How the Agencies Should Assist SDOs In Protecting Their Processes From Exclusionary Patent Holdup Conduct

Robert A. Skitol

Counsel for VITA Standards Organization

Presentation to FTC/DOJ Hearings on Exclusionary Conduct

January 30, 2007

Exclusionary Patent Holdup Conduct Defined:

- **Patent owner's inducement of an SDO's adoption of a standard that implicates the owner's patent claims without other participants' awareness of the implications, enabling the owner to acquire and exercise monopoly power that it would not otherwise have obtained.**

- **The FTC's *Dell*, *UNOCAL*, and *Rambus* cases delineate a framework for treating such conduct as a Section 2 violation in circumstances involving deliberate deception regarding the existence of patent claims.**

Exclusionary Patent Holdup Conduct Defined (Continued):

- **Same or similar exclusionary outcome can occur in a variety of other situations, e.g.:**
  - Inducing reliance on misleading or meaningless RAND commitments as alleged in *Broadcom v. Qualcomm*.
  - Inducing reliance on any RAND commitment followed by seeking injunctive relief to enforce patent claims.
  - Transferring ownership of implicated patents without binding the new owner to the original owner's commitment.
- **This is today's version of monopolization through "highjacking" a standards development process for exclusionary purposes within the spirit of the Supreme Court's *Allied Tube* and *Hydrolevel* decisions.**
- **Disagreements over extent of these kinds of holdup situations; but SDOs' inattention to the problems that surface in an environment of proliferating patent grants invites proliferation of these holdup outcomes in the years ahead.**

VITA's Interest and Recent Actions:

- **VITA develops open architecture standards for real-time modular embedded computing systems employed in a wide range of products (medical imaging equipment, aviation and navigation devices, military/defense and space exploration systems, etc.)**

- **VITA has encountered four episodes of patent holdup conduct in the past six years, each one causing major delay in implementation of the affected standard and imposing major legal expenses on the organization; major concerns over more such problems in light of impending technology transition.**

VITA's Interest and Recent Actions (Continued):

- VITA has developed a new patent policy designed to prevent further holdup episodes: required early disclosures of potentially essential patent claims; required early disclosures of key license terms; enforceability of disclosed information; arbitration procedure for compliance disputes.

- On October 30, 2006, DOJ issued a favorable Business Review Letter on the new policy; on January 17, 2007, the VITA Standards Organization membership overwhelmingly approved and adopted the new policy; now undergoing ANSI review.

Why Agencies Should Affirmatively Encourage Other SDOs to Follow VITA's Lead by Experimenting With New Patent Policies:

- **DOJ's VITA letter and recent speeches by officials of both agencies recognize that SDO policies of this kind are not only "o.k." from an antitrust standpoint but can be "procompetitive" in their protection against exclusionary holdup outcomes.**

- **The FTC's *Rambus* decision suggests that the viability of any Section 2 case against holdup conduct in this context may depend on a showing that the patent owner's actions were contrary to SDO participants' reasonable expectations in light of SDO policies in place.**

Why Agencies Should Affirmatively Encourage Other SDOs to Follow VITA's Lead by Experimenting With New Patent Policies (Continued):

- Effective SDO "self-regulation" through such policies will reduce the need for agency enforcement actions as well as all participants' exposure to disruptive private suits; and self-regulation is a far more efficient solution to this problem than reliance on litigation.

- No reason to think VITA's new policy is the "perfect" solution or one suitable for SDOs generally; lessons learned from other SDOs' experimentation with variations upon it will be to the benefit of all SDOs and participants in them.

Suggested Actions:

- **Affirmatively encourage more requests for DOJ letters or FTC advisory opinions on patent policy proposals of various kinds, thereby providing more guidance for the standards development community generally.**

- **Example would be guidance on extent to which and manner in which a policy might go beyond license terms disclosure requirements to allow discussion or even negotiation of license terms during SDO meetings.**

- **Industry-wide study of SDOs' experience with various kinds of holdup situations and how their existing policies addressed the problems encountered, resolving disagreement over the "prevalence" question and then (if warranted) suggesting solutions.**

Suggested Actions (Continued):

- **Address concerns over private antitrust claims by filing amicus briefs in cases that generate harmful decisions, e.g., the per se illegality holding in *Golden Bridge v. Nokia* and the ruling that breach of an SDO rule that results in monopoly power cannot state an antitrust claim as set forth in *Broadcom v. Qualcomm*.**

- **Support the enactment of legislation enabling SDOs to implement desirable patent policies without fear of private antitrust claims.**