETSI's disclosure-based policy, for example, encourages early disclosure of potentially essential patents and asks the patent holder to either commit to licensing or disclose that it is not willing to license such essential patented technology on FRAND terms, in which case the SSO attempts to exclude the patented technology from the standard as adopted. These approaches are working well and there have been few problems precisely because such governance practices exist and are being utilized.

Role of the Competition Regulator

A principal stated justification for antitrust involvement with IP licensing in the standard setting context is the asserted risk of patent "holdup."[13] Holdup can be defined as conduct by an owner of intellectual property essential to implementation of a standard that intentionally or affirmatively misrepresent the existence of the IPR or fails to disclose that right in the face of an SSO rule requiring such disclosure during

[13] *See e.g.,* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007) and Majoras, *supra* note 10.

the standard development process. Once the standard has been adopted, according to the theory, the IP owner will charge "excessive" royalties for access to the intellectual property, as a result of market power conveyed by inclusion in the standard. The contention is that had *ex ante* disclosure of the essential IP and the terms on which it would be made available been fully understood before a SSO adopted the standard, the follow-on licensing terms would have been "more reasonable" or another standard option would have been chosen by the SSO and its members.

It is this concern with the possibility of holdup that has led some to advocate increased antitrust enforcement action and to suggest various courses that depart from traditional antitrust principles or constitute a pervasive governmental regulatory intrusion into the licensing process. Nevertheless, empirical evidence supporting a concern with a widespread risk of holdup is lacking.

It is important to understand the limited circumstances in which patent holdup might occur. The conditions include:

1. The availability of a suitable alternative *ex ante* to the essential IP in question, such that the level of royalties derives from inclusion in the standard and not from the underlying strengths of the intellectual property;
2. The failure of the IP owner, if requested, to disclose known essential protected IP rights and the failure of the IP owner to disclose maximum terms and to refuse to negotiate those terms *ex ante* on a bilateral basis;
3. The absence of market forces that would prevent holdup, such as,
   (a.) The need of an owner of essential IP to obtain licenses from other owners of IP essential to the implementation of the standard;
   (b.) Repeat iterations of standards results from technological developments affecting the products implementing the standard and the resulting threat of retaliation against hold-up;
   (c.) Concern with the effect that "excessive" royalties might have on the downstream market;

(d.) Lag time between the publication of the standard and its implementation sufficient to permit implementers to select an alternative standard or pursue another course of action.[14]

From the foregoing conditions, it can be understood why the instances of antitrust enforcement based on holdup are rare. Antitrust challenges typically deal, moreover, with the unusual circumstances of knowing and intentional misrepresentation or non-disclosure of essential patents in the face of SSO rules calling for such disclosure.[15]

Notwithstanding the very limited conditions in which holdup might occur, far-reaching proposals have been advanced to address these concerns. One is the proposal for a more tolerant, rather than vigorous, application of antitrust enforcement to the joint negotiations *ex ante* between IPR owners and potential licensees.[16] Enforcement officials have indicated that an undefined rule of reason rule should apply in such circumstances.[17] In two business review letters, the Antitrust Division of the Justice Department indicated that the rule of reason would apply, although neither request asked for clearance of joint negotiations and neither response indicated the nature of the rule of reason analysis.[18] Some enforcement officials have expressed concern with the implications of joint bargaining for the exercise of

[14] *See* Gerald F. Masoudi, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Enforcement and *Standard Setting: The VITA and IEEE Letters and the "IP2" Report*, Address at the Spring Meeting of the American Intellectual Property Law Association (Boston, Mass., May 10, 2007), at 3 *and* Wellford, *supra* note 19, at 10 (Holdup "can be defined to involve a situation where all the following conditions exist." Masoudi and Wellford then outline three conditions); Damien Geradin, *Standardization, Antitrust, and Intellectual Property - An Analysis of the Key Issues*, Paper Prepared for the OECD Roundtable on Standard Setting, Paris (June 14, 2010) at 13 -15 ("(T)he holdup theory is based on premises which, in practice, will rarely occur in the real world." Gerardin then outlines four premises); Business and Industry Advisory Committee ("BIAC") to the OECD, *Roundtable on Standard Setting*, Presented to the OECD Competition Committee, Working Party No. 2 (June 14, 2010) at ¶¶ 26- 30 ("In sum, for holdup to occur, the party engaging in that practice must have a rare combination of ingredients to create the economic incentive to do this").

