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## ABSTRACT

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### OPEN STANDARDS

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- *Open standards build confidence in technology and emerging markets, promote investment and competition, and enable interoperation among products, systems, and services.*
- *“Openness” is determined not only by how a standard is developed but by how it will evolve in the future, the terms and conditions of use, and how widely it is adopted.*
- *As in other business contexts, participants in standards setting processes should be able to make decisions on the basis of cost and terms of use as well as technical characteristics of the standard.*

**Background:** Today, the ideal of open standards is widely accepted, although there are different degrees and contending definitions of “open.” Producers recognize the value of standards for building new markets and assuring potential users that they will not be stranded. Users of information technology have come to recognize the costs and risks of using proprietary standards in a ever-changing and increasingly networked world.

Traditional standards development organizations have focused on ensuring that the process to set the standard is open; however, from the perspective of implementers and users, this may well be less important than the present and future terms of availability and how the standard will evolve in the future. Users will also want to know the prospects for implementation by competing vendors. Thus, the different dimensions of openness include:

- **Initial Development:** How open was the process through which the standard was developed? How broad was participation in the process? Is there a public record of due process, including opportunities for outside review and comment?
- **Future Evolution:** Can the standard evolve as technology and markets change? Is a broad, motivated community of interest able to (and likely to) contribute to this evolution? Who controls the process? Is evolution constrained by patents? Is it under a trademark and who controls it? Is it vulnerable to manipulation by particular stakeholders?
- **Terms of Use:** How is the standard made available? Do patents underlie the standard, and if so, under what terms are they licensed? Are users free to implement the standard in different ways and to make modifications without seeking permission or incurring additional costs?
- **Implementation and Support:** How mature and usable is the standard? Has it been tested by multiple implementations? Is compliance testing and certification available? How widely is it implemented and supported in the market? Is it threatened by

competing standards? Is it vulnerable to ambush by patent holders outside the standards process?

Public agencies might prefer strong forms of openness because of principles of transparency, accountability, and universal access to governmental services. Private-sector managers might have greater freedom to choose proprietary standards based on trust of companies that control the standard, yet they, too, must be concerned about the hidden and future costs of lock-in. The controversy over Microsoft's efforts to secure recognition of OOXML as an official international standard has focused attention on factors that are sometimes taken for granted. Is the standard technically complete and unambiguous? How readily can it be understood and adopted? Does it incorporate or reference other standards that are less open in certain ways?

### **Patent and Licensing Issues:**

Traditionally, standards organizations have developed standards on the basis of technological merit, leaving it to individual companies to negotiate terms for using standards from patent holders. Although there is continued reliance on commitments to "reasonable and non-discriminatory" (RAND) licensing in most areas, this practice is proving increasingly unworkable because the licensor can effectively determine what is "reasonable and non-discriminatory." Because of the needs of open source developers, organizations developing software standards, such as W3C, OASIS, and OAGi, have policies favoring royalty-free (RF) licenses.

Today, pressure grows to address licensing fees and terms associated with the choice of technology - factors that are normally taken into account when business decisions are made. While there have been concerns that the practice (known as "ex ante licensing") may create opportunities for price-fixing or buyers' cartels, the Department of Justice and the Federal Trade Commission have made it clear that merely requiring contributors to state maximum royalties will normally be pro-competitive and that ex ante licensing will be evaluated under a rule of reason analysis.

Standards have become an especially attractive target for patent holders since the rewards of infringement may include payments from an entire industry segment – not just a single company. Furthermore, patent holders are motivated to "ambush" standards by not disclosing patents until substantial standards-dependent investments have been made. Patents become more valuable when they are inadvertently incorporated into standards, and, patent applicants can secretly modify their claims to track the evolution of standards in the U.S. The patent holder may enjoy enormous leverage over an entire industry when patents surface after standards are adopted and widely implemented. This has been a problem even among participants, although it can be addressed by tightly written agreements. Unfortunately, some companies have sought to evade the letter and spirit of these agreements, and the FTC's commendable effort to hold Rambus accountable under antitrust law was overturned by the Court of Appeals for the DC Circuit. Ambush by non-participants is a more difficult problem that will need to be addressed with legislation that gives special protection to standards processes that are sufficiently public and open.

A disturbing practice is emerging in which companies that have made licensing or nonassertion commitments have transferred some essential patents to others who then claim not to be bound by the original commitment. For example, a divided FTC recently concluded that N-Data had

engaged in unfair competition by renegeing on a RAND licensing commitment made by the original patent holder.

***CCIA's Position:*** CCIA staunchly supports open standards and the integrity of the surrounding business environment. Users should be able to make informed choices that take into account the many factors of openness that make technology markets responsive and competitive. In procurement and adoption by public agencies, these factors should be articulated as guidelines.

*Ex ante* licensing and good faith dealing by participants should be enforceable norms in standards processes. The equitable principle of *laches* should require that patent applicants act promptly if they wish to assert patents against properly publicized and openly developed standards.