

GCP

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Harnessing SDO Innovation to Reduce Holdup, Uncertainty, and Inefficiency

David L. Meyer

U.S. Department of Justice

Harnessing SDO Innovation to Reduce Holdup, Uncertainty, and Inefficiency

David L. Meyer*

Collaboratively set standards are an important part of the global economy. As the U.S. Department of Justice (the “Department”) explained in last year’s “IP2 Report,” issued jointly with the U.S. Federal Trade Commission,¹ collaboratively set standards are generally pro-competitive, and increasing the efficiency of standard-setting efforts is important for business and consumers alike. The Department has recently made a number of detailed statements on this subject, including in speeches² and in business review letters to VITA and IEEE. The Department’s goal in such efforts has been to articulate what we believe to be the appropriate antitrust analysis of collaborative standard setting, while reducing unwarranted “antitrust fear,” encouraging experimentation by standards development organizations (“SDOs”), and respecting the tradeoffs inherent in business decisions by standards participants. The Department believes this approach not only will provide the freedom for SDOs to work things out in

* The author is Deputy Assistant Attorney General for Civil Enforcement, Antitrust Division, U.S. Department of Justice.

¹ See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33-56 (2007) [hereinafter “IP2 Report”], available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>.

² See, e.g., Gerald F. Masoudi, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct, address at the Law Seminars Int’l Annual Comprehensive Conference on Standards Bodies and Patent Pools, Arlington, Virginia (Oct. 11, 2007), available at <http://www.usdoj.gov/atr/public/speeches/227137.pdf>.

the manner best suited to their standards development objectives, but also will create the incentives to do so—or perhaps more accurately, will permit ordinary incentives to operate, once SDO participants are convinced that antitrust will function neither as an unreasonable barrier to innovation in standards development nor as a cure-all against exploitation of intellectual property (IP) value in the standards arena.

1. Reducing “Antitrust Fear”

The potential for patent holdup, licensing uncertainty, or other licensing inefficiency in the standard-setting process is well-known. Against the backdrop of cases such as *Hydrolevel*³ and *Allied Tube*,⁴ however, SDOs often avoided all discussion of price and commercial terms, including ex ante discussion of licensing terms, fearing per se liability. The Department sought to reduce unwarranted antitrust fear when it issued business review letters to VITA⁵ and IEEE.⁶

VITA attempted to address holdup by requiring mandatory disclosure of most-restrictive terms and by establishing specific contractual remedies. IEEE later sought to address licensing inefficiency, more generally, by creating a regime of optional disclosure of most-restrictive terms, establishing a process allowing for some discussion of licensing terms when comparing the relative merits of technologies, and leaving remedies to the general law of contract—and also by tightening up the contractual relationship between IP owners, IEEE members, and IEEE standards users, to improve

³ *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

⁵ Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep’t of Justice, to Robert A. Skitol, Esq. (Oct. 30, 2006), available at <http://www.usdoj.gov/atr/public/busreview/219380.pdf>.

⁶ Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep’t of Justice, to Michael A. Lindsay, Esq. (Apr. 30, 2007), available at <http://www.usdoj.gov/atr/public/busreview/222978.pdf>.

the ability of individual companies to seek remedies through contract actions. The Department's favorable business reviews to VITA and IEEE made clear that it will apply the rule of reason to efforts by SDOs to improve licensing efficiency, and that one size does not necessarily fit all (the VITA and IEEE proposals, after all, are quite different). Like any rule of reason analysis, the Department's approach will be flexible and tailored to the specific facts, including the particular parties and the problem they are attempting to solve.

Of course, per se antitrust boundaries still apply at the margins—for example, to SDO behavior that is a mere sham for naked buyer-side price-fixing—and rule of reason treatment is not equivalent to carte blanche. The rule of reason, for example, will not sanction monopsonistic behavior that leads to allocative inefficiencies by unreasonably suppressing prices paid for IP used in standards. That said, SDOs should be confident that they have substantial legal breathing room. The Department recognizes that in an area as complex and fact-specific as standard setting, a careful and flexible approach is the only one likely to keep pace with the needs of the economy.

2. Encouraging Experimentation

Just as antitrust should not be an unduly harsh sword that deters SDOs from experimenting with efficient mechanisms to address holdup, uncertainty, and other licensing inefficiencies, standards users should not look to antitrust as an omnipresent shield against the desire of patent owners to collect royalties for technology embedded in a standard. If antitrust relief is too readily available—if, for example, standards users see

antitrust as a crutch to lean on every time a member faces a proposed licensing terms it does not like—SDO participants might refrain from taking steps to address the holdup concern ex ante, via the SDO process. Such a result would cramp SDO development just as surely as would the antitrust fear discussed in the first section of this paper.

3. Respecting SDO Tradeoffs

In the same vein, when conducting a typical ex post inquiry into the antitrust legality of standards-related licensor-licensee disputes, antitrust lawyers need to bear in mind the ex ante business tradeoffs inherent in the design of an SDO's policies. When designing a standard-setting process, SDO participants must balance a number of things that may be in some tension:

- The incentives of IP holders to participate in the SDO process;
- The incentives of users of the standard (and thus of the IP embedded therein) to participate in the SDO process;
- The ability of the SDO to develop the appropriate technical solution so that the standard works and is adopted by the industry;
- The need to keep transactional costs low for the setting of the standard itself and, if needed, for the costs of licensing of IP (as is the case for other necessary inputs); and
- The need for speed, both in the creation and the adoption of the standard.

To illustrate the kinds of tradeoffs in play, a “perfect” technical standard may take twice the development time of a “pretty good” standard. One cannot say as a general

matter that slow-but-perfect is always better than fast-and-pretty-good. One also cannot say as a general matter that either maximizing patent owner participation or maximizing user adoption is always the better policy choice. One *can* say, however, that SDO participants are generally better equipped than antitrust lawyers to make such tradeoff decisions.

In the wake of highly publicized cases such as *Rambus*, SDO participants must now recognize the potential for holdup or other inefficiencies, and antitrust should respect SDO decisions to address such problems—whether in detail, to a moderate degree, or not at all. Otherwise, unduly interventionist antitrust rules could trample the delicate tradeoffs inherent in an efficiently functioning SDO process. It can be difficult in hindsight to determine exactly what tradeoffs were contemplated by an SDO, but that does not mean that we should ignore these tradeoffs out of zeal to protect patent owners, on the one hand, or to ensure some relief from high ex post royalty rates, on the other.