



AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
241 18th Street, South, Suite 700, Arlington, VA 22202 Phone: 703.415.0780 – Fax: 703.415.0786 – www.aipla.org

April 5, 2008

Donald S. Clark
Secretary
Federal Trade Commission
Office of Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094 (“*N-Data*”)

Dear Mr. Clark:

The American Intellectual Property Law Association (“AIPLA”) submits these comments in response to the request of the Federal Trade Commission for public comment on the Decision and Proposed Consent Order in the *N-Data* proceeding. As described below, AIPLA respectfully requests and recommends that the Commission make certain clarifications and additional explanations in connection with the Decision and Proposed Consent Order to better enable proper interpretation of the FTC action.

AIPLA is a voluntary bar association of over 17,000 members who work daily with patents, trademarks, copyrights, and trade secrets, and the legal issues that they present. Members include attorneys in private and corporate practice as well as government service. AIPLA’s membership is intimately involved with the legal and business issues underlying the development, commercialization and exploitation of intellectual property, including enforceability, antitrust, and licensing issues.

AIPLA appreciates the opportunity to provide these comments and for the Commission to consider them in its further deliberations in the *N-Data* proceeding. We believe that it would be useful for the Commission to clarify that its Decision does not establish a rule applicable to all cases such that patentees may never modify their license commitments in the context of standards setting. We request that the Commission clarify that when determining whether acts and practices are “unfair” under Section 5 in the standards-setting context, the balance of interests among all of the relevant stakeholders should be considered. We also request that the Commission clarify which circumstances warranted its intervention under Section 5.

Participants in standards development represent many different interests, depending on a myriad of factors. Some firms invest in research and development and contribute patented technology into the standards development process. These firms may choose to license their patents to implementers and users to generate revenue for further research and development. Alternatively, firms may use their patent portfolios defensively, *e.g.*, enter into cross-licenses, to protect their products that incorporate standardized technology where the sale of such products

creates revenue for further research and development. Other firms may not invest in research and development but rely on products and services that utilize the standardized technology to support their business models. Many firms support all of these business models, and accordingly, the lines demarcating the interests among various stakeholders may blur. Although consumers do not often participate in the development of standards, standards adoption may be just as important to consumers as to participants. For this reason, AIPLA requests that the Commission clarify that assessing whether methods of competition, acts, and practices are “unfair” under Section 5 in the standards-setting context should involve a consideration and balance of all of the interests among the various stakeholders.

SSOs attempt to balance these competing interests in their rules and policies. On the one hand, they need to recognize the importance to implementers who are making investments in products that utilize the standard of being able to rely on licensing commitments, including those made by predecessors in interest. SSOs also need to be able to rely on commitments made by patent owners in order to preserve the integrity and reliability of their processes. At the same time, SSOs need to recognize the value of including patented technology to provide technically sound standards and of providing fair and reasonable incentives to patent holders to offer licensing commitments and to participate in standards development. The SSO will often be in the best position to balance the various competing interests in the standards development process.

The Commission’s enforcement actions are followed closely by the standards community here and abroad. However, SSOs viewing the current public record might interpret the *N-Data* decision to encourage them to take actions with respect to their policies and processes. Consequently, it is important to AIPLA that the Commission clarify that its Decision and Order is not intended to affect an SSO’s flexibility in developing a patent policy that balances the interest of all of its stakeholders.

AIPLA recognizes that the Decision and Order are directed to the parties involved in the *N-Data* matter. However, AIPLA is concerned that the *N-Data* Decision and Order may be viewed as being applicable to all cases where license rates or terms are changed significantly in the standards-setting context. While the Decision and Order, based on the facts as alleged, will likely be considered by SSOs and those who participate in standards, AIPLA believes that confirmation by the Commission that the *N-Data* case does not prescribe a formal rule would be useful. We note that the Commission acknowledges the criticality of the standards-setting context to the Decision (in the Analysis to Aid Public Comment) and that “not all breaches of commitments made by owners of intellectual property during a standard-setting process will constitute an unfair act or practice under Section 5.” However, there is concern that the examples listed apply to only situations where the effects are at most minimal, *i.e.*, immaterial commitments or where implementers could avoid injury. We suggest that the Commission clarify that changes in licensing terms may be reasonable and justified under certain circumstances, and that those reasons and justifications as well as any injury to consumers or competition be taken into consideration in determining whether an unfair method of competition or an unfair act or practice has occurred under Section 5.

AIPLA believes that it is important, in particular, for the Commission to clarify the facts warranting its action in the absence of any allegation of fraud in the development of the standard.

