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WHY ASDs SHOULD WANT TO ADOPT POLICIES THAT REQUIRE EX ANTE DISCLOSURE OF LICENSE TERMS

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DOJ BLESSED THIS IDEA FIVE YEARS AGO:

- Ex ante disclosure of license terms "permits the working group members to make more informed decisions when setting a standard."
- "At a minimum, the disclosure of most restrictive licensing terms decreases the chances that the standard-setting efforts of the working group will be jeopardized by unexpectedly high licensing demands from the patent holder."
- That disclosure from each patent holder "would allow working group members to evaluate substitute technologies on both technical merit and licensing terms."
- "Adopting this policy is a sensible effort by VITA to address a problem that is created by the standard-setting process itself. Implementation of the proposed policy should preserve, not restrict, competition among patent holders."

DOJ Business Review Letter on VITA's Proposed Patent Policy, October 30, 2006.

NIST STUDY RELEASED FOUR MONTHS AGO SHOULD ALLAY CONCERNS OVER NEGATIVE EFFECTS

- "In general, we did not find that ex ante disclosure policies resulted in measurable negative effects on the number of standards started or adopted, personal time commitments or quality of standards, nor was there compelling evidence that ex ante policies caused the lengthening of time required for standardization or the depression of royalty rates."

- "There was some evidence to suggest that the adoption of ex ante policies may have contributed positively to some of these variables."

- "Moreover, a significant majority of VITA participants responding to our survey felt that the information elicited by the organization's ex ante policy was important and improved the overall openness and transparency of the standards-development process."

  An Empirical Study of the Effects of Ex Ante Licensing Disclosure Policies on the Development of Voluntary Technical Standards by Jorge L. Contreras for NIST, June 27, 2011.

INCREASING NEED FOR MEASURES TO MITIGATE HOLDUP DISPUTES OVER EX POST LICENSE DEMANDS

- NIST study finds "recent and growing trend to dispute the meaning of FRAND, particularly with regard to royalty levels, in the standards development context." [1]
- Prominent standards participants find "an increasing number of disputes" over whether license demands comply with RAND commitments "and their prevalence in widely implemented standards such as 3G wireless and WiFi." [2]

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1 NIST Study at 4.

2 Response of Cisco Systems, Hewlett-Packard Company, International Business Machines Corporation, and Research in Motion Ltd. To FTC Request for Comment on Standard-Setting Issues, at 14 and n. 26, August 1, 2011.

AMERICAN SOCIETY OF MECHANICAL ENGINEERS V. HYDROLEVEL CORP., 456 U.S. 556 (1982)

- SDO incurs antitrust liability when anticompetitive harm occurs as a result of the SDO's failure to implement procedures aimed at preventing abuse of its processes.
- "[A] rule that imposes liability on the standard setting organization – which is best situated to prevent antitrust violations through abuse of its reputation – is most faithful to the congressional intent that the private right of action deter antitrust violations" (456 U.S. at 571, 572-73).
- Court reaffirmed SDOs' obligations to avoid abuses of their processes six years later in Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988): antitrust legality of standard-setting "depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition" (id. at 509).

HYDROLEVEL DOCTRINE REEMERGES THREE MONTHS AGO: TRUEPOSITION, INC. V. ERICSSON, QUALCOMM, ALCATEL-LUCENT, 3 GPP AND ETSI, U.S.D.C. PA, COMPLAINT FILED JULY 20, 2011

- "By their failures to monitor and enforce the SSO Rules, and to respond to TruePosition's specific complaints concerning violations of the SSO Rules, 3 GPP and ETSI have acquiesced in, are responsible for, and complicit in, the abuse of authority and anticompetitive conduct . . . of Ericsson, Qualcomm, and Alcatel-Lucent and have joined in and become parties to their combination and conspiracy." Complaint ¶ 100.
- "Defendants 3GPP and ETSI each failed in their respective obligations to ensure compliance with the SSO rules, and knowingly permitted defendants Ericsson, Qualcomm, and Alcatel-Lucent to violate these rules, procedures, and due process requirements so as to achieve anticompetitive and unlawful objectives in restraint of trade. They thereby joined in and became part of the illegal combination and conspiracy among Ericsson, Qualcomm, and Alcatel-Lucent." Complaint ¶ 129.

MANDATORY LICENSE TERMS DISCLOSURE POLICY IS PREFERABLE TO EACH OF THE FOLLOWING ALTERNATIVES:

- RAND Commitment Policy
  -- Nobody knows what RAND means
- Bilateral Negotiation Process
  -- Lack of transparency, invites discrimination
- Voluntary License Terms Disclosure Policy
  -- Few disclosures will occur
- Joint Ex Ante Negotiation Process
  -- Antitrust risk still in play