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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**INTELLECTUAL PROPERTY AND STANDARD SETTING**

**-- Note by the United States --**

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to implement standardized technology may diminish incentives for future inventors to contribute their patented technology to a standard and to compete and innovate. The Agencies seek to promote consumer welfare and innovation by supporting incentives to innovate created by adequate and effective intellectual property rights while protecting competition in their enforcement decisions involving standard setting.

3. This paper first provides general background on standard-setting activities, the procompetitive benefits of standard setting, and the potential for competitive harm, and then surveys U.S. antitrust enforcement developments and the Agencies' policy guidance since 2010. The paper also briefly discusses recent U.S. case law that addresses the judicial calculation of royalties and availability of injunctive relief in patent infringement actions in the U.S. court system when a patent is committed to being licensed on (fair, reasonable, and non-discriminatory terms (F/RAND)).<sup>8</sup>

## **2. General Background on Standard Setting**

### ***2.1 The nature of standards and standard setting***

4. "Industry standards are widely acknowledged to be one of the engines driving the modern economy."<sup>9</sup> "Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a 'fundamental building block for international trade.'"<sup>10</sup> Standards enable virtually all the products we rely upon in modern society, including mechanical, electrical, information, telecommunications, and other systems, to interoperate.<sup>11</sup> "The most success u

products.<sup>14</sup> “[S]tandards may also be set in the marketplace where firms vigorously compete, [sometimes] in a winner-take-all standards war to establish their own technology as the *de facto* standard.”<sup>15</sup>

6. Most standards developed and used in the United States are voluntary consensus standards created through private sector leadership.<sup>16</sup> In some instances, United States Government (USG) agencies need standards to achieve their own regulatory and procurement objectives. In these situations, the USG prefers that the federal agencies rely on voluntary consensus standards instead of government standards.<sup>17</sup>

7. In some countries, governments themselves are involved in selecting technologies to be incorporated into voluntary, collaborative standards, and in determining acceptable royalty and other licensing terms. Such government involvement has the potential to undermine incentives to innovate and to participate in the standard-setting process. Consequently, even for mandatory technical regulations that the government needs to set, the USG may determine the performance requirements that a standard needs to meet, but it allows SSOs to determine which technologies to incorporate according to intellectual property rules set by each SSO, and not mandated by the government.

8. In the United States, as elsewhere, licensing on F/RAND terms for SEPs arises through voluntary commitments by the patent holder.<sup>18</sup> Intellectual property disclosures to SSOs and licensing commitments are designed to promote access to the technology needed to implement the standard on F/RAND terms and to encourage patent holder participants to include the best technology in a standard by allowing for appropriate compensation.<sup>19</sup>



that prevents this situation from occurring. In addition, “[b]y agreeing on an industry standard, firms may be able to avoid many of the costs and delays of a standards war, thus substantially reducing transaction costs to both consumers and firms” and speeding up the introduction and adoption of innovative products and services in the marketplace.<sup>29</sup> In short, standard setting offers numerous efficiencies.

### **2.3 *Potential harm to competition from collaborative standard setting***

13. As set forth in the United States’ 2010 submission, collaborative standard setting “is not free of potential social costs.”<sup>30</sup> In general, agreements among competitors about which standard is best for the marketplace replaces competition that otherwise would have occurred absent the standard-setting process.<sup>31</sup>

15. To mitigate this type of hold-up, as discussed above in Section 2.1, some SSOs require patent disclosures from participants for essential patents that may be infringed by the potential users of a standard in development.<sup>38</sup> They may ask SSO members to commit to license patents essential to that standard on F/RAND terms.<sup>39</sup> As stated above, patent disclosures and voluntary licensing commitments are designed to promote access on F/RAND terms to the technology needed to implement the standard and to encourage patent holder participants to include the best technology in a standard by promising adequate compensation. However, a decision by an intellectual property owner *not*

obtain such compensation, patent holders may become reluctant to contribute technology to a standard or to invest in future research and development that leads to further innovation.

### **3. Enforcement Actions**

#### **3.1 *Harming competition through deception during the standard-setting process***

18. The FTC has brought three cases under Section 5 of the FTC Act alleging anticompetitive manipulation of standard-setting processes. In *Dell*, “the FTC alleged that during an SSO’s deliberations about a certain standard, Dell, a member of the SSO, had twice certified that it had no intellectual property relevant to the standard, and that the SSO adopted the standard based, in part, on Dell’s certifications.”<sup>43</sup> After the SSO adopted the standard, Dell demanded royalties from those using its technology in connection with that standard. The [FTC] accepted a consent agreement under which Dell agreed not to enforce the patent in question against firms using it as part of the standard.”<sup>44</sup>

19. Similarly, in *Rambus*, the FTC found that Rambus was able to distort a critical standard-setting process and engage in an anticompetitive “hold-up” of the computer memory industry by knowingly failing to disclose to the SSO patents that it believed were or could be essential to the relevant standard.”<sup>45</sup>

20. Rambus appealed, and the U.S. Court of Appeals for the District of Columbia overturned the FTC’s decision.<sup>46</sup> The court opined that if the SSO, in the world that would have existed “but for” Rambus’s deception, would have standardized the very same technologies, Rambus’s alleged deception could not be said to have had an effect on competition in violation of the antitrust laws. The court did not view the SSO’s loss of an opportunity to seek favorable F/RAND licensing terms as an “antitrust” harm. Because the FTC did not negate the possibility that the SSO would have developed the same standard even absent Rambus’s deceptive conduct, the court held that “the Commission failed to demonstrate that Rambus’s conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets.”<sup>47</sup>

21. In *In re Union Oil Company of California*, the FTC arlting probus







acquiring firms, Apple, Google and Microsoft, explaining their respective SEP licensing practices.<sup>63</sup> DOJ's competition concerns "were lessened by the clear commitments by Apple and Microsoft to license SEPs on [F/RAND] terms, as well as their commitments not to seek injunctions in disputes involving SEPs."<sup>64</sup> DOJ also found that Google's acquisition of Motorola's patents would not lessen competition.<sup>65</sup> Motorola was already in a number of disputes with Microsoft, Apple, and others over the licensing of its SEPs and Google's acquisition of Motorola's patents was unlikely to materially alter current market dynamics.<sup>66</sup>

28. These transactions "highlight the complex intersection of intellectual property rights and antitrust



patent hold-up and, therefore, such relief may be inconsistent with the statutory public interest standard.<sup>74</sup>  
The DOJ-



patentees to engage in hold-up through patent assertions,<sup>90</sup> and made recommendations for the determination of reasonable royalty damages to avoid hold-up generally and in the standard-setting context. The FTC observed that “a court may look to reasonable royalty damages law for guidance” in addressing F/RAND licensing disputes.<sup>91</sup> Specifically, the FTC recommended that reasonable royalty damages for F/RAND-encumbered patents be set using the hypothetical negotiation framework, and recognized that in market negotiation before the standard is set and switching costs accrue, a licensee would be unwilling to agree to a royalty that exceeded “the incremental value of the patented technology over alternatives available at the time the standard was defined.”<sup>92</sup>

#### 4.3.2.2 *The use of injunctions*

38. Under the U.S. Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, LLC*,

40. The Federal Circuit's decision is consistent with the FTC's *amicus curiae* brief in the case, in which the FTC