

How to Avoid Antitrust Trouble in Standard Setting: A Practical Approach

BY ANNE LAYNE-FARRAR

AN INDIVIDUAL FIRM SEEKING TO avoid antitrust trouble when participating in cooperative standard setting efforts, within the context of existing standard-setting organization (SSO) rules, is well-advised to do the following:

- (1) Read the intellectual property rights (IPRs) policy carefully as the details differ from SSO to SSO;
- (2) Disclose any and all IPRs that might conceivably be relevant for a standard under development so as to preclude allegations of "patent ambush" aimed at exploiting other firms' irreversible investments in implementing the standard;
- (3) Make those disclosures as early in the standard development process as practicable to avoid complaints of "deceptive" and "unfair" practices; and
- (4) Avoid any licensing terms or conditions that hint of "hold up," where the licensing fees are perceived to exceed the economic value of the covered technology.

These four points are generally good advice, and they are certainly straightforward and easy to understand. Unfortunately, they do not offer a foolproof guide to actually avoiding antitrust charges. This is because existing SSO IPR rules tend to be quite vague and are therefore open to broad interpretation.

Consider the many cases involving Rambus, the poster child for the view that opportunistic behaviors within an SSO rise to the level of anticompetitive abuse. In the *Rambus* cases, including one brought by the Federal Trade Commission, the key allegation was that Rambus failed to fully disclose all of its relevant IPRs to the members of the Joint Electron Device Engineering Council (JEDEC) during the development of digital computer memory standards, enabling Rambus to illegally obtain monopoly power (see suggestions (2) and (3) above).¹ One might think that it was an easy matter for the FTC to establish that Rambus had IPRs relevant for JEDEC standards but that it had failed to fully disclose them, which then facilitated a strategy of patent ambush whereby Rambus asserted its patents only after JEDEC members had invested in the standards and were

"locked in." But the Federal Circuit Court of Appeals found in *Rambus v. Infineon* that ambiguity in JEDEC's published IPR rules meant that Rambus had no discernable obligation to disclose its patents to other JEDEC members in advance of the standards (see point (1) above).² The D.C. Circuit also ruled in Rambus's favor, arguing that it was unclear whether a failure to fully disclose IPRs relevant for a standard did indeed lead to the unlawful acquisition of market power.³

Similar ambiguities arise over licensing offers made within the standard-setting process (see point (4) above). For example, Negotiated Data (N-Data) acquired patents from another firm that had made a public licensing promise to the Institute of Electrical and Electronics Engineers (IEEE) several years earlier. In arguing that N-Data's attempt to revoke the prior licensing promise constituted an unfair business practice under Section 5 of the FTC Act, the FTC made no reference at all to an abuse of IEEE's IPR rules in force at the time.⁴

As these examples demonstrate, determining the specific actions that an SSO's IPR rules mandate or forbid is not always easy, nor does following the stated rules guarantee that a firm will not run afoul of a competition agency. So in addition to the four guidelines stated at the beginning of this article, it may be advisable for firms concerned with antitrust entanglements to work to improve the IPR policies of the SSOs in which they are active. The remainder of this article discusses a number of possibilities, although each one poses its own challenges.

General Rules

Before turning to the specific rule recommendations, a general caution is in order. Any rule change proposal should recognize the diversity of businesses and interests present in the SSO at hand. When developing a new standard, cooperative standard organizations frequently attract firms from many different industries or market niches. For example, the firms participating in the radio frequency identification (RFID) standardization efforts under the auspices of the International Organization for Standardization (ISO) include General Electric, Daimler AG, Motorola, Target, and Texas Instruments—plus many other firms spanning yet other industries. This breadth of membership makes sense given the many diverse uses that RFID tags can be put to, including delivery tracking, smart card payment devices, and even U.S. passports. While all of the firms under ISO are working

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cooperatively to define and implement RFID standards to their own and their industries' benefit, it is only natural to expect them to have diverging strategic and commercial goals surrounding the RFID standards.

