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- Contribution from the United States -

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This attached document from the United States is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 7-8 October 2025 in Asunción, Paraguay.

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Session II: Competition and Intellectual Property

– Contribution from the United States –

1. Introduction

1. This paper addresses the intersection of competition law and intellectual property ("IP") and, in particular, outlines the U.S. Department of Justice, Antitrust Division's ("DOJ") perspective on standards development.[1] It first provides background on the intersection between antitrust laws and IP laws. It then describes the nature and effects of standards and standards development, which includes both potential procompetitive and anticompetitive effects. The paper then describes the frameworks that are in place in the United States to promote standards development in a voluntary, open, and balanced way. Finally, it discusses several antitrust issues with respect to standards development and actions that the DOJ has taken to address these issues.

2. Antitrust and IP laws

2. U.S. antitrust law has long recognized that IP laws and antitrust laws are complementary bodies of law that are aligned in their common goal of fostering innovation that creates dynamic competition.[2]

3. Innovation leads to the development of new products and services which are a key element of the competitive process. IP rights protect and promote innovation by giving individuals and companies the ability to obtain enforceable rights to their inventions. This ability to enforce their rights and receive compensation for use of their inventions

[1] This submission was prepared by the Antitrust Division of the U.S. Department of Justice in connection with the Competition Committee's session on "Competition & Intellectual Property." The United States has previously submitted papers to the Competition Committee discussing U.S. competition policy concerning patent licensing and standard-setting activities. *See* Licensing of IP Rights and Competition Law (DAF/COMP/WD(2019)58), https://www.justice.gov/atr/page/file/1313541/dl?inline; Intellectual Property and Standard Setting (DAF/COMP/WP2/WD(2014)116), https://www.justice.gov/sites/default/files/atr/legacy/2015/01/23/311234.pdf; Competitive Aspects of Collective Standard Setting (DAF/COMP/WP2/WD(2010)28), https://www.justice.gov/atr/page/file/1048411/dl?inline.

[2] *See, e.g.*, Licensing of IP Rights and Competition Law (DAF/COMP/WD(2019)58); U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 1.0 (2017), https://www.justice.gov/atr/IPguidelines/dl ("2017 Antitrust-IP Guidelines"); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) ("The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition."); Statement of Interest of the United States, *Radian Memory Systems LLC v. Samsung Electronics Co., LTD.*, No. 2:24-cv-1073 (E.D. Tex.), ECF No. 52, https://www.justice.gov/atr/media/1404506/dl?inline ("Patent rights also work with the antitrust laws to spur competition among innovators to create new and useful technologies, products, or services for consumers.").

encourages individuals and companies to invest in research and development ("R&D") and to pursue the development of new products and technologies.

4. Antitrust laws, which safeguard the competitive process, promote innovation and efficiencies as these are core elements of competition. Antitrust laws promote innovation by prohibiting unreasonable restraints of trade and other anticompetitive conduct. By preventing anticompetitive or exclusionary conduct, antitrust laws foster an environment where all forms of competition thrive – including innovation and price competition. Unfettered competition leads to lower prices, improved quality, increased productivity, and increased innovation.[3]

3. Standard development processes and competition

5. Nearly all of the products we rely on today use industry standards. From mechanics, electronics, telecommunications, to information systems, standards align complex technological systems and are everywhere around us.[4]

6. The process by which standards are developed and adopted can vary. In the United States, standards development is typically "sector based and market led."[5] Businesses often collaborate to develop industry standards through standard development organizations ("SDOs"). Successful standards are typically used by numerous companies in the industry, regardless of whether they directly participated in the standard development process. Standards may also be developed unilaterally in the marketplace, where different companies may compete to have their own technology win the race to become the de facto standard.

7. It is well recognized that, by fostering interoperability and pooling cutting-edge technologies of different players, industry standards can make products safer, more innovative, less costly for firms and more valuable to consumers. Standards can promote

[3] The antitrust laws rest on the principle that "competition will produce not only lower prices, but also better goods and services" in the long run. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978); *id.* (Congress's "assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers."); *see also NCAA v. Alston*, 594 U.S. 69 (2021) ("Congress tasked courts with enforcing a policy of competition on the belief that market forces yield the best allocation of the Nation's resources.").

