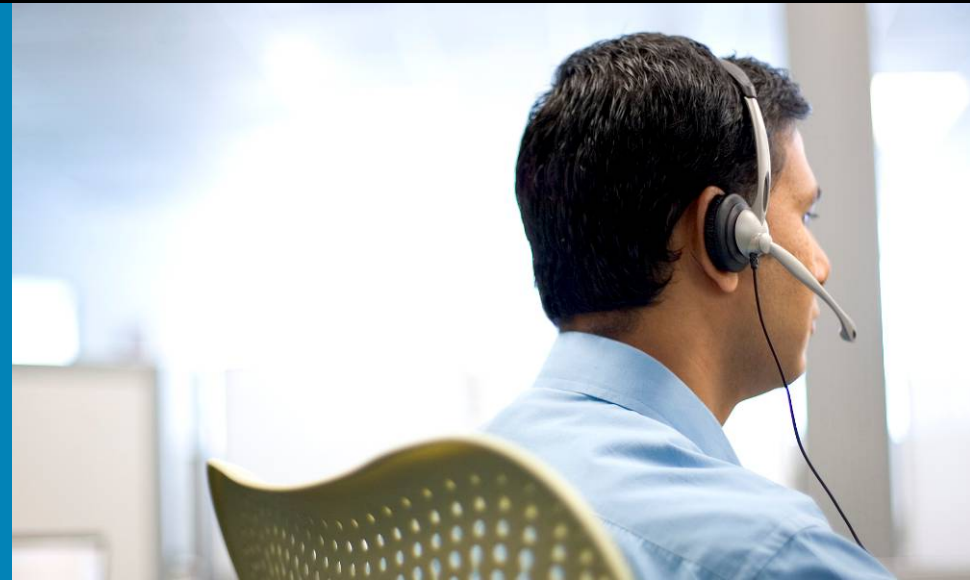




Deception, Exploitation, and the Culture of Standards Development



Gil Ohana^{*/}
Director, Antitrust and Competition
Cisco Systems
gilohana@cisco.com

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***/ Views are personal to the author, not those of his employer.**

A Preface

“Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, **private standard-setting associations have traditionally been objects of antitrust scrutiny.**”

Allied Tube and Conduit Corp. v. Indian Head Inc., 486 US 492, 500 (1988) (citations and parentheticals omitted)

Examples of Deception in Standards Development

- Failure to disclose patents despite “shared expectation” among participants that disclosure would be made
- Inducement to incorporate patented technology into standard through false licensing assurances
- Failure to honor patent licensing commitments after standard for which patents are essential enjoys widespread adoption

What is Deception in Context of Standards Development?

A patentee's exploitation of monopoly power resulting from success of standard for which patent is essential, where power is created by actions contrary to rules or shared expectations of participants in standards development

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Exploitation vs. Deception

- Example:
 - Successor's failure to honor predecessor's patent licensing commitment
 - Exploitation is successor's decision to **continue to assert patent** after it has knowledge of predecessor's licensing commitment
- Deception and exploitation can be distant in time or contemporaneous
- Deception without exploitation: no harm, no (antitrust) foul

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Implication for Section 2 Enforcement

“[T]he **successful competitor**, having been urged to compete, must not be turned upon when he wins.”

United States v. Aluminum Company of America, 148 F.2d 416, 430 (2d. Cir. 1948) (L. Hand, J.)

Implications for Section 2 Enforcement

- In deception cases, conduct and market power elements of monopolization **may** focus on different subjects:
 - Did alleged **deceiver** exclude competition / act wrongfully / lack legitimate business justification?
 - Did **standard** (including each patent necessary to implement standard) gain monopoly power?

Antitrust Enforcement in Deception Cases

- Risk of over-enforcement **lowest** when:
 - Undisclosed IP right was not core to success of standard
 - **Not** an argument for counting patents
 - Rejected substitutes:
 - Existed
 - Were close, and
 - Would have been selected absent deception

Deception and Culture of Standards Development

- Standards development is not a lawyer-intensive process
- Participants and SDOs should be advised of risk of deception, **and of ways to mitigate risk**
 - Clearly drafted rules for patent disclosure and licensing commitments
 - Rules are enforceable by any implementer
 - Collective negotiation of licensing terms?
- Use of antitrust concerns as a reason for inaction
 - *Hydrolevel*: differing interests of SDOs and participants

Role(s) of Government Enforcement

- Cases have impact:
 - Create awareness of risks among participants
 - Increase perception among standards development organizations and participants that reform is desirable
- Policy statements to help participants understand when risk mitigation measures may themselves raise antitrust concerns (and when they won't)