Given the typical diversity, SSO rules that favor one type of group or firm over another are unlikely to succeed. For example, some firms within the European Telecommunications Standards Institute (ETSI) attempted to introduce an absolute aggregate royalty cap for licensing the full set of patents necessary to implement the 3G mobile telecom standard.⁵ Such a cap would have favored manufacturers implementing the ETSI standard by holding licensing costs down, but it also would have harmed patent holders that had contributed IPR to the standard by limiting the return on their risky R&D investments and, as a result, would have reduced incentives to innovate for future advancements of the standard. Not surprisingly, then, the efforts to impose the 3G royalty cap within ETSI were abandoned in the face of strong opposition.

Even if special interest rules do manage to make it through an SSO's procedural vote on the basis of their sponsors' clout, in the long run those firms hurt by the rules may choose to no longer participate in the SSO. Broad participation in cooperative standard setting is an important goal. When firms drop out of the process, especially those firms developing inventive technologies, the quality of the standard may suffer, as may its commercial success in the marketplace—to the detriment of those consumers purchasing products reliant on it. All of this calls for balance in setting SSO IPR policy.

Disclosure

Given the importance of balance, the logical starting point for improving an SSO policy is IPR disclosure. This is where the court in *Rambus v. Infineon* felt that JEDEC had failed by not adequately specifying Rambus's patent notification obligations. To the extent that clear IPR disclosure rules can be laid out, SSOs can help to minimize "patent ambush," where relevant patents are revealed and licenses sought only after the firms in the SSO have chosen the technology path and made irreversible investments to implement the standard.

As with all SSO rules, however, clear disclosure is not as straightforward as it might at first seem. For example, should an SSO request that patent applications be listed, in addition to granted patents? Some SSOs do make such requests, but many innovative firms might balk at such a rule because disclosing applications can provide rivals (most of which will also be participating in the SSO) with valuable information on the strategic direction of the holder's R&D program.⁶ Note that the U.S. Patent and Trademark Office (USPTO) publishes patent applications eighteen months after the filing date, but loopholes prevent the publication of a significant number of applications. Should SSOs ask firms to disclose only published patent applications? That might solve concerns about the disclosure of early stage R&D information to rivals, but we also might expect greater numbers of firms to take advantage of the USPTO loophole precluding publication.

Consider also that many firms have very large patent portfolios, numbering in the many thousands of patents, and participate in numerous SSOs at any given time. Reviewing a large portfolio for each standardization effort and identifying which patents have claims that might read on a standard still under development is a time consuming and costly exercise. It is also an exercise in subjective judgment, even when the candidate patents are readily apparent. As a result of the costs involved and the likelihood of honest mistakes in disclosure, SSOs typically do not require exhaustive IPR searches, but ask instead for "reasonable efforts."

One SSO, VMEbus International Trade Association (VITA), has instituted a "disclose it or lose it" rule as a means of reinforcing its IPR disclosure policy. In addition to requesting that its members "shall disclose to the working group ('WG') in writing the existence of all patents and patent applications owned, controlled, or licensed by the VITA member company" as identified through a "good faith and reasonable inquiry," VITA's policy also states that if a "[m]ember fails to adequately and timely disclose" any IPR, then that member "must license it to the extent it is essential to a Draft VSO Specification on a royalty free basis."⁷ Royalty-free licensing is certainly the most draconian option available, and one VITA member (Motorola) left the SSO in protest. Severe rules therefore do have repercussions, as they may affect SSO participation rates.

Other SSOs might not want to go as far as imposing royalty-free licensing on member firms that fail to fully disclose their IPR in a timely fashion, but a penalty of some sort might be helpful in clarifying disclosure obligations and encouraging firms to meet them. For instance, SSO members might consider imposing royalty caps for pivotal declarations (meaning for patents that cover fundamental aspects of the standard) that come during or after the investment stage and thus theoretically provide the patent holder with the ability to hold up potential licensees. Or SSOs might consider assessing fines on recalcitrant firms, or requiring more stringent written commitments from such firms on next iterations of the standard.