[4] The White House Office of Management and Budget's OMB Circular A-119, Revised, defines the terms "standard" and "technical standard" as all of the following: "(i) common and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems practices; (ii) the definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; formats for information and communication exchange; or descriptions of fit and measurements of size or strength; and (iii) terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process, or production method." OMB Circular No. A-119, Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (rev. 2016) § 2, https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf.

[5] Competitive Aspects of Collective Standard Setting (DAF/COMP/WP2/WD(2010)28) § 2.1.

innovation, efficiency, and consumer choice.[6] The DOJ has long recognized the benefits of collaborative standard development.[7]

8. At the same time, collaborative standard development processes are not without competitive risk. Such processes often involve industry members coming together to make decisions about how they collectively intend to conduct business. Collaboration of this type inherently carries antitrust risk. As the U.S. Supreme Court has recognized, "a standard-setting organization . . . can be rife with opportunities for anticompetitive activity."[8] This is because "the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."[9] Moreover, there are risks that companies may attempt to use the standards-development process to their own economic advantage. To mitigate these risks, many SDOs adopt an antitrust policy, and warn their members against breaching antitrust laws.

9. Courts have thus found antitrust liability in circumstances that involve the manipulation of the standard-development process or the improper use of standards to exclude rivals from the market. For example, in *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, steel conduit producers were found to have violated the antitrust laws by colluding to exclude alternative plastic conduits from the influential electric code developed by the SDO.[10] The Supreme Court noted that what parties "may not do (without exposing [themselves] to possible antitrust liability for direct injuries) is bias the process by . . . stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition."[11]

10. Similarly, in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, antitrust liability arose out of SDO members who purported to issue an interpretation that a competitor's product was unsafe under the SDO's code in order to exclude the competitor from the market.[12]

11. As technology has become increasingly complex, standards often incorporate patented technology. The incorporation of patented technologies in standards can also raise competitive issues. Before a standard is established, multiple different technologies may compete to be incorporated into the standard. But once a standard is adopted, switching may become burdensome and expensive, and some effective substitutes for that standard

[6] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (When "private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages").

[7] *See, e.g.*, Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq. (Oct. 30, 2006), https://www.justice.gov/atr/response-vmebus-international-trade-association-vitas-request-business-review-letter ("Performance standards can improve the health and safety of consumers and improve consumers' confidence in a product's quality. Interoperability standards can enable consumers to share information with each other and to interconnect compatible products from different producers.").

[8] *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

[9] *Allied Tube & Conduit Corp.*, 486 U.S. at 500.

[10] *Id.* at 496-97.

[11] *Id.* at 511.

[12] *Hydrolevel Corp.*, 456 U.S. at 559-565.

may no longer be available. This phenomenon means that a patented technology incorporated into a standard has the potential to gain significant market power. Once a standard is adopted, patent holders may theoretically take advantage of the market power they gain to engage in patent hold-up, such as excluding a competitor from a market or extracting higher rents from the invention.[13]

12. To mitigate these issues, many SDOs require, ahead of time, that members indicate whether they would be willing to license any of their IP that is or may become essential to the standard—i.e., standard-essential patents (or "SEPs")—on "reasonable and nondiscriminatory ("RAND") or "fair, reasonable, and non-discriminatory" ("FRAND") terms (together, hereinafter "F/RAND" terms).[14] F/RAND commitments thus serve as safeguards that, where specific SEPs grant market power, prevent standard-essential patent holders from extracting supra-competitive terms and conditions Some SDOs also require that participants "disclose the existence of IP rights that may be infringed by the potential users of a standard in development."[15] These practices help ensure that patented technologies incorporated into a standard do not cannot be used to extract supra-competitive pricing .

