

Before the
Office of Management and Budget
Executive Office of the President
Washington, DC

In re

Request for Comments on a Proposed Revision of OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities”

Docket No. OMB-2014-0001

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the notice of inquiry published by the Copyright Office in the Federal Register at 79 Fed. Reg. 8,207 (Feb. 11, 2014), the Computer & Communications Industry Association (CCIA) submits the following comments on the subject of regulations and standards.

CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue.¹

I. Background

The proposed revision of Circular A-119 is major step forward in recognizing the strategic and economic importance of standards. While the strong preference for voluntary consensus standards remains, the proposed revision asks agencies to engage in standards setting processes that affect their work and to consider a range of factors when deciding to adopt a standard, including treatment of intellectual property and other economic considerations.

The emphasis reflects growing concerns that standard-setting organizations (SSOs) have not been sufficiently demanding of participants in setting policies on disclosure of patents,

¹ For a complete listing of CCIA members, see <http://www.ccianet.org/members>.

licensing terms, and transfer of licensing commitments. The recent report from National Academies on Patent Challenges for Standard Setting in the Global Economy² discusses these problems at length. Federal agencies using standards could bring increased attention to these problems, but they presently lack the motivation and expertise to do so.

The interests of intellectual property owners are a separate problem because the treatment reflects technological and commercial context, notably in differences among standards organizations concerning preference for royalty-free licensing. The NAS report found that half of the 12 standard-setting organizations it studied had an expressed preference for royalty-free over royalty-bearing licenses. In general, software standards organizations tend to favor royalty-free licensing of standard-essential patents because it allows for the broadest range of implementation. By contrast, royalties (under a FRAND commitment – fair, reasonable, and nondiscriminatory licensing) are common for infrastructure and hardware where high barriers to participation mean fewer but larger participants, many of whom are already cross-licensed to each other.

Agencies should be aware of broad implications of IT standards, since they may play a major role in developing new markets or engaging large populations in using public services. U.S. research agencies' support for the development of Internet standards set a new paradigm for how standards should be developed – and in so doing revolutionized networking and the use of digital technology. However, it should also be remembered that as the Internet took off, GSA was still promoting the Open System Interconnection (OSI) protocol suite as the favorite of government agencies around the world.

Today, thanks in part to the Internet, industry-led consortia operating on a global basis are accepted as normal procedure. This is a long way from the development of national standards by nationally recognized standards bodies feeding into international standards organizations. The international environment is in flux and while U.S. companies play a central role, other governments, Europe and China in particular, have been more aggressively engaged in strategic standards policy than the U.S. Government.

² National Academies, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communication Technology* (2013), available at <http://sites.nationalacademies.org/PGA/step/IPManagement/>.

II. Current Issues

As the proposed revision acknowledges, standards-setting processes have come under new scrutiny. The lack of formal policies, the increasing use of patents to manipulate standards, and the use of standard-essential patents in the high-profile litigation around smartphones have drawn attention from industry, competition agencies, and policymakers. At the same time, there is growing concern that the patent system and industry are overburdened by large numbers of low-quality patents. Most recently, Congressional attention has been focused on how patents, including standard-essential patents, are used to extract settlements from companies and individuals that are not involved in the development of technology: distributors, retailers, service establishments, websites, and other end users.

The problems around standard-essential patents gained unwelcome worldwide attention last summer when the White House overrode an International Trade Commission (ITC) decision granting Samsung an injunction against Apple. The override was premised on the grounds that Samsung's patents were standard-essential, yet Apple had not shown to the ITC's satisfaction that the patents were standard-essential. The National Academies' committee reported that it was divided on whether it was appropriate for standard-essential patents to be adjudicated by a body (like the ITC) that has no competence to assess damages and can only award exclusionary relief.

The NAS committee found no standard-setting organization that determined whether patents were in fact essential, and none that required those committing to FRAND licensing to forego injunctive relief. A Fairfield Research study of GSM patents by technical experts found that only 27% of declared patents were likely essential. In other words, overdeclaration is commonplace, and there appears to be no consensus on how to treat it. This compares to patent pools where essentiality must be formally determined by independent experts in order to comply with antitrust rules against including substitute technologies in the pool. But patent pools are cumbersome and costly to set up – and formal process appears to increase the risk of holdouts.

These problems reflect a policy vacuum that has been addressed on an ad hoc basis. Even where there is broad agreement in principle (transfer of FRAND commitments), there does not seem to be consensus on how it should be implemented. Part of the problem is that

consortium SSOs are global consensus-based operations. They remain contractual in nature and reluctant to tackle legal issues where consensus may be lacking.

Greater public agency involvement in SSOs or greater attention to their policies will not necessarily solve these problems. However, greater user engagement will help bring pressure to bear. For the government, greater user engagement can also provide continuing insight into standards and intellectual property-related issues and how SSOs and their members are addressing the issues – or not as the case may be. As it is, competition agencies have been largely on their own without any direct ongoing insight. They also face the problem that since consortium SSOs span national borders (while patent rights are strictly territorial), other competition agencies may have different perspectives, and the SSOs may formally require disputes to be settled in accordance with particular national laws. For example, although recognized as a European standards body by the EU, ETSI operates as a global consortium with 63 members across five continents. Nonetheless, its rules and procedures are required to be interpreted under French law.

III. Need for Coordination

Most agencies cannot be expected to have in-house expertise in standards policy, especially since NTTAA and current Circular A-119 direct agencies to defer to the private sector rather than develop their own standards. It is therefore important to nurture and coordinate agency expertise so that the agencies have a basic understanding of the economics of standards, the role and effects of different forms of intellectual property in standards, and differences among SSOs concerning disclosure, licensing, royalties, and injunctive relief. Agencies routinely involved with leading-edge information technology, such as participants in the National Information Technology Research and Development Program (NITRD), should be engaged at higher level that also addresses the strategic and international policy issues around standards, intellectual property, innovation, and economic development.

We believe that NIST is best positioned to be a central resource coordinating mechanisms for other agencies. NIST has expertise in developing certain kinds of standards and running interagency working groups. It has good working relationships with industry. It has hosted events on standards education and on policy, although it has not taken a position in recent policy

debates. NIST will need to draw on other agencies that have special insight in aspects of standards policy, including the FTC, DOJ, USPTO, USTR, NTIA, FCC, OMB, and DoD. NIST and cooperating agencies should inventory the extensive work on the economics of standards that has been undertaken in Europe and should develop a website of SSOs, policies, academic work, and other resources. CCIA maintains an office in Brussels and would be pleased to suggest pointers to European resources and experts.

IV. Conclusion

CCIA applauds the revision of A-119 as major step in recognizing the importance of standards in the global economy – and the need for the U.S. Government to understand standards in terms of agency practice, economic significance, and public policy.

Respectfully submitted,

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