Reasonable and Non-Discriminatory Licensing

After disclosure, the next IPR policy item of significance is the RAND commitment—for reasonable and non-discriminatory licensing. The majority of SSOs already ask their members to sign letters committing to license any IPR that may be deemed essential for a standard on RAND terms.⁸ That said, many observers have bemoaned the ambiguity surrounding RAND commitments.⁹ No SSO to my knowledge explains precisely what it means by "reasonable and non-discriminatory" licensing, nor is there any consensus definition in the academic literature. At a minimum, most would agree that RAND precludes a refusal to license (either outright or constructive) and forbids exclusive licenses, both of which are freedoms that a patent holder would otherwise have. As a result, even with its ambiguous definition it seems advisable that

the few SSOs that have yet to institute a RAND policy should do so. As Mark Lemley has pointed out, knowledge through disclosure without consequence for licensing is of little help to those firms that would implement the standard.¹⁰

Proposals that move beyond this minimal definition for RAND are quite controversial.¹¹ For instance, some claim that a RAND commitment forms an actual license, with just the particulars of the rates and terms left for negotiation.¹² Under this view, patent holders would not be able to seek injunctive relief in the event of a failure to negotiate terms. Instead, courts would set reasonable royalties, trusting the parties to agree on other terms once royalties were determined. Recalling the caveat from above regarding balance, this approach to interpreting RAND could easily tip the scales too far in favor of licensees. If there is no risk involved in *not* taking a license, SSO members planning to implement a standard would have little incentive to come to terms with patent holders, reasonable or otherwise. Unless courts imposed damages that deterred opportunistic behavior by licensees, then any contract delay would translate into fewer royalty payments made and thus more pressure on patent holders. This tactic is the mirror image of patent hold up: licensee hold out. Of course, if a majority of SSO members wanted to employ more stringent RAND rules along these lines they could certainly do so, but the policy should be spelled out explicitly in advance of any standardization efforts and not added as an interpretation at a later date. Moreover, the policy should be crafted with an eye toward preventing cartel power among licensees to keep royalty rates below a reasonable level, which would likely invite competition agency intervention.

One way to avoid the difficulty of interpreting RAND is to encourage precise licensing-term disclosure *ex ante*. Two SSOs are experimenting with policies that incorporate such features. At the same time it implemented its disclose-it-or-lose-it rule, VITA instituted a mandatory licensing disclosure policy whereby IP owners must disclose a ceiling for the royalty rate they would charge and the most restrictive terms they would impose. The disclosed terms are "irrevocable" in that VITA members may negotiate lower royalties but may not increase their royalty rates at a later date. IEEE has instituted a similar but voluntary licensing program. Under its policy, when members disclose potentially essential IPR they are encouraged to also disclose the licensing terms they intend to seek. Thus far, however, almost two years into their new policy, only three IEEE members have disclosed specific licensing terms *ex ante*.¹³

IEEE's voluntary policy appears to be of far less consequence than VITA's mandatory policy, given the weak adoption by IEEE members, but note that a mandatory disclosure policy comes at a price. Term disclosure is difficult for firms that typically hold patent portfolios for defensive purposes only, asserting their patents as a means of encouraging settlement with firms that threaten them with infringement suits. On the one hand, such firms cannot disclose royalty-free or relatively low rates as this would eviscerate the defen-

sive usefulness of the portfolio. On the other hand, disclosing higher (but still reasonable) rates would be misleading as these firms do not actively seek royalty payments. Moreover, the latter course would signal a higher aggregate royalty burden for implementers than would actually hold.

Regardless of its specific implementation, however, the fundamental insight behind the *ex ante* disclosure policies holds an obvious appeal. Before a standard is finalized, technologies may compete for inclusion. To the extent that competition can be harnessed, it may be easier to keep royalty rates at reasonable levels. Even in the absence of such competition, *ex ante* terms cannot exploit irreversible investments as those investments are not made until after the standard is fully defined and commercialization has begun. If an unreasonable rate is sought *ex ante*, SSO members can simply support the next best alternative instead. If there are no viable substitutes for a patented technology *ex ante*, then we can conclude that the technology at hand is valuable in its own right and the standard-setting process, which eliminates alternatives by design, is unlikely to create market power for the patent holder. This *ex ante* dynamic has therefore led to a number of SSO policy proposals in the academic literature.

