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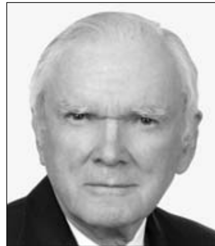
Standard-Setting Groups

By Thomas B. Leary
and Janet L. McDavid



In August, the Federal Trade Commission ruled that Rambus Inc. had unlawfully monopolized the markets for various computer technologies because it had deceived other members of a standard-setting body about its patents and its intentions to enforce them after particular standards had been adopted. The FTC found that Rambus, by silence and misdirection, had exploited the members' expectations of "fair dealing," which included an obligation by participants in the process to disclose patents relevant to the proposed standards and provide assurances that they would be licensed on reasonable and nondiscriminatory (RAND) terms.

Following this decision, some commentators have suggested that members of a standard-setting body risk antitrust exposure of a quite different kind, namely a claim that their collective refusal to deal with anyone who fails to provide the requisite assurances is an illegal boycott. This concern has been considerably eased by the publication of a business-review letter on Oct. 30, signed by Thomas Barnett, assistant attorney general in charge of the Antitrust Division of the U.S. Department of Justice. See www.usdoj.gov/atr/public/busreview/219380.htm.

The views of the Antitrust Division

The business-review letter was addressed to counsel for VITA, a trade association with a subcommittee that develops standards for connections between computer systems. The letter stated that the Antitrust Division had no present intention to challenge a requirement that members disclose their patents or patent applications at various critical times in the standard-setting process.

The association's policy also includes a commitment by patent holders that goes beyond a simple promise to license on RAND terms; it also requires disclosure of the maximum royalty rates that would be charged (either in dollars or as a percentage of the sale price) and the most restrictive nonprice terms that would be imposed following adoption of a standard. Later declarations with less onerous terms or lower royalties would still be permitted. The rules of the association, however, also expressly prohibit any "negotiation or discussion" of these rates and terms among the members. As will become apparent, this caveat is likely to raise difficult issues.

The Antitrust Division's business-review letter reasoned that "[c]ollaborative standard-setting can produce many pro-competitive benefits." It pointed out that interoperability standards, in particular, "can enable consumers to share information with each other and to interconnect compatible products from different producers." At the same time, the letter pointed out that the "process can also result in exclusionary and collusive practices that…violate the antitrust laws," and cited previous U.S. Supreme Court cases where it appeared that the process narrowed rather than expanded competitive alternatives. In response to these cases, "many [standard-developing organizations] implemented rules that strictly forbid all activities that could potentially result in antitrust liability, including restrictions on discussions about the terms and conditions of licenses to patents that are essential to a standard."

The letter went on to point out that VITA's disclosure policy "would relax these [usual] restrictions somewhat by requiring patent holders" to disclose in advance the most restrictive terms they will impose. It cited to VITA's recent experience that shows a mere commitment to license on RAND terms "is insufficient to ensure that its standards remain open." VITA had represented to the Antitrust Division that several patent holders have gone on to demand "royalties that were significantly higher than expected."

The VITA experience highlights an issue in common standard-setting policies that simply require a commitment by the patent holder to offer RAND license terms. What happens if there is a dispute about whether the patent holder has reneged on its commitment? This issue actually arose in a recent case, *Broadcom Corp. v. Qualcomm Inc.*, No. 05-3350 (D.N.J. Aug. 31, 2006), now on appeal.

Broadcom's complaint charged that a

Thomas B. Leary, *a former commissioner at the Federal Trade Commission, is of counsel, and* **Janet L. McDavid** *is a partner, at Hogan & Hartson in Washington.*

standard incorporating Qualcomm technology was adopted only after Qualcomm had agreed to license its technology on fair, reasonable and nondiscriminatory terms. The complaint further charged that, after adoption of the standard, Qualcomm had violated its commitment and refused to license to Broadcom on the promised RAND terms. The district court held, inter alia, that this factual scenario did not support a monopolization claim under § 2 of the Sherman Act because the complaint did not show the requisite injury to competition. The court reasoned that Qualcomm has a legal monopoly over the patented technology anyway, and that these monopoly rights are not affected if the technology has been incorporated into a standard. The court acknowledged that there may be a cause of action under another legal theory (presumably contract or estoppel), but that Qualcomm's conduct did not violate the antitrust laws.

Although it is not specifically mentioned, the *Broadcom* litigation poses the issue dealt with in the Antitrust Division's business-review letter. Regardless of whether a dispute of this kind gives rise to an antitrust remedy or a contract remedy, it is difficult to determine the specific content of a promise to license on RAND terms.

On the other hand, some participants in a standard-setting group may want advance assurances. The process can be long and intensive. There might be a number of competing solutions for a matter under consideration, each with varied advantages and disadvantages. Cost is obviously an important variable, and an important element of cost may be royalties and restrictions on the use of particular technologies. Advance information on those issues may facilitate standard setting.

The business-review letter should provide some comfort for members of standard-setting bodies, but there are still unanswered questions. For example, the mandated advance disclosure of the most burdensome licensing provisions will enable members to select the optimal technologies with this relevant information on the table. Suppose, however, that the members collectively decide after the disclosure that a particular technology will be too expensive, and begin to go down a different path. Could this collective decision to abandon consideration of the expensive technology be viewed as a group boycott? Suppose the patent holder then "unilaterally" scales back its maximum demands, in order to stay in the race. If the members are attracted by the new terms and react favorably, they arguably have engaged in a prohibited "negotiation"—even though the patent holder, as well as the other members, might be better served by this kind of "negotiation" than by an outright rejection. Or suppose that the group discusses the limitations on terms it would be willing to accept for a particular technology before any patent holder has declared itself. Would this also be a "negotiation," despite the obvious efficiencies? The boundaries are not clear.

An Antitrust Division business-review letter eased fears that a group's collective refusal to deal would be held an illegal boycott.

The issue, taken in the larger antitrust context

The problem here, as in other areas of antitrust, is that outcomes may depend on formalistic distinctions, rather than fundamental economics. Formalism is embedded in the basic structure of the antitrust laws because § 1 of the Sherman Act requires collective action or "agreement," and § 2 does not. Since many decisions of business significance invariably require the participation of many individuals, it has not always been easy for courts to draw the boundaries between collective and unilateral conduct.

The Antitrust Division's letter notes that VITA's prohibitions on collective negotiations of license terms will not permit licensees to depress the price of licensees for patented technologies through joint action. This is clearly true. However, another venture could defend collective negotiations on the ground that mere selection of technology by the group also confers substantial offsetting advantages on the patent holder. A patent confers "monopoly power" over a product or a process; a standard that requires a license from the patentee can confer monopoly power over a market—and there is a big difference. In addition, if membership requirements are unpalatable, the patent holder can presumably refuse to participate in the standard-setting activity altogether and simply assume that its superior technology will lead to its adoption.

This is not a criticism of the Antitrust Division's business-review letter, which offered a sound opinion on the specific facts presented. Business-review letters cannot in practice deal with a full rule-of-reason inquiry; what they do best is provide assurance against a per se attack by the agency (but not by potential private claimants). In the end, however, it is likely that courts will apply the principles that govern joint ventures and ancillary restraints.

The most significant antitrust risk in standard-setting is that the process will be rigged by dominant members to favor one solution over another, based on their individual interests rather than objective criteria. If an association takes care to avoid this problem, collective efforts to gather information that will inform the process—including information on the costs of intellectual property—may be upheld as reasonably ancillary to the achievement of a beneficial objective, in a rule-of-reason analysis. NLJ

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