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Ensuring the interoperability of products can be critical to the success of many industries, in particular to encourage the rapid uptake of new technologies. To achieve such interoperability and the efficiencies that come with it, industries often use standard-setting organizations ("SSOs") to select a particular technology as the "standard" to which all products must conform. By creating uniform standards, SSOs advance the pro-competitive goals of encouraging competition among manufacturers of products that use new technologies and allowing for accelerated development of new technologies or new generations of existing technologies. On the other hand, in deciding which technologies should comprise a standard, cooperative standard-setting efforts replace the forces of competition that would otherwise determine which technologies will be deployed in the market. In short, the function of most SSOs is to evaluate alternative technologies and select a single "winner" to become the new standard and, as a result, foreclose alternative technologies. While such efforts are typically pro-competitive and efficiency-enhancing, it is critical for antitrust law to play a role in policing standard-setting conduct to ensure that the process is not abused through improper collusion or deceptive efforts to obtain monopoly power.

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Given the significant pro-competitive benefits that standard setting can provide, the courts and government antitrust enforcement agencies allow it to continue and, indeed, encourage it. Properly structured, standard setting can increase public welfare by allowing patent holders to combine their technologies to create a single, proprietary solution that is greater than the sum of its parts. However, once a standard is set, an industry often becomes "locked in" to using that standard, and if an SSO selects patented technology for its standard, absent some constraint, the holders of patents essential to the standard have the potential to hold up the entire industry through the exclusion of other would-be participants.[1]

The lock-in of patented technology as a result of collective standard-setting efforts can create problems under competition law because, in order to produce standard-compliant products, other companies will have no choice but to practice the technology and will therefore require a license from the patent holder. Because standard setting forecloses competitive alternatives and decreases or eliminates the ability of licensees to switch to an alternative standard, absent some other constraint, it creates for an essential patent holder the ability to either capture downstream product markets deploying the standard entirely for itself or command a price for its technology far greater than the competitive rate that it would have been able to achieve without the collective effort by the industry to select a single technology as a standard and thereby foreclose all alternatives. This power to raise prices beyond that which could be achieved prior to a

[1] *See, e.g.,* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 310 (3d Cir. 2007) ("Industry participants who have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard. They will have become 'locked in' to the standard.").

technology being selected for the standard does not derive from the patent itself, or from a superior product, business acumen, or historical accident. Instead, it comes from the adoption of the standard, and, more precisely, the collective decision to eliminate alternative technologies and to proceed with the standard. Before the standard was adopted, the patent holder would have had to offer licenses on competitive terms on the assumption that licensees could choose to use a different technology to achieve the same goals.[2] Once the standard is set and investments are sunk, however, the option of pursuing an alternative technology no longer exists as a practical matter.

It is because of the exclusion of competition inherent in the standard-setting process that SSOs have rules in place to keep participants from usurping the exclusionary power of the standard for itself. Such rules (typically in the form of so-called "IPR policies") exist to preserve the benefits of the ex ante competitive situation that standard setting supplants. These policies protect the interests of patent holders by allowing an appropriate reward for their inventions, and, more generally, they encourage enhanced participation in standard-setting efforts, which leads to improved innovation and the accelerated adoption of new technologies. By preserving the benefits of ex ante competition, IPR policies also protect the interests of the remainder of the industry and of consumers against collusive behavior among patent holders that might otherwise be in competition.[3]

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[2] A patent holder might also be constrained by the possibility that industry participants would choose not to adopt, or delay adopting, a new standard.

[3] *See Broadcom*, 501 F.3d at 309 ("[P]rivate standard setting – which might otherwise be viewed as a naked agreement among competitors not to manufacture, distribute, or purchase certain types of products – need not, in fact, violate antitrust law.").

When a patent holder has to compete ex ante to have its technology selected over alternative technologies, it will be able to charge potential users of its technology only a price that reflects the competitive restraint of competing alternatives.[4] If collective standard setting is not pursued, patent holders of technologies competing to be adopted by the industry would seek to license their technologies in competition with each other, which would bring the expected price of the "winning" technology down to the incremental value of that technology relative to the next best alternative.

