

Richard S. Taffet
Direct Phone: 212.705.7729
Direct Fax: 212.702.3603
richard.taffet@bingham.com

January 23, 2009

VIA ELECTRONIC MAIL

Mr. Glenn Elder
Senior Competition Law Officer
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Re: Draft Information Bulletin on Trade Associations

Dear Mr. Elder:

We submit these comments on behalf of QUALCOMM Incorporated (“Qualcomm”) in response to the Competition Bureau’s invitation for public comment on its Draft Information Bulletin on Trade Associations dated September 8, 2008 (the “Bulletin”). In particular, Qualcomm addresses Part 3.7.3 of the Bulletin related to Standard Setting Organizations (“SSO”), and more specifically the disclosure thereto and use of intellectual property rights (“IPR”) in connection with the adoption of standards.

INTRODUCTION

As explained more fully below, the statements in Part 3.7.3 concerning the inclusion of IPR in standards may be interpreted, contrary to the intent of the drafters and sound public policy, as expressing a preference for standards that do not rely on or incorporate IPR even where doing so could increase the costs and/or diminish the performance and features relative to an alternative standard that does incorporate IPR. Accordingly, Qualcomm respectfully believes that clarification is necessary to avoid the possibility of any such interpretation.

Specifically, as currently drafted, the Bulletin states that SSOs “should generally avoid adopting standards that require members to gain access to intellectual property controlled by certain members of the association.” Qualcomm is concerned that this statement could be read to mean that, as a general matter, SSOs should favor non-patented technical solutions over patented

Boston
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Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
399 Park Avenue
New York, NY 10022-4689

T 212.705.7000
F 212.752.5378
bingham.com

technical solutions for inclusion in standards. As such, the statement could discourage pro-competitive results that in fact benefit consumers. Consumers benefit from standards based upon optimal technical solutions, which may be available only through the use of patented technology. Such technical solutions might be preferred because, *inter alia*, of their superior performance and features, and/or their lower costs of implementation and greater lifespan (such that replacement costs are lower as compared to inferior technologies). Standards based on patented technology may thus allow for higher value and/or lower-cost standardized products and services, regardless of any costs that might be associated with gaining access to the patented technology. The Bulletin, if interpreted as meaning the avoidance of patented technology, would therefore discourage conduct that could lead to competition-enhancing effects that benefit consumers. The possibility of such an interpretation should be avoided, especially because, as stated in Part 3.7.1 of the Bulletin, a primary objective of SSO self-regulation should be to promote open and competitive markets. Qualcomm, therefore, submits that clarification of the language in question would be appropriate.

Qualcomm further suggests that the Bulletin should be clarified to make clear that while it is entirely appropriate for individual firms that participate in SSOs to consider the costs of licensing IP that may be included in standards as one of the factors relevant to choosing between competing technologies for inclusion in the standard, joint conduct - *i.e.*, concerted action - to preclude the inclusion of patented technologies regardless of their technical merit, or to incorporate solely the patented technologies owned only by the conspiring firms, would raise competition law concerns. In this regard, we also recommend that the Bulletin make explicit that SSO participants should not discuss and agree upon the form or amount of compensation they would pay as a condition for permitting the inclusion of patented technology, or to establish an aggregate cap of royalties that would be permitted for all patented technology included in a standard. Likewise, joint determinations of relative valuations for standard-essential patents would be inappropriate. All such concerted action could raise significant competition law issues, particularly if the firms who are parties to such agreements possess market power at either the technology or product level of the relevant market sufficient to exclude technologies of other participants. In such circumstances, technological and innovative advances could be stymied by the concerted action of entrenched firms, and thus bar entry of new and innovative technology that could form the basis for new downstream products and services. Consumers would thereby be deprived of the benefits of such new products and services and the competition that would exist but for the concerted action of the entrenched firms.

Qualcomm, thus, submits that clarification of the subject statement to make clear that the Bulletin is addressing only such anti-competitive collective conduct, and not competition-enhancing inclusion of patented technologies, would be appropriate. Otherwise, the Bulletin could be construed as condoning SSO rules that in fact have a negative impact on competition, exactly the result that Part 3.7.1 counsels against.