One such proposal is for SSOs to hold technology auctions.¹⁴ Under this approach, an SSO would hold an *ex ante* auction where IPR owners submit IPRs coupled with specific licensing terms. A technology's selection to the standard would then be based on the combination of technological merit and licensing cost, with SSO members voting for their preferred option.

In order for the auction model to yield reasonable royalties, however, three conditions must be met. First, SSO members must be able to credibly commit and adhere to the auction mechanism initially adopted. This is actually quite problematic, since auction participants often want to change the rules as the process unfolds and thus full commitment frequently does not hold in practice.¹⁵

The second condition is that the SSO voting mechanism cannot be manipulated by any individual member or group of members. This one is troublesome as well, because in practice some SSO members will also be the owners of competing technologies. Vertically integrated firms, with both patents and downstream operations, will have the incentive and possibly the ability to tailor the auction mechanism in their favor. In this case, the resulting auction outcome could reflect manipulation and would not be optimal from a welfare perspective.

The third and final condition is that participation must be voluntary. This condition may not always hold either because, depending on the industry, opting out of formal cooperative standard setting may not be commercially feasible. While some firms may be able to walk away from an SSO with little to no impact on its business, especially for standards related to technologies peripheral to the firm's core operations, for other technologies non-participation may be tantamount to abstention from the industry. In this latter case, an IPR

owner wanting to defect from an SSO might attempt a de facto standard by offering its own proprietary solution in competition with the offering of the cooperative SSO, but this strategy would only work if the firm were able to offer a complete technical solution, rather than just a handful of the necessary components. In complex, high technology industries—DVD players, cell phones, Bluetooth, RFID, etc.—one firm holding all of the needed pieces is rare indeed.

The low likelihood that these three necessary conditions will hold in practice means that an ex ante SSO auction would be difficult to design properly and, in any event, likely would not deliver the right outcomes from a social welfare viewpoint due to the potential for manipulation.¹⁶ That said, the ex ante auction as a thought experiment can be a useful device. In fact, the FTC used this construct in its *Rambus* decision, setting the remedy royalty rates at what it believed Rambus could have won in a theoretical ex ante auction, when the Rambus technologies faced competition.

Relying on hypothetical ex ante auction outcomes as a theoretical benchmark could be applied within SSOs as well. For instance, an SSO could establish an internal arbitration procedure for licensing disputes. VITA's IPR policy is instructive here as it lays out a process by which members can air grievances. The first step is to bring the matter to the relevant Working Group Chair. If that person is unable to resolve the dispute within fifteen days, the next step is the creation of a formal arbitration panel, also within fifteen days. According to VITA's IPR policy, the panel is to be comprised of three people:

[O]ne person selected by the party asserting noncompliance; one person selected by the party whose compliance or non-compliance is at issue; and a third person jointly selected by the other two selected persons. The first two selected persons cannot be affiliated with VITA members represented on the Working Group in question but may be affiliated with other VITA members if so desired. The third jointly selected person, who will act as Chair of the Panel, cannot be affiliated with any VITA member or with VITA.¹⁷

While VITA's IPR policy does not provide any guidance as to how the arbitration panel should conduct its review, an examination of SSO documents detailing the technological alternatives available ex ante and assessing their relative merits would be a natural element of any arbitration hearing over reasonable royalty rates and licensing terms. Regardless of the specific approach taken, having a fast-track dispute resolution mechanism within the SSO itself could save considerable time and expense and should reduce the need for civil litigation.

