A Safety Zone for the Ex Ante Communication of Licensing Terms at Standard-Setting Organizations

John J. Kelly and Daniel I. Prywes

Many industry standard-setting organizations (SSOs) encourage or require participants in the standards development process to disclose patents or patent applications that relate to a proposed standard. This is done so that the SSO may make an informed choice among different options when selecting the technology to be used in a standard.[1]

If one option is likely to require use of a patented technology subject to high royalty rates, and others are not, then the SSO should take this factor into account in its selection decision to arrive at the best standard. As a matter of economic efficiency, the "best" standard is the one that strikes the optimal balance between cost and technical superiority.

__John J. Kelly__ is the President of the JEDEC Solid-State Technology Association, which serves as the semiconductor and solid-state engineering standardization body of the Electronic Industries Alliance. __Daniel I. Prywes__ is a partner in the Washington, D.C. office of Bryan Cave LLP, and has represented participants in standard-setting organizations, as well as JEDEC. The views stated in this article are the personal views of the authors. They do not necessarily reflect the views of the organizations they are associated with or of the members or other employees of those organizations.

Fear of Antitrust Liability or Claims

Standard-setting activity, however, can be inhibited by SSO concerns about potential antitrust liability and the cost of defending antitrust claims.[2] SSO members fear, with justification, that any communications with patent holders during the standards development process regarding the latter's royalty demands can expose the SSO and its participants to antitrust claims. Patent holders may allege that such communications are part of a "joint buying cartel" among SSO members collusively to suppress the cost of purchasing technology to sub-competitive levels. A "subcompetitive" royalty rate is one below the rate that would result if there were open and fair competition among technologies for inclusion in a standard.[3]

Because of these concerns, most SSOs do no more than require patent holders to declare during the standards development process that the patent holder will license its technology on "RAND" terms (reasonable and non-discriminatory terms), with or without a royalty, if the patent holder's technology should be incorporated into the standard. Any further discussions about roy-

[1] There has been considerable litigation over the scope and extent of an SSO member's obligation to disclose the existence of patents or patent applications that may relate to a proposed standard. The Federal Trade Commission has considered issues of this type in *Rambus*, FTC Docket No. 9302 and in *Union Oil Co. of Calif.*, FTC Docket No. 9305. Other significant cases on this topic include Rambus v. Infineon Techs. AG, 318 F.3d 1081 (Fed. Cir. 2003); Dell Computer Corp., 121 F.T.C. 616 (1996); Wang Laboratories, Inc. v. Mitsubishi Elecs. America, Inc., 103 F.3d 1571 (Fed. Cir. 1997); Stambler v. Diebold, Inc., 11 U.S.P.Q.2d (BNA) 1709 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1988); Potter Instrument Co. v. Storage Technology Corp., 207 U.S.P.Q. (BNA) 763 (E.D. Va. 1980), aff'd, 641 F.2d 190 (4th Cir. 1981). *See* Daniel Prywes, *Patent Ambushes and Licensing in Computer Standard-Setting Groups*, ANTITRUST REP., Mar. 2001, at 17.

[2] This phenomenon is not unique to SSOs. The federal antitrust agencies have recognized generally that "a perception that antitrust laws are skeptical about agreements among competitors may deter the development of procompetitive collaborations." U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), 4 Trade Reg. Rep. (CCH) ¶ 13,161, at 20,852, *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [Antitrust Guidelines].

[3] The general concern with competitor collaborations under the antitrust laws is that they "may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." *Id.* at 20,854.

alty rates before the final adoption of a standard—namely, ex ante discussions—are often prohibited. In essence, SSOs are free to go shopping for the most suitable technology, but not to ask how much it will cost. As discussed below, this can lead to unexpectedly high royalty demands later on, once the standard has become widely adopted and the industry is "locked in" to its use.

A number of commentators have noted that a patent holder's ex ante commitment to license under RAND principles may not provide enough information to the SSO's participants to enable an informed decision that balances cost and technical features to reach the optimal standard. There at least three problems:

1. There may be a wide range of royalty rates that could be deemed "reasonable."[4]
2. It may not always be easy to determine when different royalties charged to different firms are discriminatory. The different firms may be situated differently (e.g., using the standard for different applications), and some (but not all) may have pre-existing license arrangements with the patent holder.
3. Most importantly, unless the SSO participants know the actual royalty rate to be demanded by the patent holder, at least within a range, it is impossible to make even a reliable estimate of the future cost of selecting a particular patent-laden technology over other technical options. As a result, the SSO's selection decision will lack critical information and the optimal solution may not be selected.

