Hybridization of Open Standardization Models: Typologies and Competition Law Concerns

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WELCOME TO THE SOFTWARE ERA

- “Software is everywhere” - e.g. Internet of Things
- Convergence of ICT sectors - e.g. IT and Telecom Networks
- End of traditional allocation of IPRs (patents/hardware, copyright/software)
- Impact of ‘softwarization’ in hardware-based standardization settings

= increasing role of open source in the development of the standard
Different standardization and IP instrumentalization approaches:

- **Consensus-based formal standards** - e.g. telecoms networks

  Open innovation / Open standardization / Semi-open IPR exploitation
  (FRAND)

- **Open Source-based informal standards** - e.g. information technologies

  Open innovation / (Semi) Open standardization / Semi-open IPR exploitation
1. Vertical integration = “now I also develop software implementations”
2. Competition and exclusion = winner-takes-all
3. Coexistence by specialization by technical sector (horizontal)
4. Coexistence by specialization by value chain stage (vertical)
CURRENT COMPETITION LAW CONCERNS

101 TFUE = horizontal agreements = “innovation cartels”

Cases: X/Open Group; ETSI/DVSI.

102 TFUE = abuse of dominant position = abusive exploitation of IPRs

Cases: Rambus; Huawei v. ZTE.
NEW CONCERNS FOR NEW DYNAMICS?

Hybridization - Vertical integration

- Consensus-based SDOs also develop technical reference implementations
- Technical specifications + open source-based reference implementations

Potential competition relevant effects - ‘anti and pro’: Keeping the balance

- Internal deceptive behaviors = “factions’ wars”
- Which competition effects from the open source reference implementation?
- Ex-post market practices - e.g. forking: a rightful risk
Cool things to take back home...

→ Re-defining (re-tooling) the concept of the standard

→ “Clash of IP cultures” = exclusion (e.g. SEPs) vs. distribution (e.g. OSS)

→ Rethinking current standardization legal frameworks:

1. Public policy: Role of policy makers? Legislator? Public enforcer?

2. Private policy: New IPR policies? New standard-focused OSS licenses?

¡MUCHAS GRACIAS!

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