Another ex ante proposal put forth in the literature would be to allow the licensees within an SSO to band together for joint negotiations with IPR holders.¹⁸ The notion here is that joint licensee negotiations would balance the bargaining power of licensees against patent holders that gain market power through the standardization process when their technology is chosen and other alternatives are eliminated. In

recognition of this potential and the possibility for procompetitive effects stemming from it, the Department of Justice and the FTC announced in their 2007 report on antitrust enforcement and intellectual property rights that they will henceforth review joint negotiation policies at SSOs under the rule of reason.¹⁹ To my knowledge, no SSO has tested that promise yet. In fact, the relatively recent policy changes at VITA and IEEE, both of which sought DOJ business letter clearance, include unequivocal prohibitions on joint negotiations. The VITA policy explicitly states, "The negotiation or discussion of license terms among WG Members or with third parties is prohibited at all [...] meetings." Likewise, the IEEE policy states "Copies of an Accepted LOA [Letter of Assurance] may be provided to the working group, but shall not be discussed at any standards working group meeting."

SSO apprehension over joint negotiations is understandable, given the anticompetitive possibilities. First is the fact that most SSOs are comprised of far more technology users than patent holders. As a result, joint ex ante negotiations might devolve into a buyer cartel aimed at denying technology owners an economically appropriate return on their innovation. This is particularly a risk in cases where only substantially inferior alternatives exist ex ante and thus the adoption of the standard does not imply an increase in patent holder market power. Under this circumstance, joint negotiations may not balance licensee bargaining power against patent holder market power but instead may exceed it. As the agencies' 2007 IP Report observes,

such [joint] negotiations might be unreasonable if there were no viable alternatives to a particular patented technology that is incorporated into the standard, the IP holder's market power was not enhanced by the standard, and all potential licensees refuse to license that particular patented technology except on agreed-upon licensing terms. In such circumstances, the ex ante negotiation among potential licensees does not preserve competition among technologies that existed during the development of the standard but may instead simply eliminate competition among the potential licensees for the patented technology.²⁰

The 2007 IP Report also recognizes that joint ex ante negotiation might entice collusion in downstream, as opposed to licensing, markets, stating that "multilateral licensing negotiations certainly may offer an opportunity for SSO members to reach naked price-fixing agreements that lack plausible and cognizable justifications."²¹

If balancing licensee and patent holder bargaining power is a desired goal for an SSO, however, other routes do exist. In particular, SSOs can consider how technologies are selected for inclusion in their standards. Majority requirements for a technology to be included in a standard can provide greater leverage for licensees in ex ante bilateral negotiations and thus can lower the odds of patent hold up.²² This follows because an important route for patent holders to win support for their patented technology's inclusion in a standard is offering reasonable licensing terms ex ante. When patent holders must win the support of some majority of SSO

members, those members are likely to receive attractive licensing terms ex ante. Coupling this generally procompetitive ex ante vote-seeking behavior with a RAND commitment, the latter terms of which stipulate "non-discriminatory" licensing, and an SSO could decrease the likelihood of excessive royalty demands.

This last policy proposal, regarding an SSO's majority voting rules for technology inclusion, suggests another policy change that member firms could consider: the encouragement of ex ante bilateral negotiations. SSOs could simply add one more commitment to the list of promises already sought from members, namely the commitment to engage in good-faith licensing negotiations with as many parties as practicable before the standard is voted upon. Rather than limiting this pledge to patent holders, as with IPR disclosure and RAND commitments, the ex ante licensing negotiation promise would apply to all SSO members to ensure that members planning to implement the standard also act in good faith to seek licenses from those patent holders they believe will be the most relevant for the standard under development. This process would capture the beneficial aspects of ex ante licensing while avoiding the potential for anticompetitive outcomes inherent with joint licensee negotiations.

Duration of SSO Commitments

Implementing ex ante licensing rules—be it term disclosure, joint negotiations, or bilateral negotiations—leads to the need for another SSO IPR policy consideration: the extent to which ex ante licensing promises travel with a patent over time and across assignees. As noted above, this was the key question in the FTC's *N-Data* investigation. The FTC's *N-Data* settlement, while problematic on many fronts,²³ raises a real concern within standard setting: the potential for patent holders to skirt ex ante licensing obligations by reassigning or selling patents. To prevent any blatant game playing by patent holders, SSOs may want to consider adding explicit policies regarding disclosed ex ante licensing terms and the re-assignment or sale of patents implicated in the standard. If such commitments do not travel with the patents, then unscrupulous patent holders might transfer patent control simply to avoid ex ante licensing promises.