SSOs are free to go shopping for the most suitable technology, but not to ask how much it will cost.

The Patent "Hold-Up" Problem

Because most SSOs have not permitted, or engaged in, ex ante licensing discussions with patent holders, the SSO industries are subject to a potential patent "hold-up" problem. Before a standard is adopted, a particular patent may be only one of several solutions to meet a technical challenge, and the value of the patent may be modest. There may be options to "work around" the patent, to use non-patented technology, or to use another patented technology on royalty-free or lower royalty terms.

However, once the SSO adopts a standard using a patented technology and the market for the standardized, patented technology grows, it can often be difficult for the industry to switch to a different standard if the patent holder demands high royalties. As investment grows in the production of a standardized item, and the standard is incorporated widely by industry into devices and systems, the industry may become "locked in" to the patent-laden standard. At this point after—or ex post—the standard selection decision, the patent holder can hold up the industry by demanding a higher royalty than it could have achieved had it disclosed its royalty demands ex ante during the standard development process. Manufacturers then have no choice but to pay the royalty demands (at least until the industry can efficiently migrate to an alternative) or to litigate the validity, applicability, or enforceability of the patent.[5] The cost of using the standard, and the resulting cost to consumers, will be increased above the true value of the patent at the time the selection was made.

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[4] *See* Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5 (2005).

[5] For example, in *Rambus*, FTC Docket No. 9302, the FTC alleged that Rambus failed to disclose patent applications to a JEDEC standard-setting committee and that Rambus was later able to extract supracompetitive royalties after the patents were issued and the industry had widely incorporated the Rambus technology into computer memory systems. *See* http://www.ftc.gov/os/adjpro/d9302/index.htm.

Rule of Reason Standard for Ex Ante Communications About Royalties

There is increasing recognition that the patent hold-up problem can result in economically inefficient standards. As a result, there has recently been a tide of commentary that ex ante communications about royalty rates should not be per se prohibited under the antitrust laws.[6] Instead, it has been suggested that such communications should be permitted, subject to antitrust scrutiny under the looser rule of reason standard. Generally speaking, a practice is permitted under the rule of reason standard if its efficiency-enhancing characteristics outweigh any anticompetitive characteristics (including a reduction in incentives to innovate).[7]

In September 2005, FTC Chairman Deborah Majoras delivered a speech in which she commented favorably on SSO rules or practices that would allow ex ante communications about royalty rates (including negotiations) during the standards development process.[8] Chairman Majoras first explained that there are legitimate reasons for SSOs to take steps to prevent the patent hold-up problem:

> The ability of a patent holder to charge a high royalty rate may . . . result from the reduction in competition that may occur after a standard is chosen and lock in has occurred. The antitrust laws are concerned with situations in which a patent holder obtains such market power as a result of anticompetitive conduct.[9]

Chairman Majoras went on to note that SSOs have nonetheless been reluctant to allow any ex ante communications about royalty terms because of "concerns that agreed rates are exercises in collective price-fixing and therefore run afoul of the antitrust laws' per se ban on price fixing."[10] She explained that these concerns are too restrictive and "may have unduly prevented announcements of pricing intentions or royalty discussions that may, in fact, provide procompetitive benefits."[11]

Chairman Majoras wrote that "a patent holder's voluntary and unilateral disclosure of its maximum royalty rate . . . is highly unlikely to require antitrust scrutiny," because the unilateral announcement of a price is not a collective act (subject to challenge under Section 1 of the Sherman Act), and on its own is not an exclusionary practice (that could be challenged under Section 2 of the Sherman Act).[12]

More generally, Chairman Majoras indicated that "joint ex ante royalty discussions that are reasonably necessary to avoid hold up do not warrant per se condemnation."[13] Instead, she stated

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[6] A comprehensive presentation of this position is made in Robert A. Skitol, *Buying Power and Antitrust: Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 Antitrust L.J. 727 (2005).

[7] As articulated by the federal antitrust agencies, under a "rule of reason" analysis, "[t]he central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." Antitrust Guidelines, *supra* note 2, at 20,856.