4. Safeguards and guidelines for SDOs and standard development activities

13. There are multilateral and U.S. frameworks in place that help mitigate competitive risks with respect to collaborative industry standards and standard development processes. In general, standards developed through a voluntary, open, transparent, balanced and consensus-based approach are more likely to be procompetitive.

14. The World Trade Organization ("WTO") Agreement on Technical Barriers to Trade ("TBT Agreement"), adopted in 1994, imposes multilateral obligations on the United States and other WTO members.[16] The TBT Agreement includes an annex titled "Code of Good Practice for the Preparation, Adoption, and Application of Standards."[17] In 2000, the Code of Good Practice was "supplemented by a decision of the Committee on Technical Barriers to Trade, which invites SDOs to adopt 'procedures for soliciting input from a wide range of interests,' and notes that '[b]odies operating with open, impartial and transparent procedures, that afford[ ] an opportunity for consensus among all interested parties' are

[13] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 36 (2007), https://www.justice.gov/file/614651/dl?inline.

[14] *Id.*

[15] *Id.*

[16] For example, under the TBT Agreement, countries have an obligation to use relevant international standards, except where such standards would be ineffective or inappropriate for fulfilling a legitimate objective. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 120, Article 2.4 ("TBT Agreement"); *see also* 19 U.S.C. § 2532 (directing federal agencies to take into consideration international standards and base standards on international standards if appropriate).

[17] *Id.* Annex 3, 1867 U.N.T.S. at 138 ("TBT Code of Good Practice") available at https://www.wto.org/english/docs_e/legal_e/tbt_e.htm#ann3.

more likely to develop effective standards that do not create unnecessary obstacles to trade."[18]

15. Domestically within the United States, U.S. government policy generally espouses a preference for voluntary consensus standards developed by non-government players in "voluntary consensus standards bod[ies]" to achieve regulatory and procurement goals. Such "voluntary consensus standards bod[ies]" are defined as organizations using a voluntary standards development process that includes the following elements: openness, balance, due process, appeals process and consensus[19].

16. These very same development principles – openness, balance, due process, appeals process and consensus – serve as effective safeguards against anticompetitive conduct.

17. The U.S. Standards Development Organization Advancement Act of 2004 ("SDOAA") recognized the important role these due process principles serve.[20] Seeking to encourage procompetitive standards development, the SDOAA amended the National Cooperative Research and Production Act of 1993 ("NCRPA") to extend certain antitrust protections provided by the NCRPA to SDOs in the context of their standards development activity.[21] To this end, the SDOAA's provisions limit antitrust risk for standards development activities that fall within the scope of the Act and are properly notified.

18. Specifically, the SDOAA's potential protections fall under two prongs. First, the SDOAA provides that antitrust liability for SDOs engaging in standard development activities will be assessed under the rule of reason, being exempted from treatment as *per se* illegal under the U.S. antitrust laws. Second, the SDOAA also allows SDOs to limit their antitrust exposure by providing protection from treble damages for standards development activities that are properly notified to the DOJ. Importantly, that protection only extends to "conduct that is within the scope of a notification that has been filed" under the SDOAA.[22] The notification must be filed within 90 days after commencing a standards development activity and must disclose the nature and the scope of such activity.[23] For this reason, SDOs must update their disclosure with additional notifications for protection of

[18] See World Trade Organization, Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 G/TBT/1/Rev.15 at 20, available at https://web.wtocenter.org.tw/file/PageFile/378062/GTBT1R15.pdf; Justus Baron, Jorge L. Contreras, Pierre Larouche, *Balance and Standardization: Implications for Competition and Antitrust Analysis*, 84 Antitrust L.J. 425, 430 (2022) (quoting Comm. on Tech. Barriers to Trade, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, G/TBT/9, Annex 4 (Nov. 13, 2000) (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement)).

[19] OMB Circular No. A-119, Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (rev. 2016) § 2 at 16.

[20] 15 U.S.C. §§ 4301-4306.

