The Antitrust Division and SSOs: Continuing the Dialogue

ANSI Intellectual Property Rights Policy Committee Meeting
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Competition Advocacy by the Division

- Recommendations that SSOs consider procompetitive changes to their IP policies:
  - Presentation at ANSI IPRPC by DAAG Scott Morton (May 2012)
  - Speech at the Fordham Law Institute by Acting AAG Wayland: Antitrust Policy in the Information Age: Protecting Information and Innovation (Sept. 2012)
  - Speech at the ITU-T Roundtable by DAAG Hesse: Six "Small" Proposals for SSOs Before Lunch (Oct. 2012)

DOJ Recommendations

- Identify proposed technology that involves patents which the patent holder has not agreed to license on F/RAND terms in advance.

- Make it clear that licensing commitments transfer to subsequent purchasers.

- Allow licensees to request cash-only licensing terms; prohibit the mandatory cross-licensing of patents that are not essential to the standard or a related family of standards; permit voluntary cross-licensing of all patents.

DOJ Recommendations (con't)

- Place some limitations on the right of the patent holder who has made a F/RAND licensing commitment to seek an injunction.
- Find ways to lower the transactions cost of determining F/RAND licensing terms.
- Increase certainty that patents declared essential are essential to the standard after it is set.

Responses to DOJ's proposals

- Overall, reception to our proposals has been positive; we are cognizant that it takes time for SSOs and their members to change IP policies.
- However, we heard statements asserting that discussing changes to SSO policies regarding the meaning of a RAND commitment could violate antitrust laws.

DOJ Response

- Merely discussing a proposed rule change would not violate U.S. antitrust laws.
- The Division evaluates SSO rules designed to mitigate hold up after a standard is set under the rule of reason.
  - Sham SSO rules and sham implementation of SSOs rules will be condemned as per se naked restraints of trade.
    - For example, IP owners agree on minimum licensing terms or manufacturers agree on price of downstream products.

Examples

- VITA Business Review Letter
  - Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq. (Oct. 30, 2006),
- DOJ/FTC 2007 Antitrust-IP Report (Chap. 2)
  - U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N , ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007),
- IEEE Business Review Letter
  - Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq. (Apr. 30, 2007),

VITA Business Review Letter

- VITA proposed patent policy required participants to declare maximum royalty rates and most restrictive licensing terms for patents declared essential to a standard.

- Some argued that engaging in ex ante licensing discussions is a per se antitrust violation of Section 1.
  - Harming competition by facilitating buy-side monopsonization by potential licensees.

VITA Business Review Letter (con't)

- Division issued a favorable business review letter to VITA in October 2006.
  - VITA's proposed policy examined under the rule of reason
  - Identified efficiencies:
    - procompetitive benefits of interoperability standards;
    - likely to increase incentives for patent holders to compete on licensing terms;
    - allows SSO working groups to make more informed decisions; and
    - likely to decrease the chances of unexpectedly high licensing demands after a standard is set.

DOJ/FTC 2007 Antitrust-IP Report

- Voluntary and unilateral declaration by IP holder of licensing terms not a collective act subject to review under Section 1.
- Joint activities by SSO participants that allow licensees to negotiate licensing terms with licensors before competition among technology ends evaluated under the rule of reason.
  - Ex ante disclosure of most restrictive licensing terms
  - Joint ex ante negotiation of licensing terms by SSO participants

IEEE Business Review Letter

- IEEE proposed a patent policy that permitted, but did not require, disclosure of most restrictive licensing terms for patents declared essential to a standard and permitting relative costs of competing technologies to be discussed within IEEE working groups.

- Division issued a favorable business review letter to IEEE in April 2007.
  - IEEE's proposed policy examined under the rule of reason
  - Identified efficiencies were the same as VITA's

- The Division also recognized the procompetitive benefits associated with IEEE's policy of binding subsequent patent owners to licensing commitments made to IEEE.

Conclusion

- Mere discussion of licensing rules within an SSO does not harm competition.
- The Division evaluates SSO licensing rules designed to reduce hold up after a standard is set under the rule of reason.
- Must avoid “sham” discussions/declarations.
- With this guidance in mind, go forth and discuss!