

FRAND Holdup and Its Solution (*)

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Although many approaches have been raised to determine and calculate the royalty of SEP with FRAND commitment, because of grossly exaggeration of the risks of patent holdup and overemphasizing limiting or eliminating the availability of injunction, in the absence of scientific and uniform standard of determining FRAND royalty, not only FRAND royalty of substantive justice is still far away, but also FRAND holdup has become a serious issue perplexing SEP holder. In order to mitigate, prevent and even eliminate FRAND holdup and to determine FRAND royalty at the meantime, FRAND-oriented towards procedural justice is perhaps a good choice. The core of FRAND-oriented towards procedural justice is to design a set of rule of Notice and Counter-Notice to stimulate SEP holder and SEP implementer to negotiate royalty in good faith and settle FRAND royalty through negotiation. In case of negotiation failure, the third independent party (court, arbitration organization) can also depend on rule of Notice and Counter-Notice to determine whether injunction is necessary and decide what's FRAND royalty.

I Introduction

Patent holdup means a SEP holder unreasonably exercises its SEP rights with FRAND commitments to obtain excessively high royalties. It refers to “the ability of a holder of an SEP to demand more than the value of its patented technology and to attempt to capture the value of the standard itself.”^{1, 2} Patent holdup hampers utilization of patented technology and harms consumer’s interests.³

Different from patent holdup, FRAND holdup means a SEP implementer strategically and unreasonably makes full use of the uncertainty and ambiguity of FRAND to pay excessively low royalties or even not to pay any royalties to a SEP holder.⁴ FRAND holdup is also called as reverse holdup. Because the uncertainty and ambiguity of FRAND are one of the most important reasons why reverse holdup occurs, this paper calls reverse holdup as “FRAND holdup”. FRAND holdup hampers innovation of technology and harms consumer’s interests as well.⁵

Standardization of patent may lead to patent holdup and royalty stacking. However, uncertainty and ambiguity of FRAND (Fair, Reasonable and Non-Discriminatory) provided by SSOs⁶ to be used for mitigating, preventing and eliminating patent holdup and royalty stacking, one-sided denial of injunction against standard essential patent (SEP) implementer and other reasons have resulted in FRAND holdup, the interest balance between SEP holder and SEP implementer has

been broken by FRAND holdup. A new balance mechanism must be found.

II Why FRAND holdup occurs

1 Grossly Exaggeration of Risks of Patent Holdup

Although a lot of literature have alleged a lot of risks caused by patent holdup,⁷ these literatures possess “no empirical evidence that any industry standard has been significantly harmed by ‘holdup’.”⁸ The patent holdup is theoretically possible but rarely occurs in practice.⁹ Patent holdup is unlikely when SEP implementer believes in any time that the licensing royalty offered by SEP holder is against FRAND and exercises the right to challenge the offered licensing terms. Even if patent holdup could arise, there is no reason to assume the SEP holder will use injunction as a tool to hold up infringer.¹⁰ ¹¹ There is no reason to assert that the royalties negotiated under the threat of injunction will be beyond FRAND royalties.¹²

Besides, there is also not empirical data to back the idea that patent holdup has harmed the setting and implementation of standards.^{13, 14}

Grossly exaggeration of risks of patent holdup has led to all kinds of proposals explicitly or implicitly designed to prevent and eliminate patent holdup, for example, collective negotiation of royalties, depriving the ability of SEP holder to seek injunctive relief and to reinterpret FRAND as a tool to limit the ability of SEP holder to

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monetize innovation,¹⁵ have been or being made full use of tactically by SEP implementer to force SEP holder to excessively reduce royalties, in another word, reversely hold up SEP holder.¹⁶

2 Uncertainty and Ambiguity of FRAND

Up to now, no sophisticated and universal conclusions about what's FRAND licensing royalty have already been reached theoretically or practically all over the world.¹⁷ While the court became the final determiner of FRAND royalty in practice, it hasn't contributed any convincing answer in the past SEP dispute cases.