[21] 15 U.S.C. §§ 4301-4306; *see also* Press Release, U.S. Dep't of Justice, Justice Department Implements the Standards Development Organization Advancement Act of 2004 (June 24, 2004), https://www.justice.gov/archive/atr/public/press_releases/2004/204345.htm.

[22] 15 U.S.C. § 4303(a).

[23] 15 U.S.C. § 4305(a)(2).

"standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing."[24]

19. The SDOAA imposes important limitations on who may qualify as an SDO for the purposes of the Act. It defines the term by reference to the Office of Management and Budget ("OMB") Circular A-119: an SDO for the purposes of the Act is an organization that "plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119."[25] Notably, the SDOAA's definition of the term "standards development activity" also includes a specific reference to "actions relating to the intellectual property policies of" the SDO.[26] In other words, actions related to the SDO's intellectual property policy are considered a "standards development activity" and, as such, are subject to the openness, balance, due process, appeals process and consensus requirements.

20. OMB Circular A-119, referenced in SDOAA, was last updated in 2016. Initially released in 1980, OMB Circular A-119 is a memorandum to executive agencies that sets out policies with respect to the U.S. government's role in the development and use of standards and conformity assessment.[27] The Circular directs U.S. agencies "to use standards developed or adopted by voluntary consensus standards bodies rather than government-unique standards, except where inconsistent with applicable or otherwise impractical."[28] The Circular recognizes that the right incentives for establishing standards will "encourag[e] long-term growth" and also "promot[e] efficiency, economic competition, and trade."[29]

21. In the 2016 revision, the OMB revised Circular A-119 to elaborate on the definition of each of the identified attributes for what constitutes a proper SDO.[30] The Circular explains that, a "voluntary consensus standards body" is one that develops standards through a process that includes five attributes: openness, balance, due process, appeals process, and consensus.[31]

[24] *Id.*

[25] 15 U.S.C. § 4301(a)(8); *see also* Pub. L. No. 108-237, title I, § 102(5)(C), 118 Stat. 661, 662 (2004) ("Such principles provide for . . . balancing interests so that standards development activities are not dominated by any single group of interested persons . . . .").

[26] 15 U.S.C. § 4301(a)(7).

[27] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-119 § 1, as revised January 27, 2016, https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf ("OMB Circular A-119"). In 1998, OMB Circular No. A-119 was revised in response to the National Technology Transfer and Advancement Act ("NTAAA"), which, among other things, required federal agencies to use technical standards developed or adopted by voluntary consensus standard bodies. *See* Pub. L. No. 104-113 (1996).

[28] *Id.* § 1.

[29] *Id.*

[30] Notice on Revision of OMB Circular No. A-119, 81 Fed. Reg. 4673 (Jan. 27, 2016).

[31] OMB Circular A-119, *supra* note 26, § 2e.

22. Openness means that "[t]he procedures or processes used are open to interested parties," and that such interested parties have a meaningful opportunity to take part in the standard development process "on a non-discriminatory basis."[32]

23. Balance means that "a broad range of parties, with no single interest dominating the decision-making," should be involved in the standard development process.[33]

24. Due process means policies and procedures that are "documented and publicly available," providing participants enough time to review drafts and prepare their views, and "a fair and impartial process for resolving conflicting views."[34]

25. An appeals process means that there should be a process by which "procedural appeals" are impartially handled.[35]

26. Finally, consensus means a system of "general agreement," though "not necessarily unanimity," through which viewpoints are "considered using fair, impartial, open, and transparent processes."[36]

27. In addition, in order to qualify as a "voluntary consensus standard" as defined by the Circular, a standard that includes patented technology must be governed by IP policies that are "easily accessible, set out clear rules governing the disclosure and licensing of the relevant intellectual property, and take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard."[37]

28. The Circular also notes that voluntary consensus standards bodies "often" have IP policies that include provisions requiring that owners of relevant patented technology incorporated into a standard make that intellectual property available to implementers of the standard on non-discriminatory and royalty-free or reasonable royalty terms (and bind subsequent owners of standards essential patents to the same terms)."[38]

29. In sum, under the SDOAA and the criteria set forth in the OMB Circular A-119 for voluntary consensus standard bodies that, only SDO activity, including "actions relating to the intellectual property policies" of SDOs, that comply with the attributes noted in the Circular are guaranteed antitrust rule of reason treatment under the SDOAA. SDO activity including actions relating to the intellectual property policies, may be *per se* illegal.