If the transfer of such commitments is made explicit, though, it might also make sense for business models to play some sort of role as a means of maintaining balance. Consider that an IPR owner with downstream operations can earn profits both upstream, in the form of royalties, and downstream, through sales of the good relying on the standard that embodies the patented technology. For these firms, it is largely a business decision as to where profits are taken. Upstream firms, however, earn all of their profits through IPR licensing. Moreover, taking the full value of a license into account, including any cross licenses and other in-kind concessions made among firms with a downstream presence, could easily imply a higher outright price when explicit fees comprise the sole licensing terms.²⁴ As a result, SSO policies regarding

the running obligation imposed by an ex ante commitment may want to allow for reasonable modifications of terms when patents change hands from vertically integrated firms to those with no downstream presence in relation to the standard and thus with different licensing incentives.

Conclusion

While it is still important for firms to carefully read the IPR policies for each SSO they participate in, simply following those policies is not likely to be enough to forestall antitrust problems. That seems clear from the Rambus experience, as well as from other matters like *N-Data*. In light of this reality, it is likely in firms' best interests to seek IPR policy changes within the SSOs in which they are active. The suggestions described above focus on practical changes that stand a chance of working under real world circumstances.

Not all of the above suggestions will work for each and every SSO. The key in assessing any policy change proposal is how it will affect each of the constituents within the SSO, so that the needs of licensees and patent holders, innovators and implementers, firms large and small, national and international are all met. As VITA's experience with Motorola highlights, IPR policies deemed onerous by existing members could easily lead to SSO defections. Ensuring firms' continued participation in cooperative standard setting is an important goal since broad participation can enhance the quality of a standard as well as its commercial viability.

Clearly, to provide adequate incentives to undertake risky investments in R&D and to maintain incentives to participate in cooperative standard setting, an SSO's IPR policies should enable technology owners to be sufficiently rewarded. With that in mind, though, excessive licensing rewards can give rise to higher consumer prices. The balance must be just right to satisfy all parties' needs, maintaining investments in R&D but still resulting in moderate prices in the downstream market. The many suggestions listed above indicate that options outside of antitrust action do indeed exist for achieving this balance and for limiting opportunistic behaviors on both sides of the negotiation table, even if individual firm's well-intentioned behaviors within existing SSO policy frameworks are not enough. ■

¹ Rambus, Inc., FTC Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>.

² Rambus, Inc. v. Infineon Techs. AG, 164 F. Supp. 2d 743, 767 (E.D. Va. 2001).

³ Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

⁴ Negotiated Data Solutions, LLC, FTC File No. 051 0094, available at <http://www2.ftc.gov/os/caselist/0510094/index.shtm>.

⁵ See Tobias Buck, *Groups Push for Action on Intellectual Property*, FIN. TIMES, Nov. 22, 2005, at 32.

⁶ Benjamin Chiao, Josh Lerner & Jean Tirole, *The Rules of Standard-Setting Organizations: An Empirical Analysis*, 38 RAND J. ECON. 905 (2007).

⁷ VITA Patent Policy, available at <http://www.vita.com/disclosure/VITA%20Patent%20Policy%20section%2010%20draft.pdf>.

⁸ Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

⁹ See, e.g., Marc Rysman & Tim Simcoe, A NAASTy Alternative to RAND Pricing Commitments (Working Paper 2008), available at <http://www.rotman.utoronto.ca/timothy.simcoe/papers/NAAST.pdf>; World Intellectual Property Organization, Standing Committee on the Law of Patents, Standards and Patents, Feb. 18, 2009, available at http://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_2.pdf.

¹⁰ Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not To)*, 48 B.C. L. REV. 149 (2007).

¹¹ For an analysis of RAND, and its European counterpart FRAND, which adds "Fair" to the acronym, see Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671 (2007).

¹² Lemley, *supra* note 10.