[15] *See* Dell Computer Corp., 121 F.T.C. 616 (1996); In re Union Oil Co., 140 F.T.C. 123; 2005 FTC LEXIS 116 (July 27, 2005); *In re* Rambus Inc., FTC Dk. No. 9302, Liability Opinion (2006); *rev'd*, Rambus Inc.v. FTC, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied sub nom*. FTC v. Rambus, 129 S. Ct. 1318 (2009).

[16] *See, e.g.,* Robert A. Skitol, *Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 Antitrust L. J. 727 (2005) ("Information technology standard-setting processes are one context in which carefully structured concerted buying power could be precompetitive and where clarification of antitrust implications would be highly desirable").

[17] IP2 Report, *supra* note 3, at 54 - 56; Majoras, *supra* note 12, at 7; Varney, *supra* note 2, at 10.

[18] IEEE and VITA letters, *supra* note 13.

monopsony power and the pressure that could be executed to drive royalty rates and other licensing terms below the market level needed to encourage innovation.[19]

Unbounded tolerance of joint *ex ante* negotiations would ignore the risks presented by the exercise of monopsony power. Other courses are available to offset the threat of holdup. SSO rules requiring disclosure of essential IP are commonplace; however, the government should play little role in deciding whether these rules should require a guarantee of completeness or search of a large IP portfolio. Standards development is a dynamic process and it would be a massive and inexact undertaking for a firm to identify all IP at various stages in the process that may read on the standard as it is developed. A good faith effort to identify known and issued IP seems the farthest appropriate reach of an SSO requirement for competition law purposes.[20] In any event, without prejudice to any authority a competition agency may have to act in cases of a knowing failure to disclosure essential IP, the determination of the scope and subject of any duty to identify and disclose essential IP should be left to the SSO and not mandated by competition agencies.

Depending on the circumstances, disclosure *ex ante* of maximum rates may assist SSO members in determining whether to support a proposed standard, or a portion thereof. However, a line should be drawn between public disclosure of maximum rates, express or tacit joint agreement among implementers on the license fees and terms they are willing to accept, and efforts to exploit any monopsony power through joint negotiation.[21] Conversely, the risk of holdup can be mitigated by the willingness

[19] Hill B. Wellford, Counsel to the assistant attorney general, Antitrust Division, US Department of Justice, "Antitrust Issues in Standard Setting" remarks before 2ND Annual Seminar IT Standardization and IP, Beijing China (March 29, 2007), at 15 ("(SSO) buyer-cartel behavior has the real potential to damage innovation incentives, and is therefore properly the subject of antitrust scrutiny") and Masoudi, *supra* note 6, at 8 ("(*Ex ante* licensing) could facilitate … monopsonization, under which potential licensees may band together to drive licensee fees and other terms to artificially low levels, thereby damaging the incentive to engage in research and development in areas that may be the subject of standards efforts").

[20] It is not desirable that government mandate any SSO procedures, disclosure or other rules as some have suggested. Wellford, *supra* note 19, at 16-17 concludes that there is no basis for the antitrust enforcers to assume that an (SSO) has an anticompetitive purpose or effect in declining to adopt rules to safeguard against holdup (" … (A)ntitrust law and policy certainly does not create an affirmative requirement for (SSO)s to create an ex ante patent policy. "Recently I was asked, Since hold up is a problem, shouldn't antitrust enforcers mandate such policies, and shouldn't enforcers assume that an (SSO) has an anticompetitive purpose or effect if it declines to do so? The answer, quite clearly, is no."