5. Antitrust issues in the context of SDOs and standard development

30. The U.S. DOJ enforces the antitrust laws, including against standard-development activities that harm competition. From an antitrust perspective, the requirements outlined in OMB Circular A-119 and incorporated by the SDOAA are critical, and these assessments form an integral part of the DOJ's assessment of such activities.

[32] *Id.* § 2e(i).

[33] *Id.* § 2e(ii).

[34] *Id.* § 2e(iii).

[35] *Id.* § 2e(iv).

[36] *Id.* § 2e(v).

[37] *Id.* § 2d.

[38] *Id.*

31. The DOJ enforces the proper interpretation of the SDOAA. Clarifying the correct scope and application of the SDOAA will promote greater balance and transparency for SDOs and reduce the likelihood of anticompetitive behavior. Stakeholders should not misunderstand or misapply the SDOAA in an effort to shield themselves from antitrust risks associated with their collaborative activities. Attempts to invoke the protections of the SDOAA without meeting the requirements for a timely or appropriate disclosure will not be accepted.

32. For example, the DOJ has filed a statement of interest in *NSS Labs v. Crowdstrike*, discussing the importance of the OMB Circular A-119 due process criteria and how they affect the SDOAA's rule-of-reason treatment.[39] In *NSS Labs*, the defendant SDO argued that it had immunity from *per se* treatment under the SDOAA because it had filed a notification under the SDOAA's requirements. However, as the statement of interest made clear, whether the defendant SDO could benefit from the SDOAA's protections depended on whether its standards development process incorporated the OMB Circular A-119 criteria.[40] Moreover, companies may not benefit from the SDOAA's exemption based on their own conclusory assertions that they qualify as an SDO under the Act.[41] Rather, the burden of proving that an SDO and its particular standard development activities fall within the SDOAA's limited antitrust exemption should be borne by the company seeking to take advantage of it.[42] This is consistent with the way that antitrust exemptions are narrowly construed under the U.S. antitrust laws.[43] For example, in that case, the defendant admitted that its membership is, in fact, not balanced,[44] which suggests that it was not a qualifying SDO under the SDOAA.

33. As the DOJ's statement of interest in *NSS Labs* illustrates, the SDOAA does not insulate the notified activity from antitrust scrutiny by the government. To the contrary, the Act contemplates that notified conduct in some instances may trigger "investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by the [SDO] with respect to which [a] notification was filed."[45] The SDOAA's legislative history also makes clear that such SDO notifications are designed to enable "enforcement agencies" to review such conduct.[46]

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[39] Statement of Interest for the United States, *NSS Labs, Inc. v. Crowdstrike, Inc.*, No 5:18-cv-05711-BLF (June 26, 2019), https://www.justice.gov/atr/case-document/file/1178246/download.

[40] *Id.* at 1-2.

[41] *Id.* at 4.

[42] *Id.* at 4-5.

[43] *Id.*

[44] *Id.* at 5.

[45] 15 U.S.C. § 4305(d).

[46] H. Rpt. 108–125, at 2 (May 22, 2003); *see also* statement of Sen. Patrick Leahy, 150 *Cong. Rec.* U.S. Senate, at S3614 (April 2, 2004) ("If these agencies do not object to the standard during this 'screening' phase, but the organization is later sued by a private plaintiff, the SDO would be limited to single damages, rather than the treble damages levied under existing law."); Statement of James M. Shannon, *Standards Development Organization Advancement Act of 2003*: H.R. 1086, hearing before the Task Force on Antitrust of the Committee on the Judiciary, House of Representatives, 108th Congress, 1st sess., at 8 (Apr. 9, 2003) (SDO "activity could be predisclosed to antitrust agencies. In return for such disclosure, the parties receive not immunity but 'detrebled' damages (actual damages), *provided that their subsequent conduct stays within the bounds of their disclosure to the Department of Justice*").

