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October 5, 2004

BY EMAIL (comments@amc.gov)

Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Avenue, NW
Suite 800-South
Washington, DC 20004-2503

RE: Comments regarding Commission issues for study
69 Fed. Reg. 43969

Dear Commissioners:

I am currently general counsel and secretary of Open Source Initiative,[1] and have served as attorney for many software companies and open source software projects. I am the author of Open Source Licensing: Software Freedom and Intellectual Property Law published by Prentice Hall in 2004, and speak and write around the world on open source issues. For nearly three years I participated on the W3C Patent Policy Working Group and have direct experience with antitrust issues in industry standards organizations.

I submit this issue for your study when you consider ways to modernize the antitrust laws:

> **Industry standards organizations should be encouraged to establish mandatory disclosure and licensing procedures and to negotiate collectively for licensed intellectual property, so as to guarantee that standards they promulgate for the information technology infrastructure are "open standards."**

An open standard specifies technology that anyone anywhere can freely implement, for free. Its essential goal is ubiquity, and such standards make the information technology infrastructure possible. Consider how open standards underlie the worldwide web and the Internet in software such as browsers and electronic mail systems. Intellectual property (IP) licenses and royalties do not stand in the way of sending and receiving email or viewing web pages. Through the collective action of companies and individuals in standards organizations such as the World Wide Web Consortium (W3C) and the Internet

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[1] This Comment does not represent the official position of any of the organizations mentioned herein.

Engineering Task Force (IETF), open standards for the information technology infrastructure are widely implemented without payment of royalties.

Yet intellectual property sometimes stands in the way of open standards. For a time Microsoft as well as open source industry standard browsers were under threat of a patent with a $500+ million price tag, and just a few days ago there was a report of more than $1 billion at risk for a patent infringement lawsuit relating to industry standard Java.

This is no private matter for private resolution. National security and economic stability are at stake when industry standard technology is threatened by intellectual property claims. For example, the unavailability of Microsoft's patent-pending Sender ID technology means that open source email software can't help protect our country from spam and electronic fraud.

Collective action is needed to protect open standards from patents and other IP monopolies. This means that industry standards organizations need the freedom to act collectively, and to negotiate collectively, to protect open standards from IP encumbrances.

W3C is the first important standards organization to adopt a patent policy for its members – essentially all the major technology companies in the world – that mandates disclosure of members' IP relating to W3C standards, imposes a royalty-free licensing regime for that IP, and provides that a collective "Patent Advisory Group" be formed to investigate licensing alternatives.

Other industry standards organizations should be encouraged by the antitrust law to follow suit. Industry standards organizations should be allowed to act collectively in furtherance of open standards for the worldwide information technology infrastructure.

I will welcome an opportunity to comment further on this at an appropriate time convenient to the Commission.

Respectfully submitted,

Lawrence E. Rosen