

# AntitrustConnect Blog

## DOJ Issues Business Review Letter Pertaining to SSO Policy on Standard-Essential Patents and RAND Commitments

William Diaz and Ryan Leske, McDermott Will & Emery LLP · Monday, May 4th, 2015

The Antitrust Division of the U.S. Department of Justice (DOJ) recently issued a [business review letter](#) stating that it would not challenge the Institute of Electrical and Electronics Engineers, Inc.'s (IEEE) proposed revisions to its patent policy. These patent policy revisions seek to address the “wide divergence” in expectations between holders of patents essential to an IEEE standard and the market participants seeking to implement such standards.

The DOJ's response to the revisions continues the current trend in U.S. law limiting the rights of patent holders that make reasonable and non-discriminatory (RAND) rate commitments as part of the standard-setting process. The DOJ emphasized the policy's benefit of limiting potential exclusionary conduct in two ways: (1) by dictating that RAND rates should reflect the value of the standard-essential patents (SEPs) before the standard is implemented, and (2) by preventing SEP holders that make RAND rate commitments from seeking injunctions or exclusion orders in court proceedings.

### Standard-Setting Organizations and Antitrust Concerns

The last several decades have seen the rise of standard-setting organizations (SSOs), industry groups that set common standards to promote compatibility between products made by different manufacturers. In the technology industry, for example, these standards can specify how one type of product will be able to fit or communicate with other products ( e.g., Wi-Fi signal standards, television transmission standards).

The benefits of standards are extensive. Standards can facilitate product compatibility, reduce costs to consumers by ensuring that products from a variety of suppliers work together efficiently, and make products more valuable. In addition, the standard-setting process promotes a significant amount of procompetitive behavior, because the process can encourage competition among technologies for inclusion in standards.

While the benefits of standards are clear, antitrust concerns can arise when an SEP holder seeks to enforce its patent rights against a firm practicing the relevant standard. This can raise the cost of production for competitors or potentially exclude them from using the technology. In an effort to prevent this kind of behavior, SSOs encourage participants in the standard-setting process to disclose their SEPs and pledge to make the patented technology available to anyone that wants to follow the standard at RAND rates. Despite these efforts, there has been extensive litigation over

the past few years concerning the exact meaning of RAND rates and the value of SEPs.

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### **Proposed IEEE Patent Policy**

The IEEE policy revisions attempt to “provide greater clarity on issues that have divided [patent holders] and standards implementers in recent years.” The revisions seek to prevent or minimize costly litigation between patent holders and standards implementers over the meaning of reasonable rates and the issue of injunctive relief, both of which have created difficulties for obtaining the benefits mentioned above.

The revised policy would invite participants in the IEEE working groups to disclose patent claims that may be essential to a standard under development. Upon disclosure, the holder of the patent is asked to submit a Letter of Assurance (LOA). In the LOA, the patent holder can:

- Make licenses available without compensation;
- Make licenses available at a RAND rate;
- Commit to not enforce its essential patent claims against any person complying with the standard;  
or
- State its unwillingness or inability to license its essential patent claims.

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Beyond this structure, the revised policy implements four key changes.

1. The revised policy defines a reasonable rate to be “appropriate compensation to the patent holder for the practice of an Essential Patent Claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim’s technology in the IEEE Standard.” This definition essentially seeks to provide compensation to the patent holder for the value of the patent before the essential patent claim was incorporated into the IEEE standard. The revisions, however, do not dictate a specific calculation methodology or specific RAND rates.
2. The revised policy states that a patent holder that has submitted an LOA is not permitted to seek an injunction or exclusion order unless the standard implementer “fails to participate in, or to comply with the outcome of, an adjudication, including an affirming first-level review.”
3. The policy seeks to clarify the meaning of non-discrimination. The revisions make clear that a patent holder cannot refuse to license to any implementers once an LOA has been submitted, regardless of where a standard implementer sits in levels of production. The purpose of this requirement is to prevent patent holders from discriminating against implementers that make

components or sub-assemblies, rather than an end-use product.

4. The revised policy makes clear that when a patent holder's LOA has indicated "reciprocity," a potential standard implementer cannot both receive the benefit of the patent holder's LOA and refuse to license to the patent holder the implementer's own essential patent claims on the same standard.

### **DOJ Business Review Letter**

The DOJ issues a business review letter whenever a person concerned about the legality under the antitrust laws of a certain business practice requests a statement from the DOJ about its current enforcement intentions with respect to that business conduct. In this case, IEEE requested that the DOJ review its proposed revisions to its patent policy and provide such a statement.

In a letter written by Acting Assistant Attorney General Renata B. Hesse, the DOJ declared that it does not presently intend to challenge the IEEE's revisions to its patent policy. The DOJ concluded that harm is unlikely to result from the revised policy because its provisions are consistent with the direction of U.S. law interpreting RAND commitments. The DOJ also pointed to the fact that licensing rates ultimately are determined by bilateral agreements (as opposed to rates dictated by the policy) and that patent holders can avoid RAND commitments while still participating in the standards-setting process.

The DOJ acknowledged that the policy behind the IEEE definition of RAND rates aligns with the goals of RAND commitments and U.S. court precedent. The revised policy "provid[es] the patent owner with appropriate compensation, while assuring implementers that they will not have to pay any hold-up value connected with the standardization process." The DOJ believes this will result in procompetitive benefits, including speeding up licensing negotiations, limiting patent infringement litigation and increasing competition among technologies for inclusion in IEEE standards.

Specifically addressing the ban on injunctions and exclusive orders for patent holders that make LOA commitments, the DOJ praised the proposed revisions for limiting the threat of exclusionary conduct by SEP holders. The DOJ stated: "The threat of exclusion from a market is a powerful weapon that can enable a patent owner to hold up implementers of a standard. Limiting this threat reduces the possibility that a patent holder will take advantage of the inclusion of its patent in a standard to engage in patent hold up, and provides comfort to implementers in developing their product."

### **Practical Implications**

Now that the DOJ has stated its intention not to challenge the IEEE revised policy, more SSOs may modify their patent policies to reflect the guidance in the DOJ's business review letter. A patent holder should carefully evaluate an SSO's patent policy as it determines whether and to what extent it is willing to join the SSO and participate in its standard-setting activities given the potential limitations on patent enforcement rights. For a firm implementing a particular standard, policies such as the proposed IEEE patent policy provide additional clarification on the meaning of RAND rates and limitations on an SEP holder's ability to seek injunctive relief.

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