[21] See J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5 Journal of Competition Law & Economics 123 (2009) at 188 ("Put simply, U.S. antitrust authorities have assumed, rather

and practice of IPR owners to engage *ex ante* in bilateral negotiations over rates and terms. Such negotiations are commonplace.

If the rule of reason is applied to a circumstance of joint negotiation, it should ask whether joint negotiations are reasonably necessary to achieve a pro-competitive result, particularly in light of other market forces and SSO - established provisions to address the risk of holdup.[22] Ex ante negotiation by multiple buyers can of course raise antitrust issues and should thus be subject to rigorous analysis under the rule of reason.

Regulator Directed Licensing Terms

Another and more far-reaching suggested approach to the perceived threat of patent hold-up and exploitation is one that would involve governmental prescription of "fair" rates and terms. However, such terms are best left to the marketplace and not to be regulated in a one size fits all approach. Many SSOs have adopted rules requiring or encouraging owners of essential intellectual property to commit *ex ante* to license that property on "reasonable and nondiscriminatory" ("RAND;" in Europe, "F[air]RAND") terms. Properly interpreted, RAND undertakings provide a further safeguard against the threat of *ex post* holdups. In its current and proper implementation, a RAND commitment assures potential IP licensees that the IPR owner is willing to license essential IP to all potential users on terms that can be negotiated on an arms-length basis. A principal condition relating to the negotiations is that the terms insisted on by the IPR owners are not so draconian as to amount to a constructive refusal to license. Precedents exist for the identification of exclusionary rates, as for example, spelled out in the district court's *Georgia-Pacific* decision.[23] This application of RAND has worked well.[24]

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than tested and determined, that the social cost of patent holdup exceeds the social cost of information-sharing policies that facilitate buyer collusion").

[22] James F. Rill and Christopher J. MacAvoy, *Ex Ante Licensing Negotiations in Standard Setting and the Rule of Reason*, Antitrust Report Issue 4 2010.

[23] *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers Inc*., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

[24] *See* Damien Geradin and Miguel Rato, *FRAND Commitments and EC Competition Law: A Reply to Philippe Chappatte*, 6 European Competition Journal 129 (2010) at 147.

Some commentators have contended that the RAND commitment, so applied, is too vague and unenforceable to deal adequately with the holdup spectre. They propose government enforcement of the RAND obligation through evaluation of licensing rates on the basis of formulas to identify the "fair" rate. Should rates exceed the formulaic level, the IPR owners would be subject to antitrust challenge.[25] In sum, they focus entirely on royalty rates, ignoring other terms and the distinct circumstances applicable to each licensee. They advance proposals that are analytically baseless, such as basing "fair" rates equal to the numerical proportion of essential patents reading on a standard, or attempt to develop a formula that would replicate the rate that would be based on an *ex ante* comparison with the rate that could be charged by the next best alternative IP.[26] Any such proposal for evaluating licensing terms should not be used in determining antitrust violations as they are economically unsound, and would require unwarranted government interference in the privately - developed market, which has produced an efficient, flexible, negotiated resolution of rates and terms between IPR owners and licensees on a bilateral basis. The proposed government intrusion is not only unwarranted and inefficient, but is likely to retard innovation and undermine the private standards regime.[27]

In the federal register notice soliciting these comments the question is also raised as to whether a RAND commitment should preclude the patent holder from seeking injunctive relief against the practice of the standard in the course of patent litigation. The FTC should refrain from attempting to regulate or advocate that SSOs adopt such a policy or practice.

Interrelationship to Other Discussions and International Dimension:

The recent FTC workshop and corresponding federal register notice does not come in a vacuum. The Chamber believes it is important for the FTC to keep its interest and any policies it is seeking to promote in this area in the context of on-going broader dialogues. Domestically, the Administration has been conducting a comprehensive review of standard setting and the role of government in that process for nearly two years. Through NIST that process issued a federal register notice earlier this year

[25] *See e.g.,* Lemley & Shapiro, *supra* note 13.
[26] *Id*.
[27] *See, generally,* Geradin and Rato, *supra* note 26; Geradin, *supra* note 16.

which sought to explore essentially the same competition, IP, and standard setting issues raised in the current FTC notice.

