



ANSI Legal Issues Forum  
Patented Technology  
in Standards

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# Working Towards a Meaningful Definition of RAND

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# RAND At A Minimum

- ❑ No consensus and no court ruling on a precise definition of RAND
- ❑ But RAND does establishes some constraints
  - Consensus that RAND eliminates patent holders' right to refuse to license or to license exclusively
  - Emerging consensus that RAND travels with patent
- ❑ RAND leaves open when a license can/will be negotiated
  - Can be during standard development or after



# Progress: Linking RAND to “Ex Ante” Competition

- ❑ Cases at the FTC and European Commission establish RAND in reference to competition over technologies before standard is set (“ex ante”)
  - Qualcomm EC investigation found that license rates agreed before the standard was set provided a safe harbor for those set afterwards
  - EC economist Mario Mariniello formalized the test in a paper to be published this year
- ❑ Discussions of “incremental value” licensing rules for RAND also based on ex ante competition



# Important Caveats: Ex Ante Competition Has Limits

- ❑ What if no competition over technology exists ex ante?
  - ASDs crowning winners versus creating winners
  - RAND still useful to prevent holdup
- ❑ IPR Policies at ASDs must be viewed holistically
  - RAND and IPR disclosure are connected
  - IPR Rules can affect participation in ASDs
    - My paper with Gerard Llobet & Jorge Padilla (*Payments and Participation*) explores this topic



# Moving Forward

- ❑ More data on RAND disclosures, across more ASDs, would enable additional, more refined research
- ❑ More public reporting could aid implementers
- ❑ Given its role, ANSI could help to further both goals:
  - Encourage posting formal IPR disclosures made by ASD members on the ASD website
  - Encourage posting formal licensing disclosures made by ASD members on the ASD website, among those ASDs with licensing disclosure rules