¹³ One member, Visible Assets Inc., has declared that it will grant licenses at a rate no greater than 5 percent of the selling price. See Letter of Assurance for Essential Patent Claims from Jason August to PatCom Administrator (Sept. 20, 2008), available at http://standards.ieee.org/db/patents/loa-1902_1-visible-20Sep2008.pdf. Microsemi and Magma Design Automation have posted that they are willing to license on a royalty-free basis. See Letter of Assurance for Essential Patent Claims from Simon Kahn to PatCom Administrator (Mar. 18, 2008), available at http://standards.ieee.org/db/patents/loa-802_3at-microsemi-18Mar2008.pdf; Letter of Assurance for Essential Patent Claims from Yatin Trivedi to PatCom Administrator (Dec. 3, 2008), available at <http://standards.ieee.org/db/patents/loa-1801-magma-03dec2008.pdf>. Four other firms, Alcatel, Design of Systems on Silicon-DS2, Fujitsu and Teknovus Inc., have posted their form contracts but did not disclose any royalty rate information. See Letter of Assurance for Essential Patent Claims from Donald P. Dinella to PatCom Administrator (May 19, 2008), available at http://standards.ieee.org/db/patents/loa-802_3at-alcatel-19May2008.pdf; Letter of Assurance for Essential Patent Claims from Jorge Blasco to PatCom Administrator (Sept. 1, 2008), available at <http://standards.ieee.org/db/patents/loa-1901-DS2-01Sep2008.pdf>; Letter of Assurance for Essential Patent Claims from Shigero Kitano to PatCom Administrator (Aug. 23, 2007), avail-

able at http://standards.ieee.org/db/patents/loa-802_11-fujitsu-23Aug2007.pdf; Letter of Assurance for Essential Patent Claims from Julie Kunstler to PatCom Administrator (Nov. 4, 2008), available at http://standards.ieee.org/db/patents/loa-802_3av-teknovus-04Nov2008.pdf.

¹⁴ Swanson and Baumol present this idea. Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power* 73 ANTITRUST L.J. 1 (2005).

¹⁵ David McAdams & Michael Schwarz, *Credible Sales Mechanisms and Intermediaries*, 97 AM. ECON. REV. 260 (2007).

¹⁶ For a detailed analysis of the practicality of the SSO auction proposal, see Damien Geradin, Anne Layne-Farrar & A. Jorge Padilla, *Competing Away Market Power? An Economic Assessment of Ex Ante Auctions in Standard Setting*, 4 EUR. COMPETITION L. 443 (2008).

¹⁷ VITA Patent Policy, available at <http://www.vita.com/disclosure/VITA%20Patent%20Policy%20section%2010%20draft.pdf>.

¹⁸ 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).

¹⁹ U.S. DEP'T JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter IP REPORT], available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

²⁰ *Id.* at 20, 53.

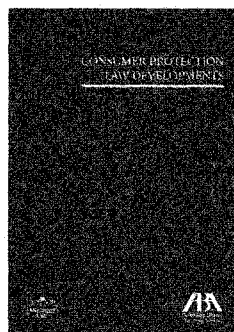
²¹ *Id.* at 21, 51.

²² For a detailed development of this argument, see Anne Layne-Farrar, Gerard Llobet & A. Jorge Padilla, *Preventing Patent Hold Up: An Economic Assessment of Ex Ante Licensing Negotiations in Standard Setting*, AIPLA Q.J. (forthcoming 2009).

²³ For a discussion of the issues, see Anne Layne-Farrar, *Patents in Motion: The Troubling Implications of the N-Data Settlement*, GLOBAL COMPETITION POL'Y, Mar. 2009, at 1.

²⁴ This is the very conclusion that Aoki and Nagaoka come to in their theoretical analysis. Reiko Aoki & Sadao Nagaoka, *The Consortium Standard and Patent Pools* (HISTAT Discussion Paper 32, 2004), available at <http://www.ier.hit-u.ac.jp/pie/Japanese/discussionpaper/dp2004/dp222/text.pdf>.

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