June 14, 2011

Jon Leibowitz
Chairman of the Federal Trade Commission
Federal Trade Commission/Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-135 (Annex X)
Washington, DC 20580

Submitted via email: https://ftcpublic.commentworks.com/ftc/standardsproject

Re: Patent Standards Workshop, Project No. P11-1204

Dear Chairman Leibowitz,

The Intellectual Property Owners Association ("IPO") welcomes this opportunity to provide its views on the interplay between intellectual property protection and standards in response to the Federal Trade Commission's Request for Comments, Project No. P11-1204, dated May 13, 2011.

IPO is an international association based in the United States. IPO's members include more than 200 companies and 12,000 individuals who are involved in the activities of the association either through their company or law firm or as IPO inventor, author, executive, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property covering all areas of technology, many of whom are involved in various formal and informal standards development organizations ("SSOs") around the world.

IPO supports adequate and effective intellectual property rights. We believe that the constitutional mandate to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," promotes the free enterprise system that has stimulated the American economy to its outstanding performance. Innovation is the key to increasing the standard of living of all. IPO believes that it is through innovation that we explore new science, develop new products, and become more productive, all of which promote the general good for the businesses and citizens of the United States and of the other countries of the world.

Indeed, our members are among the most innovative companies in the world. Collectively, they spend huge sums every year on research and development. For the most part, this innovation is *practical* innovation designed to improve the products and services offered by IPO members or to develop new products the members can offer to their customers.

IPO members regularly address diverse issues concerning intellectual property including, but not limited to those involving patents, copyrights, trade secrets and standards.. They are active licensors and licensees of intellectual property rights and understand day-to-day considerations that drive licensing transactions. IPO members license intellectual property to generate a return on the owner's R&D investment while allowing the licensee to avoid research and development costs or meet market needs not met by the intellectual property owner. In this regard, IPO members recognize the need to define principles that achieve the optimum balance between the rights of intellectual property owners and other industry standard stakeholders.

In recent years, IPO has observed and commented on proposals that, if adopted, could upset this balance by undervaluing the contribution of intellectual property owners in standards setting activities. See for example, Revision of National Standards Involving Patents, released by the Standardization Administration of China (SAC) on 02 November 2009. As written, this policy could have: 1) encumbered patent holders not participating in the standardization process; 2) required patent holders to license their technology "at a price significantly lower than the normal royalties" and 3) required compulsory national standards to be patent free. Based on its vast practical experience, IPO believes successful standardization patent polices are marked by certain general characteristics. While not an exhaustive list, these SSO policies: 1) apply to those parties agreeing to be bound by the policy, 2) balance the interests of all stakeholders, 3) attract patent holders to participate in and contribute their patented technology and 4) recognize the value of negotiating detailed licensing terms between licensor and licensees outside of the standardization process.[1]

Participants/Members

Most SSOs have their own rules governing what intellectual property rights must be disclosed and licensed ("IPR Policy"). Some bodies have IPR policies under which their members or participants that are owners of specific, identified intellectual property commit that they will license their intellectual property to all on a reasonable and non-discriminatory ("RAND") basis to the extent the intellectual property rights are necessary to practice the standard. Some require that this license be granted royalty-free

[1] We note the former FTC Chairperson Majoras' speech entitled "Recognizing the procompetitive potential of royalty discussions in standards setting" in Remarks at Standardization and the Law Conference, September 23, 2005 http://www.ftc.gov/speeches/majoras/050923stanford.pdf in which possible procompetitive effects of joint discussions are mentioned. However, many SSOs and their stakeholders have concerns about potential anti-competitive effects of any group negotiations of proposed licensing terms as part of the standardization process. These concerns include the possibility that such negotiations may lead to buyer cartels or group boycott types of conduct. From a practical perspective, the potential for such conduct may discourage participation in standards-setting activities and reduce incentives to further invest in standards-related technology.

(together with other RAND terms and conditions). The development of standards through a standard setting body can advance a particular technology to the benefit of consumers and industry.

It may be desirable to know whether non-members who hold patents are unwilling to license to implementers of a standard. But it is also important to recognize that non-participants (e.g. those not developing or voting on a standard) are normally not bound by the obligations as set forth in the SSO's IPR policy and that it is impractical to expect that such parties will monitor all standards activity in their field.