Both the judgement of case *Microsoft v. Motorola* and *Apple v. Samsung* focused on the contribution of SEP to calculate FRAND licensing royalty. In the judgement of *Microsoft v. Motorola*, the contribution is defined to the contribution of the patent to the technical capabilities of the standard and the contribution of those relevant technological capabilities to the implementer's products using the standard.¹⁸ In the judgement of *Apple v. Samsung*, the contribution is limited to the contribution of the specific component complying with standard in implementer's terminal product to the sale of implementer's terminal product and the rate of SEP contribution in the contribution of the specific component complying with standard in implementer's terminal product to the sale of implementer's terminal product.¹⁹

Although determining FRAND royalty through the technical contribution may comply with "the proportionality principle",²⁰ Unfortunately it is very hard and even unlikely to quantify the technical contribution of patent to a standard and the implementer's terminal products or the sale of implementer's terminal product. Even if it's possible to precisely quantify the technical contribution of patent to a standard and to an implementer's terminal products or the sale of implementer's terminal product, such method still disregards the SEP holder's investment cost, expected profits, R&D risk, litigation cost and risk of whether the relevant patents could be incorporated within certain standards by SSOs while calculating the royalty, the royalty by estimation is likely in conflict with the FRAND principle.

In the case *Huawei v. IDC*, Shenzhen Intermediate People's Court and Guangdong High People's Court adopted comparison approach to determine FRAND licensing royalty. The two courts all emphasized that, although a SEP holder has different licensing royalty models, under roughly the same transaction terms, the licensor(SEP holder) should grant all licensees license to implement SEPs on roughly the same licensing royalty, otherwise the SEPs licensing royalty is against FRAND. In this case, Huawei and Apple were under roughly the same transaction terms, the royalty that IDC tried to seek from Huawei was not roughly the same as the royalty it

had sought from Apple and thus against FRAND.²¹ Determining FRAND royalty by comparing the royalties that the licensor granted different licensees is perhaps best approach to decide non-discriminatory licensing royalty. However, in this case, the comparable royalty covered SEPs and NON-SEPs in the global market, Huawei only requested for license of IDC's Chinese SEPs within China. Considering the fact, a possibility is that the royalty decided by Chinese courts (0.019%) exceeded greatly the FRAND royalty that Huawei should have paid to IDC and thus thoroughly violated FRAND principle.

Depending on the uncertainty and ambiguity of FRAND, SEP implementer is able to shift the risk involved in patent negotiation to the patent holder. There is no risk to the exploiter of the technology in not taking a license before they exhaust their litigation options if the only risk to them for violating the agreement is to pay a FRAND based royalty or fee. This puts the risk of loss entirely on the side of the patent holder."²²

3 The Denial of Injunction Relief

Seen from all over the world, although there existed vehement debates about whether SEP holder with FRAND commitments has right to seek injunction relief or not, the dominant opinion is to say No, the rationales include the theory of waiver of right,²³ the theory of no harm,²⁴ the theory of misuse of right,²⁵ the theory of implied licensing,²⁶ The doctrine of anticompetition,²⁷ and so on.

Although a categorical ban on injunction for SEPs may avoid the theoretical risk of patent holdup, if there is no threat of injunction, "an implementer's best strategy would be to infringe the SEPs and litigate FRAND terms, delaying the execution of a licensing agreement and burdening the courts and diminishing the incentives for an SEP holder to contribute future technologies to the standard in the meantime."²⁸

4 Asymmetry of Information

In the process of negotiation about SEP with FRAND licensing royalty, SEP holder usually refuses to disclose licensing agreements already concluded with other competitors to the SEP implementer in the name of trade secrets protection. In the lack of the comparable licensing royalties, it's very difficult for SEP implementer to judge whether the royalty offered by SEP holder is non-discriminatory or not. In practice, the SEP implementer is always inclined to hold that the SEP holder definitely violates the FRAND principle no matter how much it quotes, and thus negotiates with SEP holder in bad faith to delay or prolong negotiation on purpose or directly files a lawsuit against the SEP holder with a view to relying upon the court ruling to pay the SEP holder as

low licensing royalty as possible. The information asymmetry has become a very important reason causing FRAND holdup.

All in all, overemphasizing the risks of patent holdup, the uncertainty and ambiguity of FRAND royalty, limiting or eliminating the availability of injunction and information asymmetry have resulted in SEP implementer's opportunistic behavior, FRAND holdup has become a serious issue perplexing SEP holder.

