



## Setting standards on the information superhighway

**W**ho should set the technical standards for hardware and software used on the information superhighway? For some things, government agencies such as the FCC will consider it their responsibility or right, but the government is oblivious to many standardization issues and it indefinitely delays acting on others. If vendors do not act, delay and chaos may result.

Even when the government acts, vendors may try to influence the outcome, seeking to slant technical standards in favor of their own products. All of this may lead them and the new standards organizations they form, or existing ones that they use, into legal controversies.

### Basic concept

It does not violate the antitrust laws for business groups to meet and discuss what would be suitable technical standards for products that the members make, sell, buy, or use. That does not mean, however, that once they meet and do other things they cannot end up violating the antitrust laws. They would violate the antitrust laws, for example, if they use the meeting as an opportunity to fix prices.

Standard setting has both procompetitive and anticompetitive effects. The antitrust issue is which one predominates. Compatibility requirements, for example, tend to make all equipment interoperable with all other equipment. That permits small vendors to compete with large, established vendors for any and all parts of the market. On the other hand, a technical standard can artificially favor one technology over others, particularly if the technology of the standard is proprietary. Moreover if a technical standard is set at a very high performance level, customers may be deprived of the opportunity to select an inexpensive, lower performance

alternative. Yet, they may be perfectly satisfied with that alternative.

Most of the time, the procompetitive aspects of technical standard setting predominate. The test of antitrust legality here is called the "rule of reason." Under that rule, there is no antitrust violation if procompetitive effects predominate.

### Formal or informal?

It is better to set standards in a formal, structured setting, and, where feasible, through an existing organization such as the IEEE. The risk of holding clandestine, catch-as-catch-can meetings is that they create the appearance of a conspiracy to do something illegal, such as fix prices. It is therefore better to use the IEEE (or ANSI or the like) and follow its rules. Or if those interested do not want to become involved in this way, they should form a nonprofit corporation. That corporation would operate according to a set of bylaws spelling out the procompetitive purposes of the group and containing safeguards against things that attract bolts of antitrust lightning. (For example, forbid any discussion of prices and cooperation on marketing practices. That's not part of making technical standards.)

### Membership

Groups have a right to define themselves in their own terms. A group of vendors who want to promote FM broadcasting, for example, do not have to admit members who want to promote AM at the expense of FM or otherwise gum up the works. Vendors of boxes need not have component suppliers as members nor, for that matter, box buyers.

However, appearance is always important. Excluding a segment of the industry at least raises suspicions. Furthermore, the reasonableness of technical standards is always an issue. A tech-

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nical standard formulated to exclude or handicap one group of competitors in favor of another group is suspect and possibly part of a pattern of illegal conduct. A standard-setting association that permits all segments of an industry to participate is less open to this charge.

Presence of users and buyers, as contrasted with manufacturers and sellers only, is also likely to appear more reasonable and to make the resulting technical standard appear to be reasonably based. As one antitrust enforcement official recently put it:

Competing sellers have incentives to restrain competition. Buyers, on the other hand, will generally not have a motive to raise prices or exclude qualified suppliers. Accordingly, a standard that represents a consensus of both manufacturers and customers may be viewed with greater deference.

### **Voluntary or mandatory?**

Can members agree not to deal with products that do not meet the technical standards that the group adopts? That would be very risky. Ordinarily, a technical standard should be voluntary, not a vehicle for setting up a group boycott of nonconformists. Moreover, a standard should not be an excuse for agreeing not to make cheap products for those users who do not want expensive products and are not interested in paying for expensive features. That kind of standard amounts to a thinly disguised price fix. There should be no penalty for a member's failure to adhere to the standard, and no pressure to conform.

There may be circumstances, however, in which a standard will not work effectively without an agreement to adhere to it. (For example, a copy-protection system desired by software vendors may not be effective unless manufacturers build the appropriate circuitry into their equipment. And FM

radios won't work if FM transmitters are incompatible with them.) If that is so, a mandatory standard may be reasonable. But the burden of proof that there is a good reason for having a mandatory standard is high, and the antitrust risks are substantial.

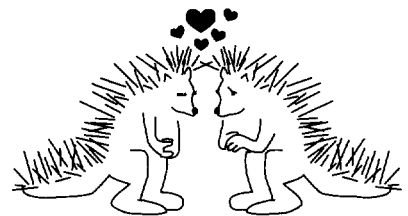
### **Refusing new technology**

May the group refuse to consider some of the competing technologies—such as a single-sideband FM? That is a risky action and has generated considerable antitrust litigation.

If the standard-setting group is influential enough to exclude from the market products that do not meet the group's technical standards, the group's *unreasonable* refusal to consider new technologies and give them a chance to enter the marketplace may violate the antitrust laws. Such exclusionary conduct could further the economic self-interest of part of the group (for example, vendors of products using the old technology who might lose market share to the new technology, or patent owners who might lose royalties). Then, the conduct is very likely to be held illegal.

### **Antitrust missteps**

In recent years, the courts have held several standards-setting organizations liable for violating the antitrust laws because of the way they carried out their activities. One manufacturer of a particular kind of conduit "packed" the membership of a group. The purpose was to vote against considering and approving use of a new conduit technology that threatened the market position of established technology users. In another case, an official of a technical standards organization (ASME) gave an opinion interpreting the group's safety standard for boilers to help some ASME members at the expense of a would-be market entrant. The "helpful" opinion said that a would-be market entrant's boiler did not meet ASME standards. Satisfying the standard was important or essen-



tial to marketing the product in both cases.

In cases of this kind, the excluded competitor would be entitled to recover three times its lost profits on sales that the illegal conduct prevented. In addition, if patents or copyrights on hardware or software were involved, the patents and copyrights could not be enforced against infringers until the effects of the illegal conduct had been fully dissipated. If the government intervened against the standards association and members with which it conspired to exclude competitors, an injunction would probably issue that severely limited the defendants' future freedom of conduct. Any patents or copyrights might well become subject to compulsory licensing.

Standard setting is an important and socially useful activity. But it can be abused to further a private agenda of some members of the organization. Standard setting is like conjugal activity of porcupines. It must be carried out carefully.

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