This case is materially different from prior standards-setting cases in which the Commission found violations of Section 5. The difference is that there is no allegation that the patent owner in this case engaged in any improper or exclusionary conduct to induce the standards-setting organization to specify its technology in the standard. In *In re Dell*, the Commission concluded that “there is evidence that the association would have implemented a different non-proprietary design had it been informed of the patent conflict during the certification process, and where Dell failed to act in good faith to identify and disclose patent conflicts.” 121 FTC 616, 624 (FTC 1996). In *In re Union Oil*, the complaint alleged that “Union Oil misrepresented to CARB that certain gasoline research was non-proprietary and in the public domain, while at the same time it pursued a patent that would enable it to charge substantial royalties if the research results were used by CARB in the development of regulations.” 2005 WL 2003365, at *5 (F.T.C. July 27, 2005). And in *In re Rambus*, the Commission concluded that “[t]hrough a course of deceptive conduct, Rambus exploited its participation in JEDEC to obtain patents that would cover technologies incorporated into now-ubiquitous JEDEC memory standards, without revealing its patent position to other JEDEC members.” 2006 WL 2330117, Opinion at 3 (F.T.C. Aug. 2, 2006).

In this case the Commission found that N-Data had engaged in unfair methods of competition, not because it had acted “deceptively” but rather because it concluded that N-Data’s/Vertical’s conduct was both “oppressive” and “coercive.” It would be helpful if the Commission further developed the record as to why it found N-Data’s/Vertical’s conduct in this case coercive and oppressive. For example, were there factors in addition to the potential for increasing cost and price that made the conduct coercive and oppressive, and if so what were they? Similarly, AIPLA requests the Commission to elaborate on the factors it considered in finding that (1) N-Data’s/Vertical’s conduct caused “substantial consumer injury,” (2) the injury is not outweighed by any countervailing benefits of N-Data’s/Vertical’s efforts to license, and (3) the injury could not reasonably have been avoided by implementers of the standard. In determining that N-Data/Vertical had engaged in an unfair act or practice, the Commission found that all three of these elements were met. However, AIPLA respectfully requests that the Commission provide more detail regarding the facts underlying the Commission’s determination that each of these elements was present in this case.

AIPLA further believes it is important for the Commission to clarify the facts upon which it based not only its Decision, but also the remedy specifying the particular terms N-Data must offer to licensees. AIPLA therefore requests that the Commission clarify that the remedy set forth in its Decision and Order is limited to the specific facts of this case, and is not based on the IEEE patent policy. For example, does the Commission, as a matter of policy, intend to set a rule that a patent owner, who makes a licensing commitment with respect to certain patents in connection with a specific standard under consideration, must apply that commitment to subsequent improvement patents and subsequent iterations of the standard or be accused of an unfair method of competition or an unfair act or practice? Because the first generation of a standard will often lock implementers into the patent owner’s technology for subsequent generations, it may be very appropriate for an SSO to require licensing commitments to cover later iterations of the standard and even later patents that read on the standard. But this may not always be the case. Indeed, to require coverage of subsequent generations may in many cases discourage patent owners from developing improvements that will benefit implementers and consumers. The SSO should have broad discretion to make these judgments in the first instance, and any Commission intervention

should take these competing considerations into account. The Commission's remedy in the *N-Data* case, however, could be read to broaden the scope of the license beyond the commitment tendered by National Semiconductor, by including later-issued patents and applying it to all IEEE standards rather than the specific one that generated the licensing commitment. It may be in this case that the Commission was relying on the broad scope of the initial licensing commitment in fashioning its proposed remedy. If so, it would be helpful if the Commission could clarify its basis for imposing this remedy.

In AIPLA's view, the Commission should be cautious in exercising jurisdiction under Section 5 in cases involving disputes between well-armed competitors, as appears to exist here. It may indeed be proper to exercise jurisdiction, but such exercise should be based on a clear and direct risk of harm to consumers and competition, and the Commission should point out what the clear and direct risk is that warrants its action under Section 5.

The questions we have raised are not intended to be exhaustive. However, a confirmation at least that the Commission's enforcement action in *N-Data* is limited to the particular facts in that case and that it will balance the interests of implementers and patent owners, as well as users and consumers who may not be participants in the standard setting process, would provide important clarification. Such clarification would be useful in avoiding a situation where SSOs may believe they are constrained in adopting policies that balance the interests of all relevant stakeholders.

Respectfully,

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Michael K Kirk
Executive Director
AIPLA