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January 4, 2005

Andrew J. Heimert, Executive Director & General Counsel  
Antitrust Modernization Commission  
1120 G Street, N.W., Suite 810  
Washington, D.C. 20005

Cc: Antitrust Modernization Commissioners

Re: Intellectual Property Issues Recommended For Commission Study by the Intellectual Property Working Group

Dear Mr. Heimert,

On behalf of Sun Microsystems, Inc. (“Sun”), I respectfully request that the Antitrust Modernization Commission (“AMC”), at its upcoming January 13, 2005 meeting, include on its planned study agenda one of the issues identified on the “not recommended” list by the AMC’s Intellectual Property (“IP”) Working Group: “how should antitrust law analyze misleading conduct and other possible abuses of standard-setting processes.” Sun, a strong proponent of open standards and interoperable systems, has participated in many standards-setting activities over the past several years where the objectives of standards setting have been thwarted by patent-related activities. Sun recognizes that to achieve open standards and interoperable systems, advance innovation and promote competition, the process by which standards are developed must be supported by a balanced approach to IP law and antitrust policies.

Our request for reconsideration is rooted in three reasons.

First, the AMC cannot study fully one of the IP Working Group’s recommended issues -- “how does the current intellectual property regime affect competition” -- without also examining the effect on competition that results from standardization practices and problems. As judicial and administrative case law<sup>1</sup> and government inquiries<sup>2</sup> both demonstrate, an increasing number of IP owners leverage the standards process to enhance their IP position. An explosive proliferation of patents in recent years, as the Federal Trade Commission (“FTC”) recently found, reveals serious issues for the interface between competition policy and patent law

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<sup>1</sup> See, e.g., *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order); *Rambus v. Infineon, Inc.* 318 F.3d (Fed. Cir. 2003); *In re Union Oil Company of California*, F.T.C. Docket No. 9305 (Nov. 25, 2003) (reversing and vacating Initial Decision), available at <<http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>>; *In the Matter of Rambus, Inc.*, Docket No. 9302 (rendered on February 24, 2004) (the FTC appealed and two oral arguments were heard on November 21 and December 9, 2004).

<sup>2</sup> See, e.g., FTC and Department of Justice, Antitrust Division, Joint Hearing on Competition and Intellectual Property law and Policy in the Knowledge-Based Economy, available at <<http://www.ftc/opp/intellect/index.htm>>.

especially in industries characterized by incremental, cumulative innovation (such as the computer and information technology industries).<sup>3</sup> In those industries, current standards practices may afford some IP owners a platform to acquire market power while diminishing other participants' ability to compete in the affected market. This interplay between IP and standards setting can result in the unintended consequence of American enterprises' diminished capacity to compete domestically and globally.

Second, the IP Working Group's conclusion that the anticompetitive conduct of IP owners in standard-setting activities "would best be left to the marketplace's adapting to existing case law" is wishful thinking. The record shows that standard-setting organizations ("SSOs") have, in the wake of court and administrative decisions, determined to stay the course, thus missing opportunities to self-correct and thereby inviting the possibility of government intervention. The IP Working Group's second conclusion, that it is best to leave corrective action "to future adjudicative proceedings," is not realistic because litigation is unpredictable, expensive and time-consuming.

Third, as Sun previously submitted in its comments of September 30, 2004, the issue of standards setting and intellectual property merits consideration by the AMC apart from other issues. American competitiveness in a global marketplace requires thoughtful balance between IP and competition policies as applied to standards-setting activities. As expressed in the American Antitrust Institute ("AAI") letter to the AMC dated January 3, 2005, Section 2B, SSOs' open-standards objectives are threatened by patent owners' misleading conduct during standards-setting proceedings. Further, as the AAI states in Section 2C, the Standard Development Organization Advancement Act of 2004's ("SDOAA") legislative record clearly encourages fresh thinking about more effective measures to ensure that the patents are appropriately disclosed and considered before a proposed standard is adopted. Sun believes that the SDOAA's legislative intent of encouraging ex ante IP and license disclosure processes by standard setting organizations could become an effective deterrent to bad conduct by participants in standard setting and is worthy of study by the AMC.

As the AAI letter proposes, the AMC could serve the public interest by promoting and providing valuable guidance on best practices that "meet legitimate needs of all stakeholders with an eye on protecting opportunities for both innovation and open competition in standards-driven markets throughout the economy."

For all the above reasons, Sun respectfully requests that the AMC reconsider the IP Working Group's recommendation and agree to study "how should antitrust law analyze misleading conduct and other possible abuses of standard-setting processes."

Respectfully yours,

/s/

Catherine McCarthy  
Director, Standards Governance

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<sup>3</sup> See TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, A Report of the FTC (October 2003).