34. The DOJ also looks to whether an organization qualifies as an SDO under the SDOAA and complies with the OMB Circular A-119's attributes of openness, balance, due process, appeals process, and consensus, which informs DOJ's evaluation of the competitive impacts of standard development activities.

35. For example, take the attribute of balance. Competitive concerns can be particularly acute for organization and consortia that do not have the attribute of balance and that are controlled by large implementers (i.e., companies that practice the standardized technology) with market power. This is because large buyers working together can exercise monopsony power. Monopsony power is the "mirror image" of monopoly power.[47] U.S. antitrust laws protect competition not only in output markets where sellers compete, but also in input markets where buyers compete to purchase.[48]

36. The DOJ and the U.S. Patent and Trademark Office ("PTO") recently filed a statement of interest addressing the anticompetitive harm that can be caused by SDOs and the appropriate standards for evaluating irreparable harm in a patent infringement case.[49] According to the plaintiff, despite its best efforts to participate in the market before its patents issued, members of a private consortium shut it out of the industry using standards-development activities.[50] The consortium at issue included several large implementers and allegedly required members to grant royalty-free licenses of patented technology to other members.[51] The plaintiff alleged that it was initially pressured to join the consortia, and, when it refused to do so, defendants and other members of the consortium infringed on the plaintiff's patented technology.[52]

37. Similarly, the attribute of openness means an SDO should be "open to interested parties" who should be able to participate in the standard development process "on a non-discriminatory basis."[53] Open standards that are developed in open, voluntary, SDOs with FRAND commitments usually promote interoperability by reducing lock-in and increase innovation and performance through pooling of technologies. By contrast, proprietary standards that are developed in a closed process (e.g. by a closed consortium), with no procedural protections and no F/RAND commitments can lead to exclusionary conduct and anticompetitive effects. Such closed processes are more susceptible for abuse by dominant implementers who can leverage the proprietary standard to entrench their own dominant market positions. Concerted standard development that lacks the SDOAA and/or F/RAND safeguards poses a threat to market competition.

38. Consortia that do not have intellectual property rights policies in place that meet the SDOAA and the OMB Circular A-119 may also implicate competition issues. The Circular notes that SDO intellectual property policies need to be clear and balanced:

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[47] Statement of Interest of the United States, *Radian Memory Systems LLC v. Samsung Electronics Co., LTD.*, No. 2:24-cv-1073 (E.D. Tex.), ECF No. 52, at 2, https://www.justice.gov/atr/media/1404506/dl?inline (quoting *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007)).

[48] Statement of Interest of the United States, *Global Music Rights, LLC v. Radio Music License Committee, Inc.*, No. 2:16-cv-9051 (C.D. Cal.), ECF No. 111.

[49] *Id.*

[50] *Id.* at 3-4.

[51] *Id.* at 4.

[52] *Id.*

[53] OMB Circular A-119, *supra* note 26, § 2e(i).

> *In order to qualify as a "voluntary consensus standard" for the purposes of this Circular, a standard that includes patented technology needs to be governed by [] such policies, which should be easily accessible, set out clear rules governing the disclosure and licensing of the relevant intellectual property, and take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard.*[54]

39. Consortia that impose mandatory royalty-free cross-licensing on members of the consortium may pose antitrust issues. Cross-licensing and pooling arrangements are agreements between two or more owners of different IP to license to one another or to third parties.[55] These arrangements promote the dissemination of technology and can be accompanied by procompetitive benefits such as "integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation."[56] However, cross-licensing arrangements and pooling arrangements can also have anticompetitive effects. For example, they could be "mechanisms to accomplish naked price-fixing or market division," which would be subject to *per se* treatment under U.S. antitrust laws.[57]