In addition, Part 3.7.3 presently states that “[i]ndividual SSO members should ... disclose any proprietary interest that they may have in a particular standard before the association adopts the standard.” While early disclosure of IPR should be encouraged in SSOs, Qualcomm respectfully submits that SSOs already have ample incentives to encourage such disclosure, where possible. Practical realities, however, as explained below, often make it difficult to disclose essential patents until a standard is well-developed, and imposing mandatory rules for early disclosure may have significant negative consequences on the ability of firms to participate in effective standards development efforts. Moreover, means to achieve appropriate disclosure, and balance the interests of all SSO participants, is best left to SSOs, rather than be the subject of competition enforcement agency directive. Accordingly, Qualcomm recommends that the competition Bureau change or forego altogether the language quoted above.¹

QUALCOMM’S INTEREST

Qualcomm is a leading innovator in the wireless communications industry. Since its founding in 1985, Qualcomm has invested considerable sums in the research and development of a variety of wireless communications technologies. In 2008 alone, Qualcomm invested \$2.3 billion in research and development. Cumulatively, Qualcomm has invested through 2008 over \$10.8 billion in R&D since the company was founded over 20 years ago. Resulting from these efforts, as of October 2008, the company had approximately 53,000 issued and pending patents globally (approximately 17,000 issued), and approximately 8,900 patents issued and patent applications pending approval in the U.S. (approximately 2,900 issued).

Qualcomm also has offered and negotiated licenses for nearly all of those patents, including but not limited to patents reading on an array of wireless communications standards. Specifically, Qualcomm to date has entered into over 200 licenses for its proprietary technology with over 145 firms worldwide, which has directly led to new entry by wireless product and service providers throughout the world. Because Qualcomm relies primarily on licensing fees to recover the costs of its R&D activities, Qualcomm has great incentives to

¹ For additional reference, we have included with this letter literature addressing standardization and IP -related issues that might be of interest to the Bureau.

license widely, and to do so at rates and on terms that will facilitate, not impede, the sale downstream by other firms of standard-compliant and other products that rely upon Qualcomm's technology. Qualcomm's practice of licensing its technology to all interested firms and offering its chipset/software solutions to all licensees allows licensees to come to market faster and at lower costs than if they had conducted their own R&D and/or developed and integrated their own technology solutions.

Qualcomm participates in many SSOs as both a technology innovator and provider of components for standard-compliant products. Qualcomm has a particular interest in those aspects of the Bulletin that may affect the development of standards, the incorporation therein of patented technology, and the incentives for innovation provided by licensing.

DISCUSSION

A. Inclusion Of Patented Technology In Standards May Facilitate Competition And Benefit Consumers

As a general matter, SSOs accommodate the inclusion of patented technologies in standards where there is a technical reason to do so and where the opportunity to negotiate licenses for such technologies exists. The primary reason for doing so is that in many instances the optimal technical solution for a standard involves patented technology. Thus, if Part 3.7.3 of the Bulletin were interpreted to mean that as a general matter the inclusion of patented technologies in a standard should be avoided, it would represent a significant departure from the accepted and regular practices of SSOs worldwide – a practice that, by consensus, enhances consumer welfare. This is so for several reasons.

First, consumers would be deprived of standardized products and services based on what all interested stakeholders - technology owners, standards implementers, product manufacturers and suppliers, government interests and consumers - determine to be the preferred or optimal technical solution. As a result, consumers will be deprived of those products and services that may be superior based on technical performance, features and/or cost. This is true even if there is a cost associated with gaining access to patented technology under a license. Such a cost may, in fact, be *de minimis* in relation to the costs associated with the lesser performance or higher implementation and replacement cost (or both) of an inferior standardized product. Accordingly, although a patented alternative may not always be the preferred course, it would be misdirected for the Bulletin to suggest that use of patented technology in a standard, especially standing alone, might create issues under competition law principles, or otherwise be contrary to the public interest. In fact, the contrary is true.

