

Intersection of Competition Law, Intellectual Property, and Standards-Setting

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Competition v. IP Laws

- Both laws have a common purpose of supporting competition and promoting innovation:
 - “[A]ntitrust and intellectual property are properly perceived as complementary bodies of law that work together to bring innovation to consumers: antitrust laws protect robust competition in the marketplace, while intellectual property laws protect the ability to earn a return on the investments necessary to innovate.”
 - (U.S. Department of Justice/Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (April 2007) – the “2007 DOJ/FTC Report”)

Static v. Dynamic Efficiencies

- Static efficiency: Occurs when enterprises **compete within an existing technology** to cut costs and drive down the price of a product that includes the technology
- Dynamic efficiency: Depends on **the creation of new technologies and innovations** that in turn drive economic growth and increased consumer welfare
 - Dynamic efficiencies provide greater societal gains than static efficiencies
 - “**IP laws ...allow producers to recoup their costs and make the kind of profit that encourages them to engage in inventive-creative behavior.**” (Remarks of Gerald Masoudi, U.S. Department of Justice, January 2007)

“Hold Up” Problem in Standards-Setting

- What is “hold up” or “patent ambush”?
 - Once a patented technology is included in a finalized standard, the patent owner may try to demand unreasonable licensing terms
 - “Hold up ... does not exist merely because a group of [licensees] is upset that a patentee holds the key to an essential technology.”
 - “Hold up certainly does not exist merely by the fact that a patentee charges a particular rate for its royalty when licensees would prefer a lower rate.” (Remarks of Gerald Masoudi, DOJ, May 2007)

“Hold Up” Occurs Rarely

- Why?
 - Many patent holders also are implementers
 - They tend to think longer-term
 - “Hold up” conduct is very visible
 - Subject to private lawsuits
 - Subject to enforcement agency (FTC, DOJ) litigation
 - Only three FTC actions (*Dell*, *Unocal*, *Rambus*) in the past 20 years
 - Involved allegations of conduct that was done intentionally to deceive a standards-setting activity

Standards IP Policies Address Hold Up

- Such policies seek to balance:
 - The needs of implementers
 - To be able to use the patented technology necessary to implement the standard, and
 - The rights of patent holders
 - To seek compensation and other licensing terms and conditions (or not to license at all)
- Enables competing implementations of the standard and stimulates further innovation to create products with different features
- Protects incentives to continue to innovate within and around the standardized technology
 - Otherwise standards will inhibit dynamic efficiency and will create innovation “dead zones”

Ex Ante Debate

- The debate is focused on to whom, how and when the disclosure of licensing terms is made
 - Today two parties can (and do) negotiate *ex ante* outside of the standards body
 - This is not likely to raise any antitrust concerns. (2007 DOJ/FTC Report)
- What is the competition law analysis of proposed patent policies that:
 - Mandate the disclosure of licensing terms *ex ante*?
 - Permit the group discussion of these licensing terms at the standards body?

Mandatory *Ex Ante* Disclosure of Licensing Terms

- Example: New VITA patent policy
 - Requires members to disclose any essential patent claims and related licensing terms *ex ante* to VITA
 - Requires a patent holder to license its essential claims for free (and on other specified terms) if it fails to disclose its licensing terms before the standard is finalized
 - Prohibits the group discussion of any proposed license terms at standards-setting meetings
 - Certain clarifications to the policy have been made:
 - Patent searches not required
 - Penalty for failure to disclose only if failure was willful

DOJ Analysis

- DOJ Business Review Letter to VITA
 - Based on facts as described by VITA
 - Concluded that the DOJ has no present intention to challenge VITA's proposed action to adopt its new patent policy
 - Stated that the new policy could be pro-competitive
 - Any conduct implementing the policy probably would be analyzed by the agency under a "rule of reason" balancing test
 - Pro-competitive versus anti-competitive effects

Points to Consider Relating to Mandatory *Ex Ante* Policy Approaches

- Needed?
- Greater burdens to conduct patent searches?
- Practical effects?
 - Delays?
- Possibility that standards will be more costly to implement?
 - Decisions made based on incomplete information?
 - Impact on passive patent holders?
- Will affect participation in the standards body by relevant patent holders?
- Business model influences viewpoints
- Experimental phase

Group Discussion of Disclosed Licensing Terms at the Standards Body

- Collective discussion or negotiation of license terms in a standards body may, depending on specific facts, result in positive static efficiency effects
- However, such collective discussions can lead to group boycott conduct, buyer cartel behaviors, and other anti-competitive conduct
 - Could violate the antitrust laws
 - Could have negative impacts on dynamic efficiencies

DOJ/FTC Views on Group Discussions

- “The Agencies will usually apply the rule of reason when evaluating joint activities that mitigate hold up by allowing potential licensees of the standard to negotiate licensing terms with IP holders.”
 - But inappropriate buyer cartel or group boycott conduct can be *per se* illegal
- “The Agencies take no position as to whether SSOs should engage in joint *ex ante* discussion of licensing terms.”
- (2007 DOJ/FTC Report)

Points to Consider Relating to Group Discussions of Licensing Terms

- Possibility of increased litigation (including antitrust claims)?
 - Technical committees appropriate venue?
- Practical effects?
 - Delays?
- Will affect participation in the standards body by relevant patent holders?
- Impact on dynamic efficiencies and incentives to innovate?
- Business model influences views
- Not aware of any standards body that permits this today