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EDITORIAL

IT'S TIME TO GET ON THE EX ANTE BUS

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It seems intrinsic to human nature that innovation is inevitably followed by ossification. Each new idea is more likely to be challenged than welcomed, but once it becomes incorporated into accepted wisdom, it becomes the new normative referent – what has become fashionable today to call a "paradigm."

Both of the personality types that set up this paradox make sense in their own ways – the innovator takes greater risks and, when successful, reaps greater rewards, while the average Joe plays it safe, settles for less, and supports the status quo that has been proven to work in the past, at least well enough.

Why ossification, though? Perhaps because there are more technicians than innovators in the world, and because the former values security. But whatever the reason, when new ideas come along, there is a tendency to attack the risk of change simply because it is change, simply because with change comes uncertainty. Better to shoot something down and take no chances than to put something on the line in the hopes of gaining the benefit of those changes that prove to be beneficial.

For better or worse, lawyers are particularly well equipped, as well as apt, to defend the status quo when innovative suggestions are made in many contexts, one of which is the further evolution of intellectual property rights policies in standard setting organizations (SSOs)). After all, the stakes are high (e.g., gaining the maximum return on valuable patent rights, and the risk of running afoul of strict antitrust laws that provide for severe penalties), and the law is complex. It is very easy to paint things in black and white, and to offer dire predictions based upon extreme cases rather than to dissect a situation or proposal, isolate the problematic elements, develop a prudent strategy to address each issue, and allow the innovation to be tested in the marketplace and succeed or fail.

Currently, there is a debate in progress in a number of SSOs that provides an excellent example of this dichotomy in action. The subject of debate is so-called "*ex ante*" disclosure (and even negotiation) of licensing terms, meaning that those that hold patent claims that would be infringed by the implementation of a new standard could not only, prior to adoption, announce (as they do today in many SSOs) the existence of such claims and their willingness to make them available on reasonable and non-discriminatory (RAND), but would also be permitted (or required) to reveal the specific economic and other terms upon which they would make those claims available to implementers.

The value of such disclosures is clear, since there would be greater predictability of result in standards creation, with fewer laboriously created standards later becoming handicapped by excessive royalties or other fees or non-economic terms that inhibit broad adoption. Of course, *ex ante* disclosure would not be a total panacea, since it would have no impact on non-members of the SSO creating the standard, but there have been many examples of valuable standards that have been excessively encumbered by the demands of those that have participated in the development process itself.

How risky would such a procedure be under the antitrust laws? In fact, full negotiation of pricing terms among direct competitors would be dicey indeed. While not out of the question, it would require care and additional infrastructure. But less radical proposals – such as mandatory disclosure of licensing terms, and in particular simply enabling voluntary disclosure – can readily be addressed with reasonable and non-burdensome process controls, even when pricing terms are included.

In fact, *ex ante* disclosure is no more problematic than many other practices that are already accepted as part of the current standard setting paradigm, such as the formation of patent pools (where price negotiations already occur) and the adoption of intellectual property rights policies that forbid royalties entirely. Each has its own antitrust risks, and in each case, these risks have been analyzed and addressed to the satisfaction of those involved. Nonetheless, both practices were seen as threatening (commercially as well as legally) when first proposed.

Significantly, the antitrust regulators in the United States – the Department of Justice and the Federal Trade Commission – have gone out of their way to encourage innovation in this regard. Most notably, FTC Chairman Deborah Platt Majoras issued a policy statement last December that was dedicated to reassuring industry with respect to the viability of *ex ante* disclosure under the antitrust laws. Quite properly, that statement did not suggest that the enforcement agencies would turn a blind eye to improper behavior. But it did send a clear signal that the agencies recognize the procompetitive effects that *ex ante* disclosure could have, and offered assurance that experiments in this area would be assessed by regulators using the "rule of reason" test, which balances such procompetitive results with any related anticompetitive impact.

It should also not fail to be noted that the Chairman's statement was made in response to the requests of major corporate participants in standard setting. This prompt and productive action represents a commendable example of government acting in support of industry to facilitate the competitiveness and efficiency of American production.

It would be a regrettable example of ossification if American SSOs did not embrace the opportunity that has been offered to them. The advancement of technology is all about innovation, and lawyers must be as willing to innovate as their clients. Otherwise, they are working against, rather than in support of, the best interests of those that they serve. Happily, many, if not all, of those engaged in the current debate are already of, or are moving towards, this opinion as well.

It's time for the rest of those involved, whether they are business people or attorneys, to get on the *ex ante* bus. Together, they can work towards crafting the type of prudent and non-burdensome policies that can assure that the specifications that are released in the future will be not only technically useful, but commercially viable as well.

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