



23 Avenue Marnix - 1000 Brussels - Belgium

T. +32 (0)2 289 0802

information@fair-standards.org

www.fair-standards.org

17 September 2020

US DoJ supplement to 2015 IEEE Business Review Letter ignores facts, undermines its own guidance and procedure

The US Department of Justice's (DoJ) supplement to its 2015 Business Review Letter to the Institute of Electrical and Electronics Engineers (IEEE) disregards data on the IEEE's activity, blurs DoJ's own guidance and undermines its own procedure to provide such guidance.

In 2015, the DoJ issued a business review letter to IEEE advising that it did not intend to challenge the IEEE's IPR policy if its updates were to go into effect.¹ On 10 September, the DoJ took what it characterized as the "extraordinary step" of issuing a supplement to that 2015 business review letter (BRL) to the IEEE.²

In issuing the supplement, the DoJ ignores hard data showing that new standardization work at the IEEE has been at its highest levels ever since the IPR policy updates were completed in 2015 while contributions to IEEE standards, and technical work within IEEE working groups, continues apace, the IEEE's activity log and studies show.

For example, the IEEE expanded its output in 2015 and 2016 as compared to the prior year. In both 2015 and 2016, more standards were approved than in 2014, with 2016 representing the fourth highest total ever for approved standards at the IEEE. Importantly, the IEEE's technical influence has grown steadily over the years, with the IEEE's standards regularly referenced by, and incorporated into, other SDOs standards. And most importantly, work at the IEEE has continued to increase: new standards projects, or 'Project Authorization Requests' – the key indicator of new activity at SDOs – were at the highest level ever in 2016.³

Indeed, it is this DoJ supplement to the 2015 BRL that could have a chilling effect on standard-setting activity at the IEEE and other standard developing organizations (SDOs) because it blurs DoJ's own guidance, creating confusion in the marketplace.

This latest DoJ move also misapplies the business review procedure. The DoJ's task in the business review process is to advise the requesting party of the DoJ's antitrust enforcement intentions regarding

¹ DoJ IEEE Business Review Letter (2 February, 2015), <https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated>.

² Supplement to DOJ IEEE Business Review Letter (10 September, 2020), <https://www.justice.gov/atr/page/file/1315291/download>.

³ See e.g. *Empirical study on patenting and standardization activities at IEEE*: https://www.iplytics.com/wp-content/uploads/2018/01/IPlytics_2017_Patenting-and-standardization-activities-at-IEEE.pdf.

the proposed conduct at the time of the request. It is not the DoJ's role to assess whether IEEE's policy choices are right for the IEEE as an SDO. SDOs develop and adjust patent policies to best meet their needs.

Indeed, the DoJ's supplement letter is inherently contradictory. It criticizes the IEEE and others for misconstruing the 2015 BRL as an endorsement of IEEE's patent policy, but it "encourages" the IEEE to update its IPR policy so that it reflects DoJ's policy preferences. In so doing, the DoJ undermines the industry-led nature of standard-setting activities and converts the DoJ's business review procedure from an enforcement tool to a policy pronouncement tool.

Thus, although the DoJ stated that the supplement was needed to better align the 2015 BRL analysis with current US law and policy, the DoJ appears to have used the business review procedure as another avenue to proclaim its views on how commitments licensors make to SDOs to license standard essential patents on fair, reasonable and non-discriminatory terms should be interpreted.

The Fair Standards Alliance (FSA) disagrees with those views. Patent hold up continues to be a real-world competition problem that standard essential patent (SEP) the holder commitment to license SEPs on fair, reasonable and non-discriminatory (FRAND) terms is designed to reduce. Holders of FRAND-encumbered SEPs must offer licenses for these SEPs to all parties that wish to practice the standard. Injunctive or exclusionary relief for infringement of FRAND-encumbered SEPs should be allowed only in exceptional circumstances, as confirmed by competition authorities and courts in multiple jurisdictions. In almost all cases, monetary damages are a sufficient remedy for infringement of such patents. FRAND-encumbered SEPs should be valued based on their technical merit and scope in relation to the alleged infringing device or component, and not downstream values or uses, which the patent holder did not invent. Specific licensing terms must be valued on a case-by-case basis depending on the facts and circumstances of the parties to particular negotiations⁴.

But at the same time, the DoJ does not explicitly withdraw its 2015 conclusion that 'the Department has no present intention to take antitrust enforcement action against IEEE with regards to its patent policy.'

Therefore, it appears that the DoJ's enforcement intentions stated in the 2015 BRL towards the IEEE and its IPR policy have not changed. Instead, the DoJ has issued yet another non-binding policy statement, which threatens to weaken innovation incentives and discourage broad adoption of standardized technologies that benefit consumers.

It is also not readily apparent that the DoJ has the authority to supplement a BRL more than five years after the fact. A business review must be requested in writing and it must address proposed – that is to say, future – conduct.⁵ Moreover, the file for the 2015 BRL was closed one year after the DoJ issued that letter.

⁴ See "Core Principles and Approaches for Licensing of Standard Essential Patents", the CEN and CENELEC Workshop Agreement (CWA 95000): 12 June, 2019.

⁵ See 28 C.F.R. §. 50.6.

About the Fair Standards Alliance (FSA)

[FSA](#) is an alliance of 47 European and global companies, large and small, that advocates fairer licensing of standardised technology in the development and rollout of the IoT. FSA members significantly contribute to global innovation and the economy worldwide. Annually, the aggregate turnover of FSA members is more than EUR 2 trillion, and in aggregate our members spend more than EUR 140 billion on R&D and innovation. Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending.

NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.