

Importance of Standards



- Industry standards are vital to the development of the Internet and to interoperability among devices and computers
- For example, anytime you use the Internet, your cell phone or a computer, you are benefitting from international technical standards
 - Watching a video? You're probably using a standard called ITU/ISO/IEC H.264
 - Connected to a wireless network? You're using another standard called IEEE 802.11
- Standards are developed in a collaborative process at standards-setting organizations ("SSOs")
 - Engineers from a variety of companies (and other stakeholder groups) come together and contribute ideas on how to define new standards
 - In information and communications technology standards, the inclusion of patented technology is highly likely



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SSOs' Patent Policies



- SSOs' patent policies seek licensing commitments from SEP holders to the effect that they will license their standard-essential patents ("SEPs") to any company that wishes to implement the standard on fair, reasonable and nondiscriminatory terms ("FRAND")
- Purpose of the FRAND agreement is to have SEPs be available to implementers on reasonable terms – SEP holder agrees that FRAND compensation will suffice
 - SEPs cannot be worked around – implementers are "locked in"
 - Many products will not be marketable if they do not implement standards (such as WiFi)
- A key objective of the FRAND agreement is to minimize the risk of opportunistic, anti-competitive behavior by SEP holders

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Competition Law Concerns



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- European Commission published this policy paper in June 2014:
http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf Excerpts:
 - “SEPs can, however, confer significant market power on their holders. Once a standard has been agreed and industry players have invested heavily in standard-compliant products, the market is *de facto* locked into both the standard and the relevant SEPs.” (Emphasis added.)
 - “This gives companies the potential to behave in anti-competitive ways, for example by ‘holding up’ users after the adoption of the standard by excluding competitors from the market, extracting excessive royalty fees, setting cross-licence terms which the licensee would not otherwise agree to, or forcing the licensee to give up their invalidity or non-infringement claims against SEPs.” (Emphasis added.)
 - “There is a strong public interest in fostering challenges of patent validity and infringement. Royalty payments for SEPs which are either invalid or not used may unduly increase production costs, which in turn may lead to higher prices for consumers.”
 - “Therefore, seeking an injunction before national courts on the basis of SEPs against a licensee willing to pay for the SEPs was found to constitute abuse of a dominant position.” (Emphasis added.)

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Competition Law Concerns

- **Competition regulators have encouraged SSOs to clarify their patent policies to reduce the risk of patent hold-up**
 - U.S. Department of Justice: “Six ‘Small’ Proposals for SSOs Before Lunch”
<http://www.justice.gov/atr/public/speeches/287855.pdf>
 - “... I would like to identify for you some policy choices that standards bodies could implement which we believe would promote competition among implementers of the standard, potentially benefiting consumers around the world.” (Emphasis added.)
 - Establish procedures that identify SEPs which the patent holder has not agreed to license on FRAND terms
 - Clarify that licensing commitments to the standards body are intended to bind transferees of the FRAND-encumbered SEPs
 - Permit licensees to license FRAND-encumbered SEPs on a cash-only basis while prohibiting mandatory cross-licensing of non-essential patents
 - Limit the ability of patent holders who have made FRAND licensing commitment from obtaining injunctions against potential licensees
 - Lower transaction costs for determining FRAND licensing terms
 - Increase certainty that disclosed patents are essential after the standard is set

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