Where collective standard setting does occur, the patent holders of the alternative technologies, among others, reach agreement that only one technology will be adopted as the industry standard and thereby remain in the marketplace. In short, the restraints of competition are eliminated. If such restraints are not replaced with some other restraint, the "winning" technology could be licensed at monopoly rates and on monopolistic terms, or even withheld from the industry altogether, allowing one patent holder to capture the entire value of the collective agreement to exclude competing alternatives. Therefore, effective IPR policies are needed to prevent collective standard setting from resulting in harm to competition and ultimately higher prices paid by consumers.

A common policy used by SSOs to achieve this goal is a requirement that members promise to license patents included in a standard on fair, reasonable, and non-discriminatory ("FRAND") terms. Likewise, SSOs also often require members to disclose all patents that cover technologies under consideration for adoption as a standard. A FRAND requirement preserves the benefits of ex ante competition because a

[4] Even if no alternative technologies exist, where an SSO can choose not to adopt a standard or to delay adoption (including until when alternatives do exist), a patent holder may also be constrained by the ability of the SSO to pursue such a course as an alternative to adopting its technology.

"fair and reasonable" royalty must be one that reflects what a patent holder could have charged before standardization and lock-in.[5] A disclosure requirement also helps achieve this result by ensuring that the SSO can accurately evaluate the costs of the standard and allowing for pre-standardization licensing negotiations. Violating such policies interrupts the competitive process and defeats the protections of the policies by usurping the power of the standard and keeping the SSO from evaluating the true costs of the standard. Such actions violate the antitrust laws because they amount to the willful acquisition of monopoly power and, as a result, enable the extraction of monopoly rents from others seeking to practice the standard.[6] They also remove the pro-competitive benefits that protect otherwise efficiency-enhancing collective standard-setting efforts from challenge as collusion.

For this reason, antitrust law has an important role to play in governing both collusive and unilateral misconduct in the standard-setting process. Such misconduct can harm consumer welfare by undermining the reliability and viability of standard setting, raising the costs of goods, and slowing innovation. Courts and federal agencies addressing standard-setting abuses have recognized this fact in a series of antitrust cases that have sought to punish patent holders for misappropriating the monopoly power

[5] *See* Opinion of the Commission on Remedy, *In re* Rambus, Inc., FTC Docket No. 9302, at 17 (Feb. 5, 2007) (holding that a reasonable royalty is "the amount that the industry participants would have been willing to pay to use a technology over its next best alternative prior to the incorporation of the technology into a standard."); *see also* Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 57 (2005) (a reasonable royalty "is or approximates the outcome of an auction-like process appropriately designed to take lawful advantage of the state of competition existing ex ante . . . between and among available IP options").

[6] *See Broadcom*, 501 F.3d at 312 ("Private standard setting occurs in a consensus-oriented environment, where participants rely on structural protections, such as rules requiring the disclosure of IPRs, to facilitate competition and constrain the exercise of monopoly power.").

created by the standard-setting process. Such enforcement should be welcomed because it encourages openness and candor in the standard-setting process, and helps protect standard-setting efforts from antitrust challenge by preventing participants from exploiting power achieved as a result of the collective elimination of competition.

The suggestion that imposing antitrust liability for willful violations of SSO disclosure and licensing policies would harm public welfare by chilling participation in standard setting is not credible. First, although standard-setting abuses have been subject to challenge on antitrust grounds for over a decade, there is no evidence of companies dropping out of standard-setting efforts in significant numbers. Rather, standard setting has only grown in scope and importance over time, and the most notable withdrawals from SSOs have been by those who dropped out specifically to circumvent the SSO rules and to engage in precisely the sort of willful opportunistic holdup that SSO policies are intended to prevent. Second, if a company is concerned about antitrust liability for violating an SSO's disclosure and licensing policies, it can easily reduce its antitrust risk by making a good faith effort to disclose patents covered under the SSO's disclosure policy and by disclosing its proposed licensing terms for essential patents prior to the SSO adopting the standard and the industry becoming locking in. Finally, far from chilling standard-setting participation, fostering an expectation and practice of disclosure in this area will benefit patent holders through increased market acceptance of standardized products and will benefit consumers through lower costs. As technology standardization becomes increasingly important in our daily lives, the application of antitrust laws to protect the integrity of standard-setting processes is critical to protecting consumer welfare and encouraging innovation, in particular where improper collusion or deception to achieve market power are involved.