ANSI Legal Issues Forum
Patented Technology
in Standards

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European Commission's Horizontal Cooperation Agreement Guidelines

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Horizontal Cooperation Agreement Guidelines

- December 14, 2010
  - DG Competition announced the finalized version of the "COMMUNICATION FROM THE COMMISSION - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" (see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF)
  - Cooperation is of a "horizontal nature" if an agreement or agreed practice is entered into between actual or potential competitors
    - Paragraphs 257-335 address standardization and standard terms agreements
    - Standardization agreements largely refer to standards-setting organizations' (SSOs') procedures and policies

Standardization Agreements Generally

- Can be procompetitive:
  - Can increase competition and lower costs, provide information and enable interoperability
- Can be anti-competitive:
  - Restricting price competition, foreclosing new innovative technologies, and excluding or discriminating against certain companies (including limited access to the standard)
- But many standardization agreements do not have sufficient "market power" to produce restrictive effects on competition
  - If there is sufficient competition between standardized solutions, or between a standardized solution and a proprietary one, then normally there will be no reason for competition-related concerns
  - Standardization agreements that fall into this category arguably do not need to consider the "safe harbor" and other factors

"Safe Harbor" Criteria (Paragraphs 280-286)

- These criteria are only relevant if there is a risk of substantial market power
  - In that situation, any such agreement that meets the "safe harbor" criteria will also normally not raise any competition law concerns
- But if any such agreement does not satisfy all of the "safe harbor" requirements, there is no presumption that such agreement raises a competition law issue
  - Instead, a self-assessment should be made under an "effects-based" analysis (similar to the "rule of reason" in connection with US antitrust law)
  - "[I]t is recognized that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy"

“Safe Harbor” Criteria

- There must be unrestricted participation in the standardization efforts
  - Participation is open to all competitors, and the voting rules are non-discriminatory
- There is no obligation to comply with the standard
- The procedures and standardization process are transparent so that a wider circle of stakeholders can stay informed
- There must be effective “access” to the standard (both to the document and any essential IPR) on fair, reasonable and non-discriminatory terms
- There must be a clear and balanced IPR policy

“Safe Harbor” Criteria – FRAND Commitment

- “In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms **("FRAND commitment**")”
  - But the policy also can allow IPR holders to exclude specified technology from this commitment
  - The policy must require that any participating IPR owner who provides such a commitment shall “ensure” that any company to which the IPR owner transfers such IPR is bound by the original commitment

"Safe Harbor" Criteria - Disclosure

- "Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development"
  - The disclosure can include the identification of specific IPR or can be more general
  - Such a disclosure requirement would not be needed for participation-based IPR policies that are based on a FRAND-RF commitment
    - If a participation-based IPR policy has a FRAND commitment, then other factors may apply
    - For example, the example given in paragraph 327 provides that even a participation-based IPR policy requiring up-front FRAND commitments (except for opted out technology) and no disclosures can be deemed acceptable where all of the technology options being considered are covered by essential patents

Examples of "Effects-Based" Assessment Factors

- Can the members of the SSO develop alternative standards or products that do not comply with the agreed standard?
- Is access to the standard (again, probably both as a document and in terms of essential IPR) limited to members (or some group other than all third parties)?
  - However, this can be mitigated if there are competing standards or competition between a standardized solution and a non-standardized one
- Is participation somehow restricted such that all competitors/stakeholders are precluded from participating?
  - However, this can be mitigated by competing standards and/or SSOs
  - "Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition…"
  - It also can be mitigated if there is a process by which stakeholders are kept informed and consulted on the work in progress
- Voluntary disclosure policies may be all right as long as it can be shown that informed decisions are taking place

FRAND – paragraphs 287-291

- Participants and not SSOs will have to assess whether licensing terms are FRAND
  - Licensors must appreciate the implication of their commitments
- In case of a dispute, "the assessment of whether fees charged for access to IPR in the standards-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR"
  - There are various assessment methods that may be used; none preferred

FRAND

- Cost-based methods can pose challenges in that it is often difficult to assess the specific costs attributable to the specific IPR
- Can compare licensing fees charged *ex ante* with fees charge *ex post*
  - "This assumes that the comparison can be made in a consistent and reliable manner"

FRAND

- Alternatively can obtain an independent expert assessment
  - Can consider *ex ante* disclosures of licensing terms
  - Can consider rates charged for the same IPR in connection with other comparable standards
- Other methods may be appropriate as well
- "[I]t should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts"

Ex Ante Disclosure of Terms

- "Finally, standard-setting agreements providing for **ex ante disclosures of most restrictive licensing terms**, will not, in principle, restrict competition within the meaning of Article 101(1)"
  - Normally a policy that "chooses to provide for IPR holders to individually disclose their most restrictive licensing terms" will not normally raise competition law concerns
  - Guidelines are silent on the issue of joint negotiations
    - Probably will be assessed under an "effects-based" analysis
  - DG Competition arguably is neutral on *ex ante* policies
    - Up to the SSO and its members to decide