III Rule of Notice and Counter-Notice Oriented Towards Procedural Justice: Possible Solutions to FRAND Holdup

1 Unavoidableness of Patent Holdup and FRAND Holdup

In order to mitigate, prevent and even eliminate FRAND holdup and patent holdup and to determine FRAND royalty at the same time, to require all standard participants unilaterally to disclose an ex ante licensing royalty to all would-be SEP implementers at the time when their patents are incorporated into relevant standard by SSOs is perhaps a choice. For the NPEs (Non-Practicing Entities), an ex ante unilateral disclosure of a fixed licensing royalty may be practicable. However, it's likely to violate market discipline (the price fluctuates with market) to require all SEP holders engaging in product manufacturing to unilaterally disclose an ex ante fixed licensing royalty to all potential licensee, it's hardly to get patent holder's support.

Ex ante multilateral licensing negotiations between IP holders and the group of SSO members is often recommended to mitigate patent holdup as well. However, multilateral licensing negotiations are strictly prohibited by many SSOs because it could potentially bring about antitrust liability, increase the costs of participation and hinder the standard-setting process.²⁹

The above situation shows that in most circumstances the determination of FRAND SEP licensing royalty has to depend on bilateral bargaining between SEP holder and SEP implementer after patent is incorporated into relevant standard. As long as bilateral negotiation is indispensable for determining FRAND licensing royalty, patent holdup and FRAND holdup will unavoidably occur.

2 Four Tasks Which Any Possible Solution Should Undertake

Facing with FRAND holdup and patent holdup, any possible solution should strike a balance between SEP holder's interest and SEP implementer's interest so as to

promote the protection and the utilization of inventions, to encourage inventions, and thereby to contribute to the development of industry.³⁰ In order for realization of the aim, any possible solution should undertake the following four tasks which substantive FRAND is incompetent to.

First, to stimulate SEP holder and SEP implementer to successfully negotiate royalty in good faith under information asymmetry.

Second, to ensure SEP holder's right to seek injunction in some circumstances.

Third, to realize disclosure of the comparable royalties.

Fourth, in case of negotiation failure between SEP holder and SEP implementer, the court can also depend on procedural rule to determine whether injunction is necessary for preventing FRAND holdup and further decide what's FRAND royalty.

A mechanism that can accomplish the four tasks at the same time is perhaps a set of ex ante rule oriented towards procedural justice which this paper calls as "Notice and Counter-Notice".

3 Procedural Justice

In *A Theory of Justice (Rawls 1971)*, John Rawls developed his idea of procedural justice encompassing three different forms: (1) perfect procedural justice; (2) imperfect procedural justice; and (3) pure procedural justice.³¹

Pure procedural justice includes no independent criterion for the right result. Instead, it requires "a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."³² Consistency, neutrality, participation, transparency and openness have been proposed to judge whether a procedure is fair.^{33, 34, 35, 36}

Research has showed that procedural justice directly and positively influences disputants' evaluation on resolution.³⁷ What's more important, research of procedural justice has showed that people were more likely to accept negative outcomes from legal institutions without losing loyalty to, or respect for those institutions if they believed that the decisions that were being made were procedurally fair.³⁸

4 Light and Shadow of CJEU's Newest Judgement

On July 16, 2015, CJEU made a landmark judgement on Huawei Technologies Co. Ltd v. ZTE

Corp., and ZTE Deutschland GmbH.³⁹The judgement attempts to solve the issue whether a SEP holder with FRAND commitment seeking a prohibitory injunction against a SEP implementer abuses its dominant position, and strives to strike a balance between maintaining free competition and protecting proprietor's intellectual property rights.

Although CJEU's judgement provides guideline for judging SEP implementer's good faith/bad faith and makes it clear that under what circumstances can the SEP holder seek injunction against SEP implementer, it does not clear such issues as whether the SEP holder should disclose the comparable royalties to the SEP implementer, whether the SEP holder should specify the SEPs that SEP implementer is using and why they are SEPs, SEP implementer still can't reasonably judge whether it is discriminated by SEP holder.

Besides, the judgement requires SEP implementer to provide a bank guarantee and even to place the amounts necessary on deposit before FRAND royalty has not been determined by the third independent party, this is hardly to be supported by SEP implementer and thus impracticable.⁴⁰

5 Rule of Notice and Counter-Notice Oriented Towards Procedural Justice

While CJEU's judgement has shadow, it still casts much light on how to devise rule of Notice and Counter-Notice oriented towards procedural justice. Based on CJEU's judgement, this paper tries to devise the following rule of Notice and Counter-Notice oriented towards procedural justice.