[8] Deborah Platt Majoras, Chairman, FTC, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Remarks Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford University (Sept. 23, 2005), *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

[9] *Id.* at 4 (emphasis added).

[10] *Id.* at 6.

[11] *Id.* at 6

[12] *Id.* at 7.

[13] *Id.*

that "[w]e would apply the rule of reason to joint ex ante royalty discussions because, quite simply, they can be a sensible way of preventing hold up, which can itself be anticompetitive."[14]

Similar comments were made in a June 3, 2005, speech by R. Hewitt Pate, who was then the Assistant Attorney General for the DOJ's Antitrust Division. He observed that many SSOs' fears of antitrust liability arising from any discussion of actual royalty rates with potential licensors may be excessive, because "[i]t would be a strange result if antitrust policy is being used to prevent price competition."[15] He too observed that there is a "possibility" that "ex ante license fee negotiations" could be "anticompetitive," but "it seems only reasonable to balance that concern against the inefficiencies of ex post negotiations and licensing hold up."[16]

These statements should offer some comfort to SSOs that want to allow ex ante discussions with patent holders. However, as noted next, the continuing uncertainty about antitrust litigation and liability—even under a rule of reason analysis—will continue to exert a chilling effect on the practice of ex ante royalty communications.

The rule of reason analysis would subject SSOs and their participants to challenge in the many cases where there can be reasonable disagreement about the choice among several different technological approaches for use in a standard.

The Rule of Reason Still Exposes SSOs and Their Participants to Antitrust Risk

As noted above, the rule of reason standard of antitrust review does not insulate a practice from legal challenge. In the case of ex ante royalty discussions, the question remains whether, in a particular case, the SSO and its participants have engaged in those communications in a manner that enhances competition by avoiding the patent hold-up problem, or whether the communications were conducted in a manner having anticompetitive consequences.

It is not difficult to imagine circumstances in which ex ante royalty discussions could be credibly challenged as running afoul of the rule of reason test. Most obviously, the discussions would be condemned as illegal if SSO participants who are "manufacturing rivals cross over the line from discussing the price of technology they will *'buy,'* . . . and start discussing—and fixing—the price of the products they *sell*."[17]

Even if SSOs avoid such perilous conduct, they still will have reason for concern. SSOs and their participants may face claims that the ex ante royalty discussions have used the SSO participants' joint buying power (as an "oligopsony") inappropriately. This could occur in any case where a disappointed patent holder can show that the SSO participants sought lower royalty rates than could be justified by a good-faith technical/cost evaluation of the patent holder's technology relative to other candidates for the standard. In such an instance, antitrust enforcement agencies and potential antitrust plaintiffs would likely consider the outcome to be anticompetitive because it threatens to reduce economic incentives for innovation by firms developing patented technology.

Consequently, the rule of reason analysis would subject SSOs and their participants to challenge in the many cases where there can be reasonable disagreement about the choice among several different technological approaches for use in a standard. The decision to select one approach over another is a matter of judgment and may be subjective to at least some degree. SSOs do not typically use expert economists to model the different costs of various technical

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[14] *Id.*

[15] R. Hewitt Pate, Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust 5, Remarks to 2005 EU Competition Workshop (June 3, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/209359.htm.

[16] *Id.*

[17] Majoras, *supra* note 8, at 10.

approaches. SSOs ordinarily depend on the judgment and technical expertise of engineers or other participants in making these determinations.

If an SSO and its participants get the selection process "wrong" under the antitrust laws, and lose an antitrust case in litigation, the cost can be enormous. In civil suits, the SSO and its participants in the standards development process may face awards of treble damages, be required to pay the plaintiff's attorneys' fees, and face injunctions that impede future standard-setting activity. SSOs and their members can also face criminal charges under the antitrust laws, particularly if they are poorly advised and do not give wide berth to the sometimes hazy line between procompetitive, ex ante royalty communications aimed at preventing a patent hold-up, and the illegal exercise of joint buying power to drive down the price of technology to unreasonably low levels.