Balanced Interests

There is a natural tension among firms involved in standardization which is based on their business models and the way that they decide to use their intellectual property. Stakeholder interests must be considered and IPRpolicies must balance the interests of IPR owners with the interests of those who seek to use IPRs as part of standardized solutions (recognizing that in the standards ecosystem these are not distinct categories of stakeholders). Prescriptive rules set by government agencies can have the effect of adversely impacting the ability of SSOs to accommodate all such interests and all potential circumstances, as well as each dynamic variable that might arise in connection with standards development. Of particular importance is that the adoption of rigid prescriptive rules may discourage firms with significant IPRs from participating at all. In short, owners of IPRs should be provided incentives for making their inventions available, even if there is a cost for obtaining access to such technology through a license. Implementers who have not invested in developing the technology in question should also benefit from being able to use the innovative technology in their products.

IPO believes that innovation is, and will continue to be, best served when SSOs and their members/participants agree on reasonable IPR disclosure and licensing policies. They are in the best position to properly balance the interests of all stakeholders and avoid the risk of diluting the value of IPRs of entities that participate in the standards development process. Also, competition among standards and standards bodies, can have its own benefits.

To balance the interests of implementers and innovators, most SSOs adopt disclosure and licensing rules to achieve a practical balance between producing a standard that can be implemented by all and one that encourages innovators to invest in innovative technologies and contribute such technologies for use in the standards. The disclosure policies of most SSOs are limited to patents that contain a claim(s) that may be an essential claim. Any commitments to offer licenses, however, typically apply only to those claims that are "essential" (or "necessary") – which generally means implementing the final, approved standard necessarily infringes the claim.

This difference makes sense and addresses the underlying purpose for disclosure and licensing statements. The disclosure rule is designed to ensure that standards

developers are on notice of the companies that may have patent claims essential to the standard. The licensing statement is then designed to ensure that companies holding patents that are actually essential to the standard will state whether they will offer licenses to such patent claims typically on RAND terms, or whether they are unwilling to license them. This early statement of refusal helps the SSO and its members determine how they wish to proceed to ensure implementation.

In response to the European Commission, IPO noted inherent characteristics of standardization that mitigate concerns related to "excessive" or "abusive" royalties and fees. For example, IPR holders seeking broad adoption of their patented technologies (especially over available competing technologies), may moderate the royalties sought so as to gain inclusion of the technology in the standard in the first instance and widespread implementation of the standardized solution. By so doing, IPR holders will be able to realize favorable returns on their R&D investment while a wide standards community can access the patented technology. Other firms may not even seek royalties because their strategy is to realize a return on their R&D investment through the sale of products or services and the defensive use of their patents. Yet further firms may seek to use their IPRs only defensively, and may offer (F)RAND terms without compensation and seek to attract the cross-licensing of other standards essential IPRs. Regardless of their approach to licensing, IPR holders are generally motivated by their business interests to negotiate terms that support rapid adoption and wide use of standards. These market dynamics help support the efficient development and introduction of most standards. In sum, self-governing conditions and incentives already exist to prevent, or at least reduce, opportunities for anticompetitive conduct that may give rise to competition law concerns.

Voluntary Consensus-Based Standards System Supports Innovation

The continuous growth in productivity and innovation over the past several decades has been attributed in large part to the current voluntary consensus-based system. Further, IPO believes the basic principles forming the U.S. Standards Strategy remain sound, relevant and essential to both U.S. competitiveness and global cooperation. This strategy, as embodied in OMB Circular A-119, directs government agencies, except in certain cases, to use voluntary consensus standards. OMB A-119 states in pertinent part:

> For purposes of this policy, "voluntary consensus standards" are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, "technical standards that are developed or adopted by voluntary consensus standard bodies" is an equivalent term.

> (1) "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, "voluntary, private sector, consensus standards bodies," as cited in Act is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:
>
> (i) Openness.
> (ii) Balance of interest.
> (iii) Due process.
> (iv) An appeals process.
> (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.

The current voluntary consensus-based system as articulated above is viewed inclusively to cover a diversity of standards-setting approaches, both formal and informal (as in consortia), that meet the needs of government and other implementers in providing critical standards and promoting innovation. All relevant stakeholders should continue to promote this system that has driven the innovation economy for decades.

Sincerely,

Douglas K. Norman

Douglas K. Norman
President