Expert Analysis

High Transparency May Help SSOs Under Attack By DOJ

By **David Newman**
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Taking aim at standard-setting organizations for potentially anti-competitive behavior, Assistant Attorney General Makan Delrahim delivered unprecedented remarks in Los Angeles on Nov. 10, 2017. Member-driven SSOs, such as the European Telecommunications Standards Institute, the International Telecommunication Union, the Telecommunications Industry Association and the Institute of Electrical and Electronics Engineers have traditionally steered clear of antitrust focus despite their inevitable tendency for concerted action. Yet the new SSO-centric scrutiny espoused by AAG Delrahim, the lead attorney for the U.S. Department of Justice's Antitrust Division, may cause SSOs to consider enacting heightened transparency measures to avoid the risk of liability.

The new assistant attorney general has taken aim at SSOs and

stated that, “enforcers should carefully examine and recognize the risk that SSO participants might engage in a form of buyer’s cartel, what economists call a monopsony effect.”[1] Delrahim was even more pointed when he stated, “I therefore urge antitrust enforcers … to take a fresh look at concerted actions within SSOs that cause competitive harm to the dynamic innovation process. I likewise urge SSOs to be proactive in evaluating their own rules.”[2] In order to act in a proactive fashion, SSOs could adopt a high-transparency protocol that would allow for SSO participants to more fairly negotiate reasonable and nondiscriminatory (RAND) licensing terms.

The warning from the DOJ highlighted the more severe risk that “hold-out” by technology implementers may cause; as opposed to the lesser risk that may occur due to “hold-up” by standard-essential patent owners (who could attempt to extract high royalty rates following adoption of their SEPs). Delrahim explained that such asymmetry was dangerous because it can “undermine incentives to innovate” and “under-investment by the innovator [SEP owner] should be of greater concern than under-investment by the implementer [licensee].”[3] Going further, he articulated bold protection for SEP owners by declaring that, “[a] patent holder cannot violate the antitrust laws by … seeking an injunction or refusing to license such a patent.”[4]

Delrahim also singled out RAND commitments as being susceptible to cause the skewing of negotiations in favor of licensees when he stated, “SSO rules purporting to clarify the meaning of 'reasonable and non-discriminatory’ that skew the bargain in the direction of implementers warrant a close look to determine whether they are the product of collusive behavior within the SSO.”[5] In order for SSOs to steer clear of skewing negotiations in favor of licensees — with respect to RAND commitments — further transparency in disclosure of licensing terms could alleviate some risk for SSOs. Letting sun shine on

the root of the hold-up or hold-out behavior — reasonable royalty rate data — could help shield SSOs from antitrust scrutiny. For example, adoption of a "TRAND" protocol that requires a heightened level of transparency with respect to licensing terms could be used by SSOs to ward off antitrust allegations.

A TRAND protocol comprises an integrated system of transparency, reasonableness, aggregation and nondiscrimination. For example, a TRAND system should include: (1) transparent licensing term data that is anonymized and de-identified to populate a comparables database; (2) reasonable royalty rate data to comply with RAND obligations or the patent statute damages provision (35 U.S.C. §284); (3) aggregated pricing data to help de-identify the data to maintain confidentiality of licensor, licensee and patent number; and (4) nondiscriminatory licensing terms offered according to RAND obligations and nondiscriminatory methods of collecting licensing data. Upon adoption of a TRAND system by an SSO, heightened disclosure will allow both implementers and innovators to have symmetric licensing data, including royalty rate data that will help avoid anti-competitive SSO environments.

Delrahim specified that such a heightened level of transparency was warranted because, "[t]he old notion that 'openness' alone is sufficient to guard against cartel-like behavior in SSOs may be outdated, given the evolution of SSOs beyond strictly objective technical endeavors."[6] The new TRAND protocol mentioned above does not merely call for "openness" in an isolated and ambiguous manner. The TRAND system specifically requires transparency used as a check on compliance in combination with the nondiscriminatory prong of a RAND obligation, but also requires transparency with respect to the disclosure of aggregated licensing terms. Such heightened transparency has been supported by Microsoft Corp., which stated, "Transparency in licensing of SEPs would enable prospective licensees to

assess more effectively [a SEP owner's] non-compliance with its FRAND commitments and expose its pattern and practice of violating its FRAND obligations."[7]

The linking of transparency to licensing terms helps correct an asymmetry problem (also raised by Delrahim) regarding licensors having more data than licensees, but also levels the playing field for all participants by allowing for a national data base comprising SEP licensing data: providing comparable data necessary to establish a robust intellectual property marketplace and hasten innovation. For an example of a TRAND protocol implementation and more detailed discussion of the benefits of a TRAND system, see the ROSEdatabase.com. Also relying on a third-party provider of a TRAND system is likely more palatable to SSOs. Because SSOs have limited administrative budgets, they may be prohibited from taking on heightened transparency measures independently and may want to rely on outside organizations — to whom SSO participants could make such heightened TRAND disclosures.

Such TRAND disclosures can establish a database with hundreds of thousands of licenses including SEP data to be used by parties when determining RAND terms. Having thousands of comparables data points for parties to consult during a SEP license negotiation could greatly alleviate the risk of hold-up or hold-out behavior by the parties. When reliable pricing data is available to technology implementers and innovators there is reduced distrust between parties; and a streamlined license negotiating process may be facilitated — with lower transaction costs.

SSOs that establish IP rules that facilitate heightened transparency may alleviate risk of heightened anti-competitive scrutiny foreshadowed by AAG Delrahim's recent remarks. Such heightened transparency has also been supported by the former

director of the U.S. Patent and Trademark Office, Michelle Lee, who stated, “Ultimately, the marketplace works most effectively in an environment of transparency, allowing innovators to make smarter investments, create jobs, and drive economic growth.”[8]

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[1] Complete speech may be found at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center, p. 4

[2] Id. at p. 5

[3] Id. at p. 2

[4] Id. at p. 3

[5] Id. at p. 4

[6] Id. at p. 5

[7] Microsoft Mobile, Inc. v. Interdigital, Inc. (D. Dela. No. 1:99-mc-09999) complaint para. 66, g.10

[8] Lee, M. Fordham U. School of Law remarks April 24, 2014.