**Are standards the crux of ICT businesses in today’s digital world?: A Thai regulator’s perspective[[1]](#footnote-2)\***

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 Industry standards have occupied much of the talk in many industries, especially in technology-intense ones such as telecommunications. It is undeniable that technology has made our lives easier, so it is inevitable that standardization of technology has become more and more important. On one hand, standards promote innovation, competition and international trade. They enable companies to enter the market and promote technology transfer and further development of technology. But on the other hand, standards, through intellectual property rights, can also be used as a tool to concentrate market power, which hinder competition and discourage innovation.

 In telecommunications industry, technical compatibility, dictated by industry standards, is essential. Standard-essential patents (SEPs) play a role in enabling such compatibility. SEPs are patents that are deemed essential to implement certain industry standards. Without infringing SEPs, companies wanting to implement the standards cannot do so. Thus, many companies which hold SEPs are able to use their intellectual property rights to prevent their competitors from achieving the industry standards and thus may exclude them from the market.

 Since most SEP holders are from developed countries, they are able to set industry standards and thus raise costs for firms wanting to implement the standards, including those in developing countries. This does not mean that stakeholders in developing countries would reject standards altogether. Without standards, developing countries, as technology takers, would have more difficulty accessing technology transfer. Simply because standards have negative effects does not mean that we should disregard standards. Standards are not the cause of the problem, but the abuses of standards are. So, instead of trying to regulate how standards are set or intervene in the SEPs licensing market, both of which firms do better than regulators, regulators should focus on ways to prevent the abuses of standards, whether through injunction, high licensing fee, license hold up, license discrimination or standard over-inclusion. Although I am a regulator, I believe that regulators only have an indirect role in overseeing so that disputes regarding standards are well-handled. If not, this will hinder transfer of technology and raise consumer costs.

 By focusing on the problem, i.e., abuses of standards, not standards themselves, I suggest that we balance rights of all stakeholders to ensure best benefits to innovation, consumers and businesses. To do so, cooperation among multilateral institutes may provide a negotiating platform to reconcile diverse interests. Because standards are set in standard-setting organizations (SSOs), SSOs may serve as one organization to help oversee that SEP holders commit to a reasonable and non-discriminatory (RAND) licensing fee. Other organizations that step-in to oversee the abuses of standards are courts and antitrust commissions. In some countries, we have seen courts or antitrust commissions interpret RAND commitment as an implied license, a breach of contract or an antitrust violation. Yet, we have not seen a uniform regime in tackling this problem. So, cooperation could be one way to alleviate the degree of this problem.

For the case of Thailand, the National Broadcasting and Telecommunications Commission (NBTC) adopts standards in telecommunications sector set by ITU. Operators then must follow the NBTC’s set standards. Since the issue of abuses of standards present an overlapping among telecommunications, patent and competition laws, I believe NBTC should work with the Department of Intellectual Property, an agency responsible for issuing patents, the Intellectual Property Association of Thailand, the Telecommunications Association of Thailand and the Central Intellectual Property and International Trade Court to produce legal certainty as to the agency and the court’s interpretation of abuses of standards and the remedies. An accessible database of industry standards and court interpretations of each country relating to RAND licensing commitment could be developed. At the global level, WTO may be one platform for this type of cooperation to solve the problem relating to SEPS and industry standards.

1. \* This article is written based on my view at the panel discussion on the topic “Are standards the crux of ICT businesses in today’s digital world?” at the Global Symposium for Regulators – GSR 13, Warsaw, Poland, July 3, 2013. [↑](#footnote-ref-2)
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