



Cisco Systems, Inc.
170 West Tasman Drive
San Jose, CA 95134-1706
Phone: 408 526-4000
Fax: 408 526-4100
<http://www.cisco.com>

May 25, 2006

Legal Policy Section
Antitrust Division
U.S. Department of Justice
Suite 3234
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex Z)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Subject: Section 2 Hearings, Project Number P062106

Ladies and Gentlemen,

Cisco Systems appreciates this opportunity to comment in the above-referenced proceeding. We join with Hewlett-Packard Company in encouraging the addition of standard-setting and potential abuses of the standards process to the list of topics to be considered in the hearings.

The networking products Cisco develops derive substantial value from their ability to interoperate seamlessly in multi-vendor networks. For that reason, Cisco is a frequent participant in standard-setting. Our company has a strong corporate interest in standard-setting processes that provide us with as much predictability as possible regarding the prices and terms on which intellectual property that is essential to practice industry standards will be made available by patent-holders. Receiving accurate information about future royalty obligations helps Cisco make efficient pricing decisions.

Unfortunately, the rules of many standards organizations currently limit the information that patentees may disclose concerning their licensing intentions to a commitment to license on reasonable and non-discriminatory terms. Standard-setting organizations often defend these rules as necessary to ensure antitrust compliance, leading to what former Assistant Attorney General Hew Pate described as the "strange result" of antitrust being used to discourage discussions of commercial terms

between licensors and licensees.¹ Preventing patentees from stating the terms under which they will license their patents until after those patents have been incorporated in a standard risks “convert[ing] a previously competitive technology market into one that is subject *ex post* to market or monopoly power.”²

Changes to the patent system exacerbate this risk. As the patent thicket in information technology industries grows ever denser, the number of patents disclosed by patent-holders during the creation of a technology standard increases. Some of these patents come to be owned by “firms [that] use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”³

The leadership of both federal antitrust agencies have spoken to the potential for exploitation of the *ex post* market power that standards development organization rules limiting disclosure of licensing terms to RAND can create.⁴ The European Commission has also addressed the issue in the Guidelines accompanying the 2004 revision of the Technology Transfer Block Exemption Regulation and determined that “ [i]n certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies.”⁵

Nevertheless, additional guidance is needed to encourage US standards bodies to determine whether the continued use of rules that prevent the disclosure of licensing terms beyond RAND is, in fact, necessary to fend off antitrust liability for the

¹ R. Hewitt Pate, Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust, (June 3, 2005), available at <http://www.usdoj.gov/atr/public/speeches/209359.htm>.

² Daniel Swanson and William Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 9-10 (2005).

³ *EBay, Inc. v. MercExchange, LLC*, 547 U.S. ____ (2006), concurring opinion of Kennedy, J. at 2.

⁴ Deborah Platt Majoras, *Recognizing the Procompetitive Benefit of Royalty Discussions in Standard-Setting*, Presented to Conference on Standardization and the Law: Developing the Golden Mean for Global Trade (September 23, 2005) at 7 (available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>); Pate Speech, *supra* n. 1.

⁵ European Commission, *Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements* ¶225, O.J. C 101/2 2004 (April 27, 2004), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_101/c_10120040427en00020042.pdf.



May 25, 2006

Page 3 of 3

standards organization and its members. Cisco, like HP, believes that the agencies' examination of Section 2 of the Sherman Act and the legal treatment of monopoly power would be incomplete if it did not address how the misperception of antitrust risks may facilitate the acquisition of monopoly power by holders of patents that are essential to practice industry standards.

~~Very truly yours~~ / / / /

Mark Chandler
Senior Vice President and
General Counsel

Copies to: Gail Kursh, Esq.
Frances E. Marshall, Esq.
Susan S. DeSanti, Esq.