



# The antitrust ghost in the standard-setting machine

**RICHARD H. STERN**  
r.stern@computer.org

..... It is the policy of the IEEE and many other standard-setting organizations to request that any patented technology incorporated into a technical standard be made available to all users of the standard on reasonable and nondiscriminatory (RAND) terms (see IEEE-SA Standards Board Bylaws, clause 6, available at <http://standards.ieee.org/guides/bylaws/sect6-7.html#6>). By the same token, such organizations typically require that participants engaged in formulating a standard disclose whether the proposed standard's use would infringe patents that their companies own. They must also disclose whether such patents will be subject to RAND licensing.

Ordinarily, if it appears that a necessary patent exists and will not be available on a RAND basis, the organization requires that the technical committee change or abandon the standard to prevent a patent from blocking its use. Consequently, the technology needed to practice all or most standards is, in principle, subject to RAND licensing.

The fly in the ointment becomes visible once an industry adopts a standard and uses it. The owner who promised to make the patent available on a RAND basis might have a different concept of what that means than prospective licensees. Recently, disgruntled standards users have complained that patent owners have unilaterally

demanding excessive royalty notes on a "take it or leave it" basis. They have also complained of abusive and unreasonable negotiating tactics. One antitrust suit, for example, charged that the owner of a patent necessary for practicing an IEEE standard (802.11, in this case) offered to license the patent at an allegedly already very high rate. Further, the offer would remain open for only 30 days, after which the royalty rate would double.

To prevent such conduct, some have suggested that standard-setting organizations should require not only an assurance of RAND terms, but also an advance disclosure of those supposedly RAND terms. Then, if the terms are excessive—for example, because of a royalty that is a large multiple of normal and customary notes in the industry—the organization can simply not adopt that technology as a standard, or at least consider other options.

The IEEE and other standard-setting organizations have firmly rejected all such proposals. Thus, the IEEE has stated: "You must not discuss subjects like the pricing for use of a patent, how a patent should be licensed, validity or interpretation of a patent claim, or any terms or conditions of use" (<http://standards.ieee.org/board/pat/guide.html>). ANSI has a similar policy (<http://www.ftc.gov/opp/intellect/020418marasco.pdf>). The main stated reason for the policy is fear that the organization will be liable as a tool for a price-fixing cartel or liable for some similar antitrust violation. The effect, however, is as if a prospective car buyer goes to the dealer,



and the salesman says, “Have I got a deal for you!” The buyer asks about the price, and the salesman says, “Sign here and then I’ll tell you.”

The origin for such antitrust concerns is a problem that the American Society of Mechanical Engineers (ASME) ran into around 1980. Hydrolevel Corp. wanted to introduce a new technology for monitoring boilers to prevent them from running too low on water. (If a boiler runs out of water and its heating system does not shut down, it could blow up.) The old technology was a float shut-off mechanism. Hydrolevel’s technology was a thermal sensor fixed to the boiler wall. Companies using the old technology controlled the ASME’s committee on boilers. One committee member drafted an opinion on behalf of the boiler committee, asserting that the new technology did not comply with the ASME boiler standard, which meant that it was a safety hazard. The committee member then induced an ASME official (the Secretary of the Boiler and Pressure Vessel Committee and a full-time ASME employee) to incorporate the boiler committee’s opinion into an ASME letter that the official then signed on ASME’s behalf. Hydrolevel could no longer sell its devices and filed an antitrust suit against the ASME and the float device manufacturers whose employees were on the ASME boiler committee. Every defendant except the ASME settled. The ASME’s position was that it was not responsible for the actions forming the basis of the suit. It argued, also, that holding a standard-setting organization responsible for such conduct would throttle the standard-setting process and thus deprive the public of its benefits. The case went all the way to the Supreme Court.

The Supreme Court held the ASME liable for its official having acted as a tool of the boiler float device manufacturers [*ASME v. Hydrolevel Corp.*, 456 US 556 (1982)]. Since then, the IEEE, ANSI, and most other standards organizations have pointed to the Hydrolevel case as the reason why they cannot police RAND terms before or after adopting a standard that incorporates patented technology subject

to RAND availability. This antitrust specter is the great obstacle to organizations such as the IEEE making any inquiry into promised RAND terms before basing standards on patented technology. That, in turn, has led to the problem of some patent owners taking advantage of the process to impose unreasonable terms on standards users, once their technology becomes part of a standard.

It is time to exorcise the antitrust ghost in the standard-setting machine. What made the ASME liable under the antitrust laws in the Hydrolevel case is a far cry from asking someone promising RAND terms to explain what, specifically, RAND will mean for that patent. The IEEE and other standard-setting organizations should stop using the antitrust laws as an excuse for failing to protect standards users from gouging by patent owners. IEEE members participating in a standard-setting process should not vote on a standard covered by a patent without first knowing what RAND will really mean to manufacturers that make products complying with the standard. They should have the option of looking for an alternative technology if they don’t agree with the patent owner’s idea of RAND. For IEEE to insist on such disclosure would not—without considerably more cartel behavior or exclusionary conduct—constitute forming or participating in a price-fixing conspiracy or other antitrust violation.