Second, the use of patented technology in standards may expand access to such technology. Under patent laws, the owner of a patent is under no obligation to make its inventions available or allow others to practice the inventions claimed therein. By contributing patented technology to a standard, the patent owner compromises its rights because, typically, an SSO will not adopt the standard unless patent owners provide the opportunity for all who are interested to negotiate licenses for the patented technology. As such, the patent owner foregoes its right to absolutely exclude access to its technology, as well as its right to license exclusively or to selected licensees of its own choosing. Licensees are then broadly able to utilize the licensed technology in the manufacture and sale of standardized products and services and compete downstream in offering standardized products and services to consumers. Downstream competition is further facilitated because suppliers are able to differentiate their products and services based on non-standardized features, improvements and enhancements, as well as price. The availability of patented technology in this way, however, is completely voluntary for the patent owner, and SSO rules should, if anything, encourage such availability so that decisions on what technology should be included in a standard is made based on a full consideration of all alternatives, whether patented or not.

Third, including patented technology in standards may facilitate long term innovation and thus, dynamic efficiencies. As commented, it is typical that an SSO will require that before a standard is approved with a patented technology(ies), the owner of that technology(ies) will have to provide an assurance that it will negotiate licenses with all who wish to implement the standard. If the patent owner does not provide such an assurance, and consistent with its rights under patent law it is not compelled to do so, alternative approaches for the standard that do not involve the patent owner's technology could be explored. Assuming, however, that such a licensing assurance is provided, it is typically made on reasonable and non-discriminatory (RAND) or fair, reasonable and non-discriminatory (FRAND) terms and conditions. SSOs do not specify what terms will be RAND/FRAND, but rather leave it to patent owners and licensees to negotiate bilaterally for terms that will best satisfy their specific needs. These RAND/FRAND policies enable owners of patented technology to earn the returns they need to justify the considerable risks of making investments in R&D, and at the same time ensure that firms in downstream markets, and consumers, benefit from the availability of such technologies; firms benefit by being able to compete based on access to the patented technology, and consumers by having access to standardized products and services based on such technologies. This creates incentives for innovation firms to make additional investment in new and more advanced technology. This furthers long term consumer benefits - *i.e.*, dynamic efficiencies - because next generation technologies will be made available for the creation of new innovative product and service offerings. This

has been the model that Qualcomm has followed, and the advances in wireless communication technologies, functionality and competition over the years have been staggering at all levels.

It is for these reasons that it is very important that the Competition Bureau clarify the Bulletin to ensure that it does not suggest, even as a general matter, that sound competition policy or the public interest favors the exclusion of patented technology from standards. The decision to develop a standard based on a technology should be made based on a variety of factors, foremost on technical merit, regardless of whether the technology is subject to patent protection provided the patent owner has agreed to offer licenses to industry participants on RAND/FRAND terms and conditions. Such a clarification would also allow for the Competition Bureau to explain that competition law concerns may in fact arise if patented technology, or indeed a non-patented technical alternative, is excluded from standards based on concerted action by certain SSO participants to allow the inclusion of only their own technologies in standards. Such conduct could inhibit the introduction of new technologies, and simply act to maintain the market power of entrenched interests at the expense of new entrants at both the technology and product levels of a relevant market.

B. Disclosure Rules Must Be Flexible And Practicable

SSO IPR policies strike a balance between protecting the rights of patent owners, recognizing that it is entirely appropriate - and indeed necessary - for patent owners to realize an appropriate return for making their technology available, and standards implementers who need to have the opportunity to obtain licenses to patents that are essential to standards. Absent such an opportunity, standards implementers would be forced to infringe or forego the opportunity to benefit from the standard. For this reason, SSO IPR policies seek to obtain assurances from patent owners that essential patents - *i.e.*, patents that are technically necessary to implement a standard - will be made available on RAND/FRAND terms. Disclosure of essential patents facilitates making such patents available to standards implementers under RAND/FRAND licenses. Yet, it is not always easy to identify patents that are in fact essential, as distinct from patents that "might be" essential, and it is likewise not always possible or practicable to have disclosure of patents that are essential or just potentially essential made in advance of SSO approval of a standard. This is for a number of reasons.

First, the development and adoption of standards is a complex and dynamic process, often involving significant changes to the standard and the technology included in that standard. Prior to adoption of a standard, it may be difficult, if not impossible, to determine with any degree of certainty which technology will ultimately be included in the standard. As such, patented

technology believed to be potentially essential during the development of a standard may ultimately not be incorporated in the standard when it is adopted. Moreover, IPR may include patent applications, which are themselves subject to change for a variety of reasons prior to issuance. As a result, it is impracticable to mandate that all essential IPR be disclosed before a standard is adopted.