(1) The SEP Holder's Notice

Before exercising SEP rights (include seeking injunction relief and requesting for royalty), a SEP holder should send a notice to a SEP implementer. An effective notice should include the following contents:

- (i) a physical or electronic signature of the SEP holder.
- (ii) the SEPs claimed to have been infringed and why these patents are SEPs.
- (iii) the specific way in which the SEPs have been infringed.
- (iv) the amount of royalty, in particular, the way in which the royalty is to be calculated and the comparable licensing royalty. Correspondingly, declaration to request a SEP implementer to keep the comparable licensing royalty secret.
- (v) information reasonably sufficient to permit the SEP implementer to contact it, such as an address, telephone number, and, if available, an electronic mail address at which the SEP holder may be

contacted.

- (vi) a statement that the SEP holder has a good faith belief that use of the SEP in the manner complained of is not authorized by the SEP holder, its agent, or the law.
- (vii) a statement that, where no agreement is reached on the details of the FRAND terms following the counter-notice by SEP implementer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.
- (viii) a statement that the information in the notification is accurate, and under penalty of perjury.

(2) The Implementer's Counter-Notice

After receiving SEP holder's notice, as CJEU's judgement holds, SEP implementer should diligently respond to the notice, in accordance with recognized commercial practices in the field and in good faith.⁴¹ Corresponding to SEP holder's notice, SEP implementer's effective counter-notice should include the following contents:

- (i) a physical or electronic signature of the SEP implementer.
- (ii) the SEPs claimed by SEP holder are not SEPs and the reasons.
- (iii) a statement not to infringe SEP holder's SEP and the reasons.
- (iv) specifying the reasons why SEP implementer rejects the amount of royalty offered by SEP holder and the way in which the royalty is to be calculated, in particular, the comparable licensing royalty. Correspondingly, declaration to keep comparable licensing royalty secret.
- (v) the amount of royalty that SEP implementer thinks FRAND and the way in which the royalty is to be calculated.
- (vi) if the SEP implementer is using SEP before a licensing agreement has been concluded, the number of the SEPs being used, the products using SEPs and their number, the area using SEPs and the sales number of the product using SEPs.
- (vii) a statement that it will pay FRAND royalty to SEP holder in accordance with recognized commercial practices in the field and in good faith, in particular, without no delaying tactics.
- (viii) a statement that, where no agreement is reached on the details of the FRAND terms following the notice by SEP holder, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.
- (ix) information reasonably sufficient to permit the SEP holder to contact it, such as an address, telephone

number, and, if available, an electronic mail address at which the SEP implementer may be contacted.

- (x) a statement that the information in the notification is accurate, and under penalty of perjury.

(3) Consequences Against Rule of the Notice and Counter-Notice

For the SEP holder, failing to send an effective Notice to the SEP implementer shows that it is unwilling and in bad faith to negotiate FRAND royalty with SEP implementer and is trying to do patent holdup, the SEP implementer has the right to refuse the royalty offered by it and to require directly the independent third party (court or arbitration organization) to determine a FRAND royalty in favor of it, the royalty should be regarded as FRAND.

For the SEP implementer, failing to send an effective Counter-Notice to the SEP holder shows that it is unwilling and in bad faith to negotiate FRAND royalty and is trying to do FRAND holdup, the SEP holder has the right to file a suit for seeking injunction against SEP implementer and meanwhile to require directly the independent third party (court or arbitration organization) to determine a FRAND royalty in favor of it, the royalty should also be regarded as FRAND.

IV Conclusions

Based on all the foregoing analysis, the following conclusions may be drawn:

1. To absolutely negate injunction will lead to FRAND holdup and is adverse to balancing the interests between SEP holder and SEP implementer.
2. Disclosure of SEP holder's comparable royalties to SEP implementer is necessary for determining what's Non-discriminatory royalty and avoiding FRAND holdup.
3. In order to decrease transaction costs, it's necessary to design a set of ex ante rule (for example, rule of Notice and Counter-Notice) to determine whether the SEP implementer negotiates royalty with SEP holder in good faith and whether the SEP implementer is trying to do FRAND holdup.
4. In view of the uncertainty and ambiguity of FRAND, it's necessary to design a set of ex ante rule (for example, Notice and Counter-Notice) to stimulate SEP holder and SEP implementer to successfully negotiate royalty in place of looking for substantive FRAND licensing royalty.

