



Attorneys at Law

Consortium Standards Bulletin

A ConsortiumInfo.org publication

December 2002

Vol I, No. 1

EDITORIAL

IPR POLICIES: A CALL TO (LAY DOWN) ARMS

The following editorial is adapted from a keynote address delivered by Andrew Updegrove on July 22, 2002 at "Boundaryless Information Flow: The Role of Web Services," a conference organized by The Open Group

When a group of consortium member representatives meets to engage in standard-setting, the goal is to collaboratively agree on a piece of technology which they hope everyone - non-members as well as members alike - will adopt. The hope is that by achieving this end, the members themselves will be able to sell goods and services more certainly, more widely, more economically, and more quickly than otherwise would be the case. Standard setting is about making safer strategic decisions.

If that is the goal, why does the standard-setting process have to be so difficult? Isn't the marketing challenge intimidating enough?

In the last few years, consortium after consortium has become an intellectual property rights ("IPR") battleground upon which some of the largest member companies attack, counterattack, and seek to outflank each other in order to secure their favorite terms. In the meantime, the process of adoption slows, and the potential for "gaming" the system increases. Actual litigation (most recently between Infineon and Rambus) has ensued, and we are aware of other situations where allegations of improper conduct have been made which have not yet broken into public view.

Not surprisingly, the Federal Trade Commission has begun taking an active interest in the situation and has opened an investigation into the conduct of Rambus. More tellingly, the FTC has also publicly stated that all who would engage in standard setting are on notice that their behavior may be investigated if it is alleged to be improper.

What gives rise to this behavior? We propose that the root cause is the failure of some standard setting participants to realize that the gains to be achieved from successful standard setting will almost always outweigh the economic impact (usually a foregone royalty opportunity rather than an economic loss) which the adoption of a standard is likely to have on their patent portfolios. When preexisting patents do read on a standard, there is near universal agreement that a patent holder participating in the standard setting process has the right to withhold a license, so long as it is disclosed in timely fashion.

This is not to ignore the fact that there are a significant number of difficult issues that must be wrestled with in order to create an IPR policy that all can live with. But there is nothing to be gained by fighting the same battle over and over again. The entire standard setting concept is based upon resolving differences once so that companies can get on with the more important challenge of bringing products to market. Why should it be any different when it comes to setting IPR policies?

Its time for the IPR policy wars to stop, and for the standard setting world to set a standard for itself - a standard policy by which it will handle IPR. With such a policy available, a new consortium could look forward to getting started on the technical adoption process business immediately, rather than only after a long, contentious and divisive battle over the rules of submission and adoption.

What's needed is for the industry to have a "constitutional convention" to set a standard policy - a policy which will have alternative terms for a limited number of situations where alternatives are truly needed, but also a well articulated rationale for each alternative, stating where and why that alternative is appropriate. Its time for the industry to compromise once, and agree many times thereafter. Once this is accomplished, the industry can get back to the far more important business of standard setting, rather than arguing about how to do it.

Comments? updegrove@consortiuminfo.org

Copyright 2002 Andrew Updegrove