Further, in May of last year, the FTC partnered with the Department of Justice and the Patent and Trademark Office for a day long workshop that explored many of these same issues. Internationally, the OECD took up this topic last year and concluded that standard setting activities were overwhelming pro-competitive and the World Intellectual Property Organization has conducted similar stocktaking exercises.

The Chamber also urges a "light-handed" approach not just because there are such a limited number of legitimate anti-competitive concerns, but also out of concern for the tone of the conversations underway within certain governments around the world on these important subjects and the implications FTC pronouncement and actions have on U.S. trade policy.

The Chamber urges the FTC to be supportive of the current U.S. standard setting approach not only because it has served the United States well, but in large measure out of concern for the state of standards development and standards-related policy around the world. U.S. business increasingly finds that divergence in standards approaches around the world leads to barriers to trade and damage to consumer welfare around the world, and undermines U.S. competitiveness.

Standards development around the world is typically more government-driven with strict limits for private stakeholder participation, particularly with regard to foreign private stakeholders. In some countries, for some industries, standardization is drafted and mandated entirely by government. In these cases, standards have become tools for protectionism.

For example, China has been revamping its standards system to (i) lessen the "control of foreign advanced countries over the PRC," especially "in the area of high and new technology", and (ii) increase the effectiveness of Chinese technical standards as important protective measures or barriers to "relieve the adverse impact of foreign products on the China market."[28] More recently, China has taken a very

[28] See Preface and Part I, Section IV, "Study on the Construction of National Technology Standards System," Standards Administration of China (September 2004).

interventionist approach to royalty negotiations in the standard setting context.[29] These developments are not being driven by the national competition agencies, but by other PRC governmental authorities that intend to favor Chinese standards and lower the cost of technology transfer to Chinese entities.

The U.S. government position has been to aggressively address standards related trade barriers as they arise in international markets – both through advocacy and through trade negotiations and enforcement. [30] Any attempt by a World Trade Organization member to require SSOs to license on RAND terms as defined by that government would be a form of compulsory licensing that would raise serious issues under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[31]

In addition, some countries with emerging competition policies believe that there are serious, significant, and routine concerns with regard to anti-competitive behavior occurring within SSOs which have led to poor standards outcomes and unreasonable licensing terms. As noted earlier in these comments the reality is that the voluntary, private sector driven standards-setting process has and continues to operate remarkably well in producing standards that efficiently deliver consumer welfare gains.

The FTC plans as it relates to standard setting and patents as well as its March 2011IP report will benefit from a connection to and coordination with these other discussions both at home and abroad. Further, the FTC needs to be mindful of the trade implications of its actions and avoid encouraging abusive, industrial policy like intervention by foreign governments.

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[29] See The Supreme People's Court of the Republic of China Letter to Liaoning Higher People's Court (July 8, 2008), Mm San Ta Zi No. 4; draft Provisional Rules Regarding Administration of the Establishment and Revision of National Standards that involve Patents, Standardization Administration of China (October 2009).

[30] For example, in 2004, as a result of U.S. pressure during the U.S./China Joint Commission on Commerce and Trade (JCCT) discussions, China agreed to remove regulators from negotiations over royalty payment terms with relevant IPR holders. As with other JCCT commitments, China's compliance with this commitment has been sporadic at best.

[31] Among other requirements, the TRIPS Agreement makes it clear that governments can only issue compulsory licenses (i) according to the individual merits of each situation; (ii) after the proposed user of the patent has tried to negotiate reasonable terms and conditions with the patent holder; and (iii) with remuneration based on "the circumstances of each case, taking into account the economic value of the authorization." Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 31(a), (b), (h). TRIPS in effect prevents a government from establishing generic royalty payment rules because they would undermine the market value of patents.