¹ Microsoft Corp.v.Motorola,Inc.,2013 U.S.Dist.LEXIS 60233 (W.D.Wash.Apr.25,2013),Order 21.

² In economic literature, the problem of hold up generally refers to the problem that arises out of the interaction between asset specificity and opportunism, asset specificity means the condition in which an asset cannot be redeployed from its presently intended use to some alternative use without a decline in value. Oliver E. Williamson, *The Economic Institutions of Capitalism* 52-56 (Free Press.1985).

³ Mark Lemley and Carl Shapiro, "Patent Holdup and Royalty Stacking", 85 (2007) *Texas Law Review* 1989; Philippe Chappatte, "FRAND Commitments – The Case for Antitrust Intervention", (2009) 2 *European Competition Journal*; Joseph Farrell et al., "Standard Setting, Patents, and Hold-Up", (2007) 74 *Antitrust Law Journal*; Brad Biddle et al. *The Expanding Role and Importance of Standards in the Information and Communications Technology Industry*, 52 *Jurimetric* 177(2012); Knut B. Ling et al. *Study on the Interplay Between Standards and Intellectual Property Rights*, Final Report 62(2011), http://www.iplytics.com/download/docs/studies/ipr_study_final_report_en.pdf; Gorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 *Antitrust Law Journal* No.1(2013); Joseph Kattan and Chris Wood, *Standard-Essential Patents and the Problem of Hold-up*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370113; Google/Motorola Mobility (Case No. COMP/M.6381) Commission Decision 2012/C 75/01[2012].

⁴ Case C-170/13, I-8 (Huawei Technologies Co.Ltdv.ZTCCorp.and ZTC Deutschland GmbH).<http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=85194>. Paragraph 38.

⁵ Damien Geradin, *Reverse Holdup: The (Often Ignored) Risks Faced by Innovators in Standardized Areas*. *SSRN Electronic Journal* 11/2010; DoI:10.2139/ssrn.1711744; Einer Elhauge's analysis shows that holdup and stacking problems does not bring about systematically excessive royalties, to the contrary, the royalty rates predicted by the holdup models are often below the true optional rate. Further, those predicted royalty rates are overstated because of incorrect assumptions about constant demand, one-shot bargaining, and informational symmetry. Einer Elhauge, *Do Patent Holdup and Royalty Stacking lead to systematically excessive royalties?* *Journal of Competition Law and Economics*, 4(3), 535-570.

⁶ To date, the important SSOs in the world include:
(1) International Organization for standardization (ISO).
(2) International Electrotechnical Commission (IEC)
(3) International Telecommunication Union (ITU)
(4) Institute of Electrical and Electronics Engineers (IEEE-SA)
(5) European Telecommunications Standards Institute (ETSI)
(6) American National Standards Institute (ANSI)
(7) Internet Engineering Task Force (IETF)
(8) Organization for the Advancement of Structured Information Standards (OASIS)
(9) VMEBUS International Trade Association (VITA)

⁷ Supra note 3.

⁸ Damien Geradin, *Supra note 5*.

⁹ Commissioner Joshua Wright of FTC observed in 2013 that, despite the amount of attention patent holdup has drawn from policymakers and academics, there have been relatively few instances of litigate patent holdup among the thousands adopted and empirical evidence of patent holdup is unremarkable. Joshua D. Wright, *Comm'r, Fed. Trade Comm'n*, Remarks at the Center for the Protection of Intellectual Property Inaugural Academic Conference: The Commercial Fun