The mere possibility of an antitrust challenge, even under the rule of reason standard, inhibits many SSOs from allowing most forms of ex ante royalty communications. Antitrust litigation can be exceedingly expensive, and the Supreme Court has held that SSOs themselves are subject to liability for anticompetitive activity conducted under their auspices.[18]

These concerns are demonstrated by the recent *Soundview* litigation.[19] In that case, an antitrust counterclaim was filed by Soundview Technologies, Inc., against two SSOs (the Consumer Electronics Association and the Electronics Industries Alliance) and several of their member companies. Soundview claimed that it had a patent for technology needed to implement the Congressionally and FCC mandated television V-Chip (used to allow parents to block the display of violent or sexually explicit programming). Soundview alleged that members of the SSOs "had agreed upon a uniform price for a license under the Soundview patent: 5 cents per television set," which allegedly constituted an illegal "joint boycott and concerted refusal to deal."[20] Soundview characterized the alleged "5 cent" agreement as one among a group of buyers with market power who were seeking to depress the price of one of the key inputs into their product. Even though the end result was to reduce costs that would ultimately be borne by consumers, Soundview alleged that the agreement had anticompetitive effects because it negatively impacted the price Soundview could charge for its intellectual property and thus reduced the incentive to innovate.

When the SSOs at the outset of the case filed a motion to dismiss Soundview's antitrust claim, the trial court declined to do so. The court did not find that the alleged agreement was per se illegal. Instead, it found that there were too many factual issues to conclude that the claims were legally insufficient. The court allowed discovery and further proceedings to determine whether the SSOs and their members were "acting as rational economic decision-makers or participants in an illegal price-fixing conspiracy."[21] As a result, the litigation continued for several years through the discovery process and a *Markman* hearing on patent infringement. Ultimately, the court ruled that the television manufacturers had not infringed Soundview's patent in the first instance,[22] which mooted the antitrust claims.[23] At the end of this extensive and expensive litigation, there was still

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[18] *See* American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp. 456 U.S. 556, 577 (1982).

[19] Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180 (D. Conn. 2001).

[20] *Id.* at 182, 187.

[21] *Id.* at 188.

[22] Sony Elecs., Inc. v. Soundview Techs., Inc., 225 F. Supp. 2d 164 (D. Conn. 2002).

[23] Sony Elecs., Inc. v. Soundview Techs., Inc., 281 F. Supp. 2d 399 (D. Conn. 2003).

no court ruling as to whether the alleged royalty agreement among the SSO members was procompetitive and legitimate, or illegal.

The cumulative litigation expense in the *Soundview* case to the SSOs and their members is estimated to exceed ten million dollars, even though no liability was imposed on the SSOs or their members. The *Soundview* case demonstrates that any SSO considering ex ante royalty discussions must consider the costs of defending an antitrust challenge—even if unsuccessful—when evaluating whether, and to what extent, to allow ex ante communications concerning royalty terms.

Given these concerns, SSOs will remain cautious with respect to the extent and scope of any ex ante royalty communications that they permit. The chilling effect of potential antitrust challenges will be strong enough to dissuade many SSOs from allowing ex ante communications that are sufficient in scope to prevent patent hold-ups. While Chairman Majoras has suggested that antitrust challenges in the more benign rule of reason climate will be few, and reserved for extreme cases, the future is uncertain because private plaintiffs (such as disappointed holders of patents not selected for a standard) also have the statutory right to sue to enforce the antitrust laws.

To truly solve the patent hold-up problem in standard setting, SSOs need a clearer delineation of the boundary between legitimate and illegitimate ex ante royalty communications.

To truly solve the patent hold-up problem in standard setting, SSOs need a clearer delineation of the boundary between legitimate and illegitimate ex ante royalty communications. The federal antitrust agencies can do their part by outlining these boundaries in various ways, such as through Business Review letters issued by the Antitrust Division, or by developing more specific guidelines pertinent to standard-setting activity. SSOs and their respective industries would greatly benefit from the development of "safety zone" guidelines which, if followed by SSOs, would ensure that antitrust action will not be taken by the federal antitrust agencies absent extraordinary circumstances. Although not binding in litigation brought by private plaintiffs, such forms of guidance can be influential with courts.

New legislation should also be considered to create truly binding guidelines that protect SSOs and their members from private antitrust suits, as well as government enforcement actions, that challenge ex ante royalty communications. Congress has proven itself attentive to the problems associated with SSO activities that touch on intellectual property, but its actions to date go only so far.