Hydrolevel held the ASME liable because, by not properly supervising its official involved with the boiler committee, it allowed the boiler float manufacturers to use the ASME as a tool to exclude Hydrolevel from the market. Yet, merely requiring patent owners who promise RAND terms to specify what they mean is not exclusionary conduct. Nor is a request for price information, without more culpable conduct, an agreement to fix prices. Furthermore, requesting royalty-level information in advance of an IEEE commitment to a standard incorporating a particular technology is a long way from a price-fixing conspiracy.

Consider again the car-buying analogy. A group of prospective car buyers decide that they will standardize on one brand and

model. They go to a dealership where the salesman promises them a RAND deal. So far, that is like RAND licensing under the present IEEE system. Nobody has suggested that this conduct, so far, is price-fixing or some other antitrust violation. Now, add to that the further element that the buyers ask the salesman to tell them what the terms of his deal will be. How does this additional element convert what has been perfectly legal, thus far, into an illegal price-fixing conspiracy?

Group purchasing of cars or anything else is not illegal conduct unless the buyers form a buyers’ cartel. Is developing a standard for an electronic product like forming a buyer cartel? It cannot be, unless the buyers have enough control over their market to give them the power, collectively, to dictate price terms to sellers. If the car-buying group of this example represents only a small fraction of the potential car buyers to whom that car dealer can sell, the group cannot dictate price. The dealer has too many alternative customers available; the group cannot force him to accept its terms. By the same token, unless the standard-setting group of electronic-product manufacturers represents a large fraction of the market for the patented technology, they cannot dictate royalty levels to the patent owner. All they can do is refuse to be hoodwinked into signing up for the patent without prior disclosure of the allegedly RAND terms. In other words, all they can do is refuse to hand the car dealer or patent owner a signed, blank check.

Ordinarily, companies adopting a standard do not have collective market power over a patented technology’s market. Therefore, the joint-buying activity described here is not the equivalent of a buyers’ price-fix. If it is any type of antitrust violation at all—and it is not clear what other type it could be—the courts must evaluate its legality under the rule of reason. That means weighing its anticompetitive effect against its pro-competitive effect to determine which one preponderates.

It would appear that the benefits of preventing the abusive conduct in RAND licensing far outweigh any possible harmful effects—in the real world, at least.

Therefore, any court applying the rule of reason to standard-setting activities that require the advance disclosure of RAND terms would have to conclude that the conduct was reasonable and therefore not an antitrust violation.

Indeed, requiring advance disclosure of RAND terms is comparable to asking for competitive bids. In effect, an IEEE-sponsored standards committee asking for advance RAND disclosure would be using a competitive-bidding process to select which technology to incorporate into a standard. Competitive bidding requirements have never been considered an antitrust violation. Not only is bidding not anticompetitive, but the Supreme Court has held that a professional association's ban on competitive bidding on projects was an antitrust violation [National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978)].

The antitrust ghost in the standard-setting machine is just that: a ghost without substance. Standard-setting groups should no longer let fear of the ghost stop them from protecting their process against RAND promises that turn out to be illusory. Such groups should feel free to institute

safeguards against such abuse, requiring, for example, advance disclosure of the details of promised RAND terms.

Finally, it has been argued that unless organizations such as the IEEE take steps to prevent patent owners from abusing the standards process in this way, the organizations can become liable. Thus, Washington antitrust maven and former US Federal Trade Commission official Robert Skitol has argued that antitrust liability for not preventing such abuses is a greater risk to standard setters than asking for advance disclosure of RAND terms. In the Allied Tube case, Skitol points out, the Supreme Court said that a standard-setting organization must impose "safeguards sufficient to prevent the standard-setting process from being biased by members with economic interest in restraining competition" [AlliedTube & Conduit Corp. v. Indian Head, Inc., 486 US 492 (1988)]. According to Skitol, the "central teaching" of Allied Tube and Hydrolevel is that standard-setting organizations must adopt safeguards against patent owners who promise RAND terms and then hold standards users up for exorbitant royalties. Organizations like IEEE, he argues, must implement policies

that try to prevent RAND abuse, or they will be liable just as the ASME was for not having a proper policy in place. That is, in ASME's case, a policy that would have kept the boiler float manufacturers from manipulating ASME to make it a tool in excluding Hydrolevel. Here, arguably, it would be manipulating IEEE to make it a tool for imposing abusive licensing.

The conclusion that comes from Skitol's analysis is that standards organizations should exorcise the antitrust ghost in the standard-setting machine, but not just because it is a sham. Its invocation—and the antitrust fears that it causes—prevent the adoption of measures that deter the abuse of RAND promises. This situation, in fact, creates real antitrust risks for IEEE and other standard-setting organizations. In that sense, the antitrust ghost in the machine causes risks for IEEE and the standard-setting process that at present go unrecognized or unappreciated. The ghost in the machine is a menace.

**For further information on this or any other computing topic, visit our Digital Library at <http://www.computer.org/publications/dlib>.**

# Get access

**to individual IEEE Computer Society documents online.**

More than 100,000 articles  
and conference papers available!

*US\$9 per article for members*

*US\$19 for nonmembers*

**<http://computer.org/publications/dlib/>**



IEEE  
COMPUTER  
SOCIETY