



ANSI Legal Issues Forum
Patented Technology
in Standards

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Are there a few Elephants in the RAND Room?

Presented by

Andrew Updegrove

Gesmer Updegrove LLP

andrew.updegrove@gesmer.com

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What do we really mean when we say “RAND?”

- ❑ Is it so clear that there's no need to define it (“you know it when you see it”)
- ❑ Is it irrelevant, given how little litigation has arisen over the years on this topic?
- ❑ Or is the incidence of litigation increasing?



Should we define RAND further?

- Some arguments I've heard against doing so:
 - It's so situational that trying to define it would be more constraining/misleading/provocative than useful
 - But are the situations any more diverse than in other common situations?
 - It would be much too hard – how do you define “reasonable” and “non-discriminatory”
 - Isn't that what legislatures and courts do all the time?
 - And would you rather have a legislature or court do it for you?



Should we define RAND further?

- Some arguments I can think of why we should:
 - It does get litigated, and the courts don't have a lot to work with when it does
 - Licensing discussions are private, so no one knows if the terms they received were non-discriminatory
 - RAND is being examined in new contexts
 - Government purchasing
 - Potentially, by regulators
 - Would both define RAND the same way industry would?



An extreme example

□ Assume:

- There are three dominant vendors in a product sector
- All are represented on a standards working group
- All have large patent portfolios
- Each discloses Necessary Claims, and each intends to charge royalties
- Under existing cross-licenses, none will actually pay another to implement
- There are multiple small companies that would like to implement the standard
- None were part of the working group
- None have many, or any, patents



What does RAND mean in this situation?

- ❑ Should the little companies have to pay a royalty to each of the big companies?
 - Of course, say the big companies, because of our sunk costs of IPR development
 - Of course not, say the small companies, because:
 - That would place us at a significant economic disadvantage, barring us from competing with you
 - We weren't part of the working group, and you could have created a standard that did not infringe your patents



Who would a Regulator agree with?

- Cross licenses do tend to favor market leaders, and make it harder for new players to compete
- Is investment the only relevant criterion, or should competitive effect be taken into effect?
- Would a court in India reach the same result?