In 2004, Congress enacted the Standards Development Organization Advancement Act[24] (SDOAA) to reduce to an extent the possibility that true standards-development activity by an SSO (as contrasted to collusion in fixing prices for downstream products) can be challenged as a per se violation of the antitrust laws.[25] Under the SDOAA, SSOs that engage in a defined range of "standards development activity" will be subject to antitrust challenge only under the rule of reason standard.[26] The Act, however, does nothing to change the standard of antitrust liability for individual firms participating in an SSO's standards development process.[27] Those individual firms remain at risk of claims alleging that their ex ante royalty communications are illegal per se. Since

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[24] Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, Title I, 118 Stat. 661 (2004).

[25] 15 U.S.C. § 4302(2). The legislative history of the SDOAA includes comments by supporters that that Act "seeks to encourage disclosure by intellectual property rights owners of . . . proposed licensing terms." 150 Cong. Rec. H3657 (June 2, 2004) (Supplemental Legislative History agreed to by Rep. Sensenbrenner and Rep. Conyers).

[26] 15 U.S.C. §§ 4301(a)(7) and (c), and 4302.

[27] Nothing in the Act "shall be construed to alter or modify the antitrust treatment under existing law of . . . parties participating in standards development activity of standards development organizations within the scope of this title, including the existing standard under which the conduct of the parties is reviewed, regardless of the standard under which the conduct of the standards development organizations in which they participate are reviewed . . . ." SDOAA § 108, 118 Stat. at 665.

SSOs are ultimately composed of participating firms, the SSOs cannot function in those areas which the SSO participating firms find too risky. Nor does the Act protect an SSO from the following broad categories of per se allegations:

1. Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

2. Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

3. Entering into any agreement or conspiracy that would set or restrain prices of any good or service.[28]

Safety-Zone Guidelines

The federal antitrust agencies have specified safety zones (or safe harbors) for a wide range of industries and circumstances. These have been determined to be useful to "provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the [a]gencies presume the arrangements to be lawful without inquiring into particular circumstances."[29] Activity outside the safety zone may be procompetitive or competitively neutral, but may require a more detailed analysis.

Specific safety zones can be tailored for the specific circumstances of standard setting. Various commentators have offered suggestions for procedures with low antitrust risk that might be used to govern ex ante royalty communications.[30] The goal is to develop a safety zone in which the ex ante royalty communications are almost surely (1) going to promote the SSO's informed selection of the best cost/technical tradeoff between different technical options, but (2) not force a patent holder to license its patent below the rate that would apply if there were an open and fair competition between different technical options.

Of course, one size may not fit all. A generalized safety zone may need to be adjusted to address different factual scenarios, as well as different industries.[31] For the moment, however, we suggest procedures that are likely to have wide applicability. Of course, any form of ex ante royalty communication or negotiation that goes beyond the proposed safety zone is not intrinsically improper or illegal; it may simply require an individualized analysis under all the circumstances. Additionally, the safety-zone provisions should not be so onerous as to discourage participation by firms having large patent portfolios or large market shares.

One major issue in determining the scope of ex ante communications is whether SSOs can request or require potential licensors to make disclosure of their royalty demands, or whether the SSOs may safely go further by permitting or requiring additional communications about royalty

[28] 15 U.S.C. § 4301(c).

[29] Antitrust Guidelines, *supra* note 2, at 20,864.

[30] *See, e.g.*, Daniel Swanson, Evaluating Market Power in Technology Markets When Standards Are Selected in Which Private Parties Own Intellectual Property Rights 12–13 (Apr. 18, 2002) (submitted to Joint Hearings of the DOJ and FTC regarding Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy), *available at* http://www.ftc.gov/opp/intellect/detailsandparticipants.htm; Skitol, *supra* note 6, at 742.

[31] Once the basic model is set for a safety zone for ex ante communications relating to royalty rates, the model could hopefully be refined to allow for communications about other licensing terms such as grantbacks.

rates. The mere disclosure of royalty demands, with nothing more, will reduce some of the uncertainty in the standards selection process. However, it may be too limited to allow the SSO (and ultimately consumers) fully to achieve the optimal price/technology tradeoff among competing technologies for inclusion in the standard. Therefore, in our proposal below, we suggest that a safety zone should be allowed for ex ante communications that go beyond the mere disclosure of a potential licensor's royalty demands. The safety-zone proposal could be adopted by the antitrust agencies as a guideline or could serve as the basis for possible legislation by Congress.

