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EDITORIAL

STANDARD SETTING AND INNOVATION: A SALUTE TO VITA AND IEEE

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Standard setting and innovation enjoy an interesting symbiotic relationship. Without innovation, the need for new standards would decrease, and eventually dry up completely. And without standards, many types of innovation would struggle in the marketplace, and some would fail. As the world becomes more virtual and less physical, an increasing percentage of the new products and services that are the fruits of technical innovation will rely upon standards. The hundreds of consortia that have sprung up in the last twenty years bear ample witness to this trend.

Standard setting itself has not traditionally been distinguished by rapid innovation, however. This may be so in part because in the past, standards have more often followed, rather than led or been developed in parallel with the technologies that they serve. Again, while product innovation can be driven by a single individual with a vision, standards by definition are the product of consensus, often achieved with considerable difficulty among those with quite divergent interests. Too, standards must be highly credible to become widely deployed. Each of these dynamics lends itself to conservatism rather than risk taking in the breach.

Of course, innovation is not wholly unknown in standard setting, although it has not always been universally welcomed. To some, the concept of launching consortia in competition with accredited standard setting organizations seemed radical, and even dangerous, when the floodgates of this type of activity were first opened. Today, of course, there are many well-respected consortia that are nearly indistinguishable from their accredited peers in width and breadth of activity, and in the wide adoption of their standards output.

Why would innovation seem threatening to some? Perhaps because consensus-based processes have much to gain when they become recognized as institutions. Those that achieve that status are likely to become enamored of the respect and credibility that institutions enjoy. As a result, change, even in the service of innovation, can seem to be more threatening than desirable.

A natural hesitation to embrace change can be found among many individuals that participate in standard setting as well. Standard setting is, after all, a political process. As in all political processes, the most influential participants are likely to be those that best understand the rules and the system, and that have learned how to use those tools to best advantage. For those on the offense, a stable system therefore offers an excellent opportunity to refine skills and benefit from that prowess.

For those on the defense, predictability offers a sense of security. Predictability is more likely to be found in stable systems, where rules are applied consistently in similar situations. All things being equal, and so long as the rules do not change, a member's competitors are more likely to act, vote and bargain in the future as they have in the past.

The same comfort factor applies to legal risks. Experience has demonstrated that participation in standard setting is not a high risk activity, despite the fact that it involves bringing many competitors into the same room to agree upon common action – ordinarily, the very stuff of which antitrust investigations are based upon. Operating beyond parameters that have proven to be safe in the past can make change appear threatening indeed, especially if understanding the bounds of safety might seem to require the advice of a legal expert.

For all of these reasons, there has always been great inertia in standard setting. That inertia can make innovation appear to represent purely risk, and offer no potential for reward.

But surrendering to inertia can have its risks as well, although this type of risk may be less apparent. For example, inertia can lead to a gradual loss of efficiency in the standard setting process, higher costs of standards development, a decrease in the market-appropriateness of the standards that are produced, or even a higher failure rate of standards to become widely adopted.

Currently, standard setting is experiencing a sort of innovation challenge, as many participants in the standard setting process conclude that traditional intellectual property rights (IPR) policies are proving inadequate to address the realities of the marketplace as it is evolving today. While some changes that are being advocated in response are relatively minor, evolutionary and non-threatening, others are more dramatic, and may appear to be revolutionary, and even alarming.

One such change involves the so-called "ex ante" disclosure of licensing terms, perhaps even including the prices that a patent owner might demand as a precondition to implementing a given standard. Permitting, or even requiring, such disclosures would seem to require conduct that standards participants have always been sternly warned by lawyers to avoid. Moreover, such a practice would dramatically change many dynamics in the consensus-based process, requiring members to develop new strategies and skills in order to achieve their individual goals.

As a result, those that do not individually feel the need for change are likely to feel threatened, or even hostile, to proposals to amend existing policies to embrace *ex ante* disclosure. These reactions can render the introduction of changes within a consensus-based organization difficult indeed.

Recently, two well-respected, accredited standards development organizations headquartered in the United States have moved in the direction of *ex ante*, one conservatively, and one dramatically. The first is the IEEE, which is changing its IPR policy to permit *ex ante* disclosure, and the other is VITA, which has gone much further, and voted to put in place a policy that will require it.

The actions of these two organizations, I believe, are to be greatly applauded. Each has gone to great time, trouble, and expense to move these significant process changes through their internal approval procedures. In doing so, they have performed a significant service to the standard setting community as a whole. This is because each organization has served as a crucible within which the benefits, risks and impacts of such a change have been debated, modified and ultimately approved. The resulting IPR policies, offer real-world, "stress tested" examples that other organizations interested in making similar changes can use as efficient starting points for their own efforts.

Moreover, each organization has gone to the time and expense of asking its attorneys to file a detailed request with the United States Department of Justice for a "business review letter." These requests, as well as the DOJ's responses, are public documents. In each case, the organization's proposed process has been described in detail. The DOJ has already

commented upon, and expressed approval of, the VITA process (the IEEE expects to receive the DOJ's response to its request shortly). While business review letters are unique to their situations and cannot be legally relied upon by other organizations, they can provide valuable information on how regulators view specific instances of *ex ante* implementation. When read in conjunction with earlier policy statements from both the FTC and the US Department of Justice, the letters requested by VITA and IEEE will provide a growing body of guidance, and an expanding comfort zone, for other organizations to exploit.

A similar service will also be provided by these organizations when their amended policies are reviewed by the American National Standards Institute (ANSI) for compliance with that organization's accreditation requirements. When both policies have been approved as proposed, or as supplemented or changed at the request of ANSI, these determinations will provide guidance for accredited organizations, each of which will benefit from the willingness of VITA and IEEE to act as pioneers.

In summary, I believe that the standard setting community at large owes a vote of thanks to these two organizations for taking the initiative and demonstrating the determination to innovate. Inertia is a seductive force, and neither of these organizations faced an urgent crisis that demanded action. Because they were willing to tackle a tough task, other organizations will find it easier to do so.

Sometimes, standard setting demands innovation as urgently as do the industries that standard setting serves. And, just as in those industries, innovation demands leadership. Hats off to VITA and IEEE for providing must that.

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