Second, and at least equally important, the identification and disclosure of IPR that is or even might be essential to a standard is not a clear-cut or simple exercise. Determining whether a patent reads on a standard will involve the same type of analysis that occurs in the context of patent litigation - *i.e.*, the terms of the patent claims must be interpreted and then analyzed in light of, in this case, the standard's language. Such an exercise may be subject to differences of opinion, and if patent litigation is any guide, may not be definitively settled even after numerous court determinations. In addition, a more practical reason makes identification of essential or potentially essential patents difficult, especially prior to approval of a standard. Firms participating in standardization often hold many thousands of patents and patent applications. It is, at a minimum, impracticable to require a firm to examine and compare each and every patent and patent application it holds with each of the many thousands of standards that are being developed continuously in SSOs worldwide. Any such requirement would, inevitably, significantly increase the time required for standard development in SSO's - a time period which already may be too long for rapidly developing, high technology industries. Indeed, and in light of these considerations, current SSO IPR policies generally state that a patent search is not required. Moreover, under existing SSO IPR policies, only known IPR is to be disclosed, and the requisite knowledge is of the individual participating in standardization (generally an engineer or other technical expert unfamiliar with the extensive corporate patent portfolio), not the knowledge of his employer.

Third, even if disclosure of essential patents is not made until a standard is approved, or even after such approval, that conduct alone may have no anticompetitive effect. For example, it may be the case that even where there is *ex post* disclosure of an essential patent, if the patent owner agrees to negotiate RAND/FRAND licensing terms, the timing of the disclosure may cause no different competitive effect than if there had been *ex ante* disclosure. Many other factors may have to be considered, well beyond the issue of timing.

Against this background, Qualcomm submits that the statement in the Bulletin that "[i]ndividual SSO members should also disclose any proprietary interest that they may have in a particular standard before the association adopts the standard" fails to account for the complexity of the patent disclosure issue, and could thus chill participation in standard-setting activity. If the Competition Bureau believes it should address patent disclosure issues, which we respectfully

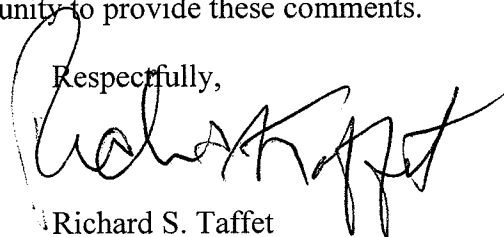
suggest is unnecessary and that such matters are best left to individual SSOs and their members, it should include in lieu of the statement quoted above a different statement recognizing the need for SSOs to balance the various costs, benefits and uncertainties of the patent disclosure process. SSO rules that fail to account for all of these concerns put patent owners at risk of not only competition law claims, but also claims under contract and tort theories - all based on entirely unintentional and good faith conduct. As a result, the incentive for leading technology companies to participate in SSO activities could be lessened by the fear of liability, or even just the cost of having to defend against claims directed to wholly-innocent conduct. This in turn would deprive the market of the benefits of such companies' technology and their input into the development of optimal standardized solutions. Alternatively, leading technology companies would require their technical personnel at SSO's to delay adoption of each and every standard until a thorough patent search and analysis of the proposed standard could be completed by its patent experts, which would result in a complete bottleneck of the standards development process. For all of these reasons, it is best to have each SSO address and adopt its own policies on patent disclosures taking into account the various tradeoffs identified above (as they are currently doing).

CONCLUSION

For the foregoing reasons, Part 3.7.3 of the Bulletin should be amended in the following respects. First, it should avoid any suggestion that patented technology should be singled out for exclusion from standards, and instead make clear that the focus of the Competition Bureau's concerns are directed at concerted action that poses a threat to competition, and not to conduct that may in fact facilitate competition. Second, the Bulletin should be amended to delete or revise the language in Part 3.7.3 that might be misinterpreted as imposing IPR disclosure rules on SSOs that are both impracticable and that would not address anticompetitive conduct.

Thank you for this opportunity to provide these comments.

Respectfully,



Richard S. Taffet

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cc: Mr. R. Hoffinger, QUALCOMM Incorporated