Conclusion

Precisely because time tested SSO governance practices are widely followed, few problems arise, leaving little need for outside intervention. When there is a breach, however, the role competition authorities should play should remain limited.

First, competition authorities clearly have a duty to police standard-setting bodies in the event collusion occurs among SSO members that undermines established SSO decision making procedures. Such a clear competition violation is exceedingly rare as standards bodies and their participants are mindful of the fact that price coordination and other similar competition law violations are subject to aggressive enforcement. Second, to the degree there is outright fraud in the standard-setting process by one of the IP holders; competition authorities may be needed to assume a policing role. While the SSO may be an effective self-regulator, some standard organizations are not well equipped to deal with fraud.

Beyond these two narrow circumstances, however, the undue insertion of a competition regulator into the proceedings of a standard-setting body is troubling and can be quite counterproductive. By intervening, a competition regulator risks determining the outcome reached in the chosen standard and the terms by which it can be used. Such an influence, at best, is unlikely to produce a measurably better outcome than that which a standards body would have decided independently. At worst, a competition authority's influence could produce a worse outcome and thereby harm competition and reduce consumer welfare.

In the event a competition authority fears a suboptimal standards outcome has been produced in spite of a rigorous, transparent, thorough, stakeholder-engaged process, such an authority should avoid taking an enforceable action. "Imperfect results" in the eyes of an authority centered on concerns over possible foreclosure should not be a concern, particularly in the short term and where standards are voluntary. The market itself, in most cases, given a short period of time will further evolve and an additional standard will emerge.

In addition, competition regulators are rarely well situated to second guess licensing terms pertaining to standards involving intellectual property rights (whether in-bound, out-bound or cross-licensing obligations) that are the result of arms-length bilateral negotiations made under competitive conditions. Competition authorities must be mindful that in most cases standardization efforts are characterized by good governance practices routinely employed by standards organizations. Therefore while some stakeholders may not be entirely pleased with the final licensing terms painstakingly negotiated, competition authorities aren't likely to be any better informed to determine the appropriate valuation, market price or other IP licensing terms.

Also most implementers entering into a license with a holder of essential patent claims will want to negotiate a customized bilateral agreement that likely will cover more than just those essential claims. After all, the holders of the IP that support the standard have incentives in many cases to license and to do so on commercially viable terms in order to maximize the number of implementers taking licenses and therefore the IP holder's royalty proceeds.

The FTC should in any final report make clear its views on the limits of its authority and the role of antitrust enforcement in these matters. The FTC should draw a bright line steering itself and interested foreign antitrust agencies away from going so far as to pick standards and establish royalty rates. Finally, any attempt to take a regulatory like approach should be discouraged as it would serve to encourage far more inexperienced competition authorities that are prone to regulation, rather than market competition, to consider following a similar path.

In conclusion, there are only a handful of anti-competitive standards cases that are regularly cited to support the argument of a widespread problem, but there are tens of thousands of standards developed each year that represent model, pro-competitive arrangements. Standard-setting organizations are home to some of the most competitive forces at play in the market, and they are typically well governed and their stakeholders understand the penalty for collusion and fraud. Voluntary standards produced as a result of a rigorous competitive process within private-sector standards bodies have routinely proven to be efficient and pro-competitive forces in the overwhelming majority of cases, to the benefit of enhanced competitiveness and consumer welfare.

Without meaningful empirical evidence of systemic problems, competition authorities should be both hesitant and cautious in intervening, except where there is collusion or fraud, as such actions are unlikely to produce a better standards outcome or more appropriate IP licensing terms. Because the stakes for innovation and consumer welfare are significant, and the risks of unintended consequences are high, the FTC should not let its advocacy work be driven by anecdotal concerns. The FTC should be mindful that the rest of the world is watching to see what the FTC says and does going forward in this area, and should thus understand the potential impacts such actions have outside the United States.

The Chamber appreciates the opportunity to engage and participate in this consultation.

Sincerely,