There could be endless debate among engineers and economists whether any particular royalty reached through ex ante communications is optimal or consistent with a competitive outcome. Therefore, to be useful, any safety zone guidelines need to stress the *process* of standard setting, the *scope* of the ex ante communications, and the *structure* of the choice facing the SSO in selecting a standard among competing technical options. Our safety-zone proposal therefore emphasizes these issues. The proposal can be summarized with ten principles:

To be useful, any safety zone guidelines need to stress the process *of standard-setting, the* scope *of the ex ante communications, and the* structure *of the choice facing the SSO in selecting a standard among competing technical options.*

Principle 1. The SSO and its members may ask participating patent holders to state the maximum royalties (if any) that they will demand if their patented technology (or any rights under patent applications) is adopted as part of an SSO standard. The SSO and its participants may ask patent holders to indicate if their proposed royalty rates are higher than the royalty rates obtained for any pre-existing licensing arrangements. The SSO may require that the patent holder agree to license on other reasonable and non-discriminatory (RAND) terms. An SSO can do these things even if there is only one technical option under consideration, because the SSO always has the option not to propose a standard at all.

Comment: These features will enable the SSO and its members to obtain meaningful information about the royalty rates to be charged by patent holders so that the SSO can make an informed evaluation in selecting a standard. In essence, this principle allows SSOs to seek the "disclosure" of royalty demands. The RAND non-discrimination requirement will serve to ensure that the standards development process is not misused as a means of favoring some industry firms over others. Absent some communication about the specific royalty rates sought by owners of patent rights, it would be difficult to make an informed evaluation of the cost and technical features of different candidates for a standard.

Principle 2. Notwithstanding the foregoing, the SSO may not require participants to engage in ex ante discussions beyond committing to license on RAND terms. The participants' decision to respond to inquiries about their licensing plans should be entirely voluntary. However, if an SSO requests that a participant engage in such discussions, and the participant refrains from doing so, the SSO may take the resulting uncertainty about future royalty rates into account in its selection of a standard but may not exclude the participant's technology from consideration if the participant gives a RAND commitment.

Comment: By making ex ante discussions voluntary, a patent holder supporting its patented technology for inclusion in a standard may not claim that it was forced by the SSO to enter negotiations. On the other hand, the SSO is entitled to consider the resulting uncertainty over the scope of the participant's licensing demands when selecting a technology for the standard. Otherwise, the SSO could be subjected to the patent hold-up problem.

Principle 3. During the development process, the SSO and its members may consult with each other and evaluate the estimated cost and technical advantages of different options, subject to three conditions:

(a) The patent holders must be given access to the findings and the right to participate in such consultations.

(b) The SSO members' communications about cost should be limited to those cost elements that are relevant to the selection among competing technologies being considered for inclusion in a standard.[32]

(c) Neither the SSO nor its members shall jointly agree on or demand a specific, maximum royalty rate to be paid to any patent holder.

Comment: This provision contemplates that some negotiation-type communications with the patent holder are permissible, provided that they are conducted in an open fashion and do not lead to specific licensing demands set collectively by the SSO members. If the disclosure of a royalty demand occurs, it may be difficult to prevent at least some signaling between the patent holder and the SSO members about an appropriate rate, and it is better to get those discussions into the open. Sunlight is a great deterrent to collusive activity. There is also no reason to condemn direct exchanges on the question of royalties, since that is a useful factor in the standards selection process. Discussions about cost should not veer off into the discussion of costs that will be incurred no matter which technology is selected. The interests of patent holders will be protected under the remaining elements of the safety zone, particularly principles (4), (5), (6), and (9) below.

Principle 4. The SSO, its members, or a patent holder, if they elect, shall have the right to commission a strictly independent expert to prepare an expeditious study of the relative incremental cost and technical advantages of different technical approaches. Any such expert report must be shared with the SSO members and the patent holder.

Comment: This procedure provides a means for bringing independent advice into the standards development process.

Principle 5. If more than one patent holder is offering its technology for inclusion in a standard, the SSO shall conduct an "auction" in which each such patent holder is provided the opportunity to publicly state its royalty demands, and to change those demands after learning of the other patent holders' royalty demands. The auction shall be conducted only at an open meeting of the SSO.

