

Licensing and Disclosure Rules in Standard Setting

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Standard Setting Organizations (SSOs) and Antitrust

Following *FTC v. Dell*, *Broadcom v. Qualcomm*, *FTC v. Rambus*, *EC v. Rambus*, attention of academic and policy debate on the functioning of standard setting consortia and the design of their rules.

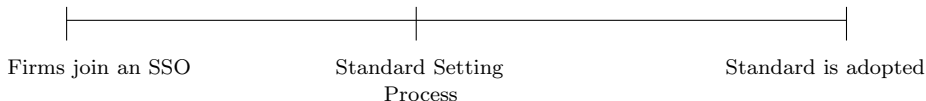
United States: Department of Justice and Federal Trade Commission guidance to VITA and IEEE on the design of respective licensing rules.

- ▶ Implementation of “ex-ante” licensing policies.

Europe: Commission draft guidelines on horizontal cooperation agreements.

- ▶ Legal framework for the analysis of the deals that can be exempted from the application of art. 101 TFEU.

The Process of Standard Setting



Disclosure rule: on the requirement to disclose the existence of relevant intellectual property to other standard setting participants.

Licensing rule: on the timing (before v. after standard setting) and scope (e.g., royalty free or FRAND) of licensing negotiations.

Licensing Rule

Ex-post licensing: bilateral negotiations among patent holders and adopters *after* standard setting.

- ▶ Risk of hold-up. Timing confers bargaining power to patent holders whose technology is included in the standard, inefficient especially in the presence of competing technologies ex-ante.
- ▶ \Rightarrow Might result in “excessive” pricing (Broadcom v. Qualcomm saga).

Ex-ante licensing: (collective/bilateral) negotiations among patent holders and adopters *before* standard setting.

- ▶ Risk of anticompetitive coordinated practices.
- ▶ But, licensing terms consistent with FRAND.

Licensing Rule: Literature in Economics

Impact of licensing rules on firms' incentives and technology adoption.

General message: ex-ante licensing eliminates the scope for excessive pricing and hold-up (+), however it also limits the rents that can be extracted on the licensing market (−).

- ▶ FROEB, GANGLMAIR, AND WERDEN (FORTHCOMING):
ex-ante licensing might hamper pure licensors' investments in R&D.
- ▶ LAYNE-FARRAR, LLOBET, AND PADILLA (2011):
ex-ante licensing might impair innovators incentives to participate in SSOs.
- ▶ TARANTINO (2011):
ex-post licensing might trigger the inefficient exclusion of the technologies produced by pure innovators from the standard.

Disclosure Rule

Late patent disclosure (with respect to standard adoption) inflates patent holders' bargaining power.

Hold-up caused by lock in: adopters implement the technology in the standard under the presumption that it is *not* patent protected.

- ▶ *Dell Computers, Inc.* (1996): Is patent enforceable even if Dell (deliberately?) failed to disclose it to Video Electronics Standards Association violating VESA's IP policy?
- ▶ *Rambus, Inc.* (2002/2003): It was alleged that Rambus deliberately failed to disclose to JEDEC patent applications relating to SDRAM standard. FTC filed antitrust charges (deceptive conduct) [later also by EC].

Literature in economics: impact of disclosure rule on firms' incentives to participate in SSOs.

Disclosure Rule: Literature in Economics

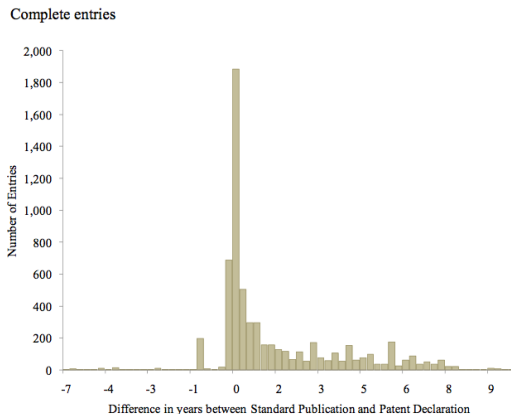
General message: presence of fear of hold-up may impair users' incentives to participate.

This might induce patent holders to give up private information on future technological strategies/existence of patent and disclose.

- ▶ CHIAO, LERNER, AND TIROLE (2007):
patent holders encouraged to disclose if need to reassure users that they will not be held up offsets fear to reveal technological strategies. Main result: firms' propensity to disclose depends on expected royalty fees.
- ▶ GANGLMAIR AND TARANTINO (2012):
firms' might disclose even in absence of an obligation to do so, when disclosure rescues the standard setting process. Of course, imposition of a rule encourages earlier disclosure.

Patents' Disclosure: Some Evidence

- ▶ Essential patents' declarations in ETSI (LAYNE-FARRAR, 2011).
- ▶ 88.7% of declarations after standard publication.



Patents' Disclosure: Some Evidence

Rules matter!

In 2005, ETSI changed its rules to clarify what timely disclosure meant in relation to standard publication.