40. The DOJ has recognized that, although cross-licensing and pooling arrangements need not be open to all who want to join, "exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may, under some circumstances, harm competition."[58] In addition, such pooling arrangements can also have the anticompetitive effect of disincentivizing innovation by discouraging participants from engaging in research and development.[59] Members of the group can free-ride on the research and development undertaken by other members, which can reduce the incentive to invest in R&D.[60]

41. Some consortia grant a royalty-free license to members that is conditioned on a royalty-free cross-license among the members of the consortium, sometimes with the express purpose of creating a purportedly royalty-free standard. Such a mandatory, royalty-free cross-licensing scheme is not F/RAND. Standards essential patent owners and implementers typically do not have equal values of portfolios. Therefore, when there are no F/RAND royalties at play to balance value, royalty-free cross-licensing discriminates against cross-licensors that have valuable patent portfolios.

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[54] OMB Circular A-119 at 16.

[55] 2017 Antitrust-IP Guidelines, *supra* note 2, § 5.5.

[56] *Id.*; *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 57 (2007), https://www.justice.gov/file/614651/dl?inline.

[57] 2017 Antitrust-IP Guidelines, *supra* note 2, § 5.5.

[58] *Id.*

[59] *Id.*; *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 58 (2007), https://www.justice.gov/file/614651/dl?inline ("foreclosure of invention" is a potential anticompetitive effect of cross-licensing an patent-pooling agreements).

[60] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 67 (2007), https://www.justice.gov/file/614651/dl?inline ("foreclosure of invention" is a potential anticompetitive effect of cross-licensing an patent-pooling agreements)

42. Especially if a consortium is controlled by dominant players who collectively hold market power, a mandatory royalty-free cross-licensing scheme effectively allows a group of dominant buyers to fix royalties for innovations at zero. As noted above, this may evoke monopsony concerns under U.S. antitrust laws when it is collective action by licensees with the purpose and effect of depriving licensors of the ability to be paid for their IP contributions.[61] Such a system disincentivizes innovation and is harmful to dynamic competition. Innovation may also become artificially limited to companies that are vertically integrated and act as both the innovator and the implementer, because only those companies would have the means of recouping their investment in R&D.

43. Moreover, consortia that develop and impose proprietary standards, if successful, can threaten standards development processes by SDOs that qualify under the SDOAA definition and are F/RAND-committed. A consortium that has dominant implementers as members can drive the adoption of their proprietary standard by adopting the standard themselves and forcing other participants in the ecosystem to adopt that proprietary standard too. And once a standard becomes well-established, a system of mandatory, royalty-free cross-licensing means that any party that requires access to the standard (for example because the party works with the dominant implementer) may be forced into that mandatory royalty-free cross-licensing scheme, under which their IP rights cannot be infringed. This scenario is a concerning one from a competition perspective and reflects that can happen where there is a lack of safeguards in closed proprietary standards development scenarios.

44. Recognizing these competitive issues, DOJ Antitrust Division leadership have previously highlighted the competitive advantages of giving licensees the option to license F/RAND-committed patents essential to a standard "on a cash-only basis and prohibit the mandatory cross-licensing of patents that are not essential to the standard or a related family of standards, while permitting voluntary cross-licensing of all patents."[62]

6. Conclusion

45. IP laws and antitrust laws are aligned in their common goal of fostering innovation that creates dynamic competition. Standards development activities are generally procompetitive when conducted in SDOs that follow the WTO and SDOAA procedural safeguards, that have in place IP policies which take into account the interests of all stakeholders, including IPR holders and those seeking to implement the standard, and as long as F/RAND commitments are in place. Standards development activities in settings that do not meet these due process and/or F/RAND commitment safeguards may violate competition law.

[61] *See* Statement of Interest of the United States, *Global Music Rights, LLC v. Radio Music License Committee, Inc.*, No. 2:16-cv-9051 (C.D. Cal.), ECF No. 111.

[62] Renata Hesse, Six "Small" Proposals for SSOs Before Lunch, at 9, https://www.justice.gov/archives/atr/file/518951/dl?inline=.