Discussion Topic One: Intellectual Property Rights and Global Standards Setting

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Overview

- **Agenda**
  - Panel Introductions
  - IPR in perspective
  - Range of IPR Issues facing SSOs
  - Discussion Topic: Ex-Ante disclosure of terms
Panel Introductions

- **Gil Ohana**
  - Counsel, Antitrust and Competition Department
  - Wilmer Cutter Pickering Hale and Dorr LLP

- **Scott Peterson**
  - Senior Counsel
  - Hewlett-Packard Company

- **Chuck Powers**
  - Director, Standards Strategy
  - Motorola’s Corporate Standards Department

- **Richard Taffet**
  - Bingham McCutchen LLP
IPR in perspective

- While IPR may complicate our lives, bear in mind that
  - Appropriate use of Intellectual Property Rights can help
    - Simulate the creation of innovative technologies that facilitate the adoption and longevity of standards; and
    - Promote market development and competition in products and services that implement standards.
  - Successful SSOs typically strive to balance the interests of the stakeholders by using reasonable rules to efficiently select technologies that facilitate the timely adoption of the standard.
  - Due to the wide range of business models and environments, there is no “one-size-fits-all” solution.
Some* IPR Issues currently facing SSOs

- Issues dealing with the identification of potentially encumbered technology
  - How much detail to reasonably request on potentially essential patents?
  - How to differentiate between essential and non-essential IPR?

- Issues dealing with confirming commitments to license
  - When to reasonably require a commitment to license?
  - How to deal with potentially essential IPR held by non-members?
    - What actions to take if a requested commitment to license is
      - Not forthcoming?
      - Expressly denied?
  - How to deal with the licensing commitments when IPR is transferred?

- Issues dealing with the efficient selection of technology for inclusion
  - How to avoid issues relating to IPR (such as the potential of “hold-up”)?
  - How much and when can information regarding IPR licensing be reasonably requested?
  - What can be reasonably and practically accomplish Ex-Ante and Ex-Post?

* Not an exhaustive list
What is Ex-Ante and Ex-Post?

- “Ex-Ante” means “before” technology is locked-in to a standard
- “Ex-Post” means “after” technology is locked-in
US FTC Chairman Majoras’ speech

- Antitrust concerns may have unduly suppressed some pro-competitive benefit of standards development
  - RAND commitment can be vague
  - Transparency in price may increase competition

- Voluntary unilateral Ex-Ante disclosure is highly unlikely to require antitrust scrutiny

- Joint Ex-Ante discussions that are reasonably necessary to avoid hold up do not warrant per se condemnation
  - Merit a rule of reason review

- Cautioned that neither Ex-Ante disclosure or discussion may be appropriate for all persons in all situations

See: “Recognizing the Procompetitive Potential of Royalty Discussions in Standards Setting”