- ction of Patents in Today's Innovation Economy 20(Sept.12, 2013). <http://cpip.gmu.edu/wp-content/uploads/2013/06/Program-Schedule.pdf>.
- ¹⁰ Gregory Sidak, The Meaning of FRAND, Part II: Injunction, *Journal of Competition Law and Economics*, 11(1), 2015, at 233.
- ¹¹ Gregory Sidak, *supra* note 10, at 233.
- ¹² Gregory Sidak, *supra* note 10, at 234.
- ¹³ The World in 2013: ICT Facts and Figures, <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf>; The World in 2014: ICT Facts and Figures, <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf>.
- ¹⁴ Dennis W. Carlton and Allan Shampine, Identifying Benchmarks for Applying Non-Discrimination in FRAND, 8 *Competition POL'INT'L* 1,5(2014).
- ¹⁵ Dimien Geradin, *supra* note 5.
- ¹⁶ Einer Elhauge's analysis *supra* note 5
- ¹⁷ *Cincinnati Car Co. v. N.Y. Rapid Transit Corp.*, 66 F.2d 592,595(2d Cir.1993); Jorge L. Contreras, The February of FRAND, Mar. 6, 2012, *Patently-O Patent Law Blog*, at <http://patentlyo.com/patent/2012/03/february-of-frand.html>
- ¹⁸ *Microsoft Corp. v. Motorola, Inc.*, Order 10, 2013 U.S. Dist. LEXIS 60233(W.D. Wash. Apr. 25, 2013).
- ¹⁹ 平成25年(ネ)第10043号債務不存在確認請求控訴事件.
- ²⁰ Proportionality principle means that "The size or scope of an IP right ought to be proportional to the value or significance of the work covered by the right" and "an IPR must not confer on its holder leverage or power that is grossly disproportionate to what is deserved in the situation. If an IPR would effectively confer power or control over a much more vast market or set of markets than what is actually deserved, in light of the work covered by the IP right, that right must be limited in some way." *Robert P. Merges, "Justifying Intellectual Property", Harvard University Press, 2011. p150, p162.*
- ²¹ (2013)No.305 YueGaofaMinsanZhongzi.
- ²² Sandra Badin, Mike Renaud and James Wodarski, "Patent Hold-up or Patent Hold-out? Judge Essex Adds His Voice to the SEP-FRAND Debate." <http://www.mintz.com/newsletter/2014/Advisories/4096-0714-NAT-IP/index.html>.
- ²³ Joseph S. Miller, Standard Setting, Patents and Access Lock-in: FRAND Licensing and the Theory of the Firm, 40 *Ind. L. Rev.*(2007), Jay P. Kesan and Carol M. Hayes, FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments, 89 *Indiana Law Journal*, 231(2014). *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872,884-885(9TH Cir.2012).
- ²⁴ Mark A. Lemley and Carl Shapiro, A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents, 28 *Berkeley Tech. L. J.* 1135, 1144(2013).
- ²⁵ *Supra* note 19.
- ²⁶ *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1022-24(Fed. Cir.2011); Article 82 of "Notice for Soliciting Public Opinions on the Draft Amendment of Patent Law of the People's Republic of China".
- ²⁷ *Motorola Mobility, L.L.C.*, No. 121-0120(F.T.C. Jan. 3, 2013).
- ²⁸ Gregory Sidak, *supra* note 10, at 268-269.
- ²⁹ Scott K. Peterson, Patents and Standard-Setting Processes (Apr. 18, 2002 Hr'g R.) at 9-10, <http://xml.coverpages.org/HIP-ScottPetersonTestimony200204.pdf>
- ³⁰ Article 1 of Japan Patent Law. <http://www.cas.go.jp/jp/seisaku/hourei/data/PA.pdf>
- ³¹ John Rawls, *A Theory of Justice* (rev. ed. 1999), at 73-76. Cambridge: Harvard University Press, Belknap Press.
- ³² John Rawls, *supra* note 31, at 75.
- ³³ Robert Folger, Blair H. Sheppard and Robert T. Buttram, Equity, Equality and Need: Three Faces of Social Justice, in *Conflict, Cooperation, and Justice: Essays Inspired by the work of Morton Deutsch* 261, 272, Barbara Benedict Bunker and Jeffrey Z. Rubin eds., 1995.
- ³⁴ Robert Folger, Blair H. Sheppard and Robert T. Buttram, *supra* note 33: *Essays Inspired by the work of Morton Deutsch*, 273. Michelle Maiese, *Procedural Justice*, <http://www.beyondintractability.org/essay/procedural-justice>.
- ³⁵ Michelle Maiese, *supra* note 34.
- ³⁶ Michelle Maiese, *supra* note 34.
- ³⁷ Jill Howieson, *Perceptions of Procedural Justice and Legitimate in Local Court Mediation*, *Murdoch U. Electronic J.L.*, Vol 9, No. 2 (June 2002).
- ³⁸ Mark Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 *Denv. U.L. Rev.* 303-305(1995).
- ³⁹ *Supra* note 4. Paragraph 71.
- ⁴⁰ *Supra* note 4. Paragraph 67.
- ⁴¹ *Supra* note 4.