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ABSTRACT

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OPEN STANDARDS

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- *Open standards give confidence to and encourage widespread investment by multiple providers and users.*
- *“Openness” is determined not just by how a standard is developed but by how it will evolve in the future, the terms and conditions of use, and, in effect, how widely it is adopted.*
- *As in other business contexts, participants in standards development processes should be able to make decisions on the basis of cost and terms of use as well as features and quality of the technology.*

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

Traditional standards development organizations have focused on how the standard is set, but from a user’s perspective, the original process may be less important than the terms of availability of the standard. Users also want to know the prospects for adapting and evolving the standard – and for uptake by competing vendors.

Thus, the different dimensions of openness include:

- **INITIAL DEVELOPMENT PROCESS:** How open was the process through which the standard was developed? How broad was participation in the process? Was 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? Is it vulnerable to subtle forms of control by particular stakeholders?
- **TERMS OF USE:** How is the standard made available? Are patents involved, 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 supported in the market? Is it threatened by competing standards? Is it vulnerable to ambush by nonparticipating patent holders?

The controversy over Microsoft's efforts to secure recognition of OOXML as an ISO 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?

Perspectives on openness are in part context-dependent. Public agencies may prefer strong forms of openness because of political expectations of transparency, accountability, and access. Private-sector managers may have greater freedom to choose proprietary standards based on relationships with trusted suppliers, yet they, too, need to be concerned about the hidden and future costs of lock-in.

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. Today, pressure grows to address licensing fees and terms *ex ante* alongside technology. While business decisions normally take all these factors into account, some worry that the practice might be construed as a form of price-fixing, but the Department of Justice and the Federal Trade Commission have made it clear that this will be determined only under a rule of reason analysis.

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, software standards are shifting toward royalty-free (RF) licenses, following the lead of the World Wide Web Consortium.

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 standards-dependent investments have been made. Patents become more valuable when they are inadvertently incorporated into standards, and, in the U.S., patent applicants can secretly modify their claims to track the evolution of standards. When patents surface after standards are adopted and widely implemented, the patent holder may enjoy enormous leverage over an entire industry. This has been a problem among participants (the Dell and Rambus cases), where it can be addressed by tightly written agreements. Ambush by third parties is a more difficult problem that must be addressed publicly.

A disturbing practice is emerging in which companies that have made licensing commitments in favor of standards have transferred or sold patents to others who then claim not to be bound by the original commitment. A divided FTC recently concluded that N-Data had engaged in unfair competition by renegeing on a RAND licensing commitment.

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 public procurement and adoption, these factors should be articulated as guidelines.

Ex ante licensing and good faith dealing by participants should be enforceable norms in standards processes. The legal principle of *laches* should be extended to require patent applicants to act promptly if they wish to assert patents against emerging open standards.