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ABSTRACT

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OPEN STANDARDS

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- In information technology, standards are needed to create new markets, reduce technological and market uncertainty, and promote competition. However, low thresholds for patenting and the expansion of patentable subject matter have generated conflict between patents and standards.
- Participants in standards-setting processes should be able to make informed choices that take into account price, terms of access, and other factors that make technology markets open and competitive. Standards should be protected against opportunistic behavior by patent holders.
- “Openness” can apply to different aspects of standards development and availability. Governments should take these different aspects into account, including the terms under which the standard is made available to competitors and to the public.

Background: Standards play an important role in information and communications technologies. ICT standards are essential for creating new markets, building the confidence of buyers and providers of complementary products and services, and insuring that different components of a system interoperate.

Some standards organizations require participating firms to disclose patents – but this is usually limited to the actual knowledge of those participating in the standards development process, since companies do not want the burden of searching their entire patent portfolio. Most standards organizations therefore require a commitment to license standards-essential patents on [fair,] reasonable, and nondiscriminatory ([F]RAND) terms. However, as shown in the smartphone wars, it is not clear what FRAND means in practice. With extensive cross-licensing among major stakeholders, ambiguity over FRAND was not an issue, although it could be problematic for new entrants seeking licenses from established firms.

Software standards organization such as W3C and OASIS prefer royalty-free (RF) licenses because they allow everyone immediate access to the standard, allowing for rapid uptake and implementation. A recent survey of European companies suggested a trend toward royalty-free, apparently because there is less strategic behavior (less jockeying for inclusion) among patent holders, which tends to slow things down. Producing companies will allow royalty-free use of their patents because they can benefit from familiarity with the technology and they may control the surrounding technology.

Standards have become an especially attractive target for opportunistic patent holders since the rewards of infringement may include payments from an entire industry segment – not just a single company. Standards become deeply embedded over time and the patented technology can

be very difficult and costly to excise. Patent holders thus have an incentive to “ambush” standards by not disclosing patents until substantial investments have been made. The smart phone wars have brought the FRAND problem out into the open as Motorola Mobility has pressed the limits of what the commitment means and successfully sought injunctions based on FRAND-encumbered patents in Germany.

U.S. patent law allows applicants to secretly modify their claims to track the evolution of standards. Among participants, this behavior can be minimized by tightly written agreements, but some companies have sought to evade the letter and spirit of these agreements. The strength of patent commitments can also be at issue when patents are sold to third parties who claim not to be bound by the original pledge. Since patent ambush by third parties cannot be addressed by agreement or internal policies, there should be public procedures for clearing standards against patent ambush.

The Obama Administration has favored a stronger federal role in supporting standards efforts where diverse interests make balanced representation and coordination difficult – for example, the Smart Grid, health information, and advanced manufacturing. Europe has strongly emphasized interoperability and standards in government use of information technology. However, version 2.0 of the European Interoperability Framework (December 2010) retreated from the “royalty-free” requirement of version 1.0 (2004). The Federal Trade Commission and the National Academies of Science are currently studying the relationship between standards and patents.

Global Standards

In information technology, *consortia* – as distinct from traditional official standards development organizations – are the preferred vehicles for getting standards developed and promulgated quickly. Consortia are open to participation without regard to nationality, although most are based in the U.S. Given the global nature of the IT industry, it makes little sense to run standards through national standards organizations en route to becoming international standards. Efforts have been made to combine the legitimacy of the international system with the flexibility and speed of consortia – such as allowing consortium-developed standards to feed directly into international standards organizations.

Controversy over efforts to secure recognition of OOXML as an official international standard focused policy attention on factors that are sometimes taken for granted: Is the standard technically complete and unambiguous? Can a complex standard be understood and adopted expeditiously? How much should it incorporate or reference other standards that are not developed in an open process? Under what circumstances is it acceptable or desirable to have two standards instead of one?

CCIA’s Position: CCIA staunchly supports open standards and recognizes the need to protect openly developed standards against opportunistic behavior.