Comment: This requirement aims to ensure that competition actually occurs in the standards development process.

Principle 6. After a standard is selected, each patent holder which had offered its technology shall have the right to register a protest with the SSO on grounds that the SSO or its members pressured it or any other participating patent holder to offer a royalty rate which was below the rate that such patent holder could have obtained in an open and fair competition among different technical approaches. If no such protest is made, the SSO may proceed safely to adopt the standard and gain the benefit of the safety zone. If such an objection is made, the SSO shall have the choice of (1) canceling its proposed standard, (2) proceeding anyway (outside the protective scope of the safety zone), or (3) referring the issue to a strictly independent arbitrator for expedited consideration of whether the technology selected for inclusion in the standard is being offered at a subcompetitive rate, and if so whether there is any reasonable basis to believe that is due to illegal collusive activity. To make the arbitration option effective, SSO rules should incor-

[32] For example, assume that there is a device that can be used to perform a certain function, and that it has several components that will be used no matter which of several competing technologies is selected in a new standard as an enhancement to the device. While engaging in ex ante communications and analysis, the SSO participants should avoid discussion of the costs of those components that will be used no matter which technology is selected. Rather, they should focus on the relative cost advantages of those elements of the component that could change depending on which technology is selected.

porate such an arbitration requirement, or a commitment to arbitration should be required when a protest is filed.

Comment: The courts have stressed that SSOs should conduct their activities with procedures that protect against anticompetitive conduct. This provision seeks to ensure that any objections to the way in which ex ante communications are conducted are flushed out early, and corrected if appropriate.

Principle 7. The safety zone protection will apply only to SSO adoption of standards of products or technologies that are not already in widespread use (such as de facto standards) in the industry. The safety zone would also extend to products or technologies that are government mandated but not already in widespread use.

Comment: This requirement should avoid the misuse of the SSO process as a means to collectively negotiate royalty rates on a product or technology that is already in widespread use. In such cases, there is a danger the SSO process may be used as joint buyers' cartel with no procompetitive benefits in the development of new technological standards.

Principle 8. The safety zone will apply only if none of the patent holders vying for inclusion of their technology into a standard dominates the selection process for the specific standard in question.

Comment: This rule would prevent the situation where one SSO member could bias the selection process to favor its own technology (or those of strategically allied firms) and thereby reach an outcome that does not strike the optimal balance between cost and technical quality.

To ensure that a balanced approach is taken, the safety zone might include principles that "require openness, balance, transparency, consensus, and due process" in the standards development process, as outlined in the SDOAA.[33] Such principles would provide:

(a) notice to all parties known to be affected by the particular standards development activity;

(b) the opportunity to participate in standards development or modification;

(c) balancing interests so that standards development activities are not dominated by any single group of interested persons;

(d) readily available access to essential information regarding proposed and final standards;

(e) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections; and

(f) the right to express a position, to have it considered, and to appeal an adverse decision.[34]

Principle 9. The SSO and its participants should not discuss or enter into any agreement that precludes any firm from entering into an individual license to use a patent holder's technology for any purpose.

Comment: This provision should eliminate the possibility of imposing a joint group boycott on the patent holder.[35]

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[33] The DOJ has indicated in various Business Review letters that "it is less inclined to challenge a proposed standard where a wide array of constituencies was involved in setting the standard." American Bar Association, Handbook on the Antitrust Aspects of Standards Setting 51 (2004).

[34] SDOAA § 102(5).

[35] Antitrust concerns are reduced where SSO members remain free after the adoption of a standard to purchase license technology that was not included in a standard. Antitrust Guidelines § 3.34(a), *supra* note 2, at 20,861.

Principle 10. Neither the SSO nor its members shall discuss the specific prices to be charged on downstream products, or agree to boycott the use of the patent holders' technology for uses other than that embodied in an industry standard.

Comment: Any such discussions likely would be unlawful under the per se standard.

Conclusion

The time has arrived to bring greater certainty into the area of ex ante royalty communications. Unless appropriate safety zones are developed and approved, the antitrust laws may perversely become an impediment to efficiency and consumer welfare. The federal antitrust agencies, and Congress, should seriously consider adopting such safety zones in the near future.