

Sponsored by:



LEGAL CONSIDERATIONS

Megan L. Campbell
ATIS General Counsel
mcampbel@atis.org
202-434-8847

Toni E. Gilbert
ATIS Staff Attorney
tgilbert@atis.org
202-434-8830

T1 Leadership Forum
September 12, 2000



Legal Considerations For Committee T1

- I. Introduction
- II. Antitrust Considerations
- III. Intellectual Property Considerations
 - A. Patents
 - B. Copyright
- IV. Guidelines for Electronic Mail
- V. Other Issues and Guidelines



- Participation in industry committees raises numerous legal issues and potential antitrust risks.
- An “industry committee” is any group, formal or informal, of any size in which employees meet to discuss technical, operational, legal and regulatory matters with others in the same industry -- including *competitors* and *potential competitors*.
- *Industry committees are by their nature combinations of competitors - meeting one element of a possible antitrust violation.*




Sherman Act § 1 (15 U.S.C. §§ 1-7)

 Prohibits any “contract, combination. . .or conspiracy. . .in restraint of trade.”


 Parties subject to the Act include: participants, individual members, corporate members and association.


 Civil Action: recovery of treble damages, costs and attorney fees.


 Criminal Action: individuals may be fined up to \$350,000 and/or jailed for 3 years; corporations and other entities may be fined up to \$10M or twice the gain to the offender or twice the loss to the victim.



Sherman Act - Standards of Liability






 “*Per se Unlawful*” - naked price-fixing, certain types of boycotts and market or customer allocation.

 “*Rule of Reason*” - balancing the perceived threat of harm to competition against the likelihood that it will yield procompetitive efficiencies.

 “Is the act an unreasonable restraint on competition?” Where the *reasonableness* depends upon all of the facts and circumstances of a particular situation.







Sherman Act - Standards of Liability

-  In the Association context, the courts have considered, among other things:
 -  the **openness** or ability of all parties to participate
 -  the level of **due process** afforded
 -  the **availability** of services (work product) to non-members
 -  the actual **discussions** at Association sponsored events




The Federal Trade Commission Act (15 U.S.C. §§ 41-77)

-  “Unfair methods of competition are unlawful.”
-  Parties subject to the Act include: persons, partnerships and corporations.
-  Civil Actions: Recovery of treble damages, costs and attorney fees or injunctive relief.
-  Criminal Actions: None.




International Antitrust Policy


 Generally, international enforcement of the antitrust laws is consistent with the approach in the U.S. Any private effort to restrain trade that reduces U.S. consumer welfare through the exercise of market power is actionable.



Proper Procedures to Mitigate Risks


 There must be openness with no barriers to participation.

 **Caveat** -qualifications for participation/ membership are allowed provided that the qualifications are reasonable (i.e., nondiscriminatory; uniformly applied; objectively related to a procompetitive business purpose; and not intended to exclude or otherwise disadvantage nonmembers.)

 There must be timely and adequate notice of the initiation and development of the Issues and resolutions.




Proper Procedures to Mitigate Risks (cont'd)

 The resolution process should have a **balance of interests** not dominated by a single interest category.




 The **interest categories** should be **clearly and fairly defined**.

 There should be appropriate **notification** on the various steps of the **development** of the resolution.

 There should be careful **consideration of all the views and objections**, and these should be properly answered or addressed.





Proper Procedures to Mitigate Risks (cont'd)


-  **Unresolved objections** should be **reported** to all of the members/participants of the industry committee.
-  Careful **meeting records** should be kept.
-  There should be a good **appeals process** in place.



Sensitive Discussion Topics

 **Price** or any element of price or pricing policies, including costs, discounts, markups, etc.

 **Contractual terms** to offer the provision of products or services including, commercial liabilities, warranties, guarantees, or the particular terms and conditions of sales.

 Sales or production **quotas**, **territories**, **allocations**, **boycotts** or **market share** (e.g., geographic areas of territories in which competitors will or will not offer products/services)



Sensitive Discussion Topics (cont'd.)

 **Confidential** or **proprietary** information.

 Individual company **statistics**, **inventories**, **merchandising** or **marketing** methods/plans.

 Particular **competitors** or **customers**, particularly those to whom services will or will not be offered.

 Anything dealing with **“arm-twisting,”** **trade abuses**, **exclusion** or **controlling competition**.




 **Sensitive Discussion Topics (cont'd.)**


A prudent rule is to avoid the above discussion topics at all meetings - whether during the official meeting or “off-the-record” at the coffee break.



Patents


 A patent confers a secured right to be exclusive . . . to exclude others from making, using or selling the invention.

 To be patentable, an invention must pass 4 tests:

 The invention must fall into 1 of 5 statutory classes: (1) processes, (2) machines, (3) manufactures, (4) compositions of matter or (5) new uses of any of the previous classes.


 The invention must be “useful.”


 The invention must be “novel.”


 The invention must be “unobvious” to a person having ordinary skill in the art to which the subject matter pertains.



ANSI Patent Policy (*T1 Procedures Manual* § 14)


 If technical reasons justify inclusion of a patented item in developing an ANS, there is no objection in principle to including the use of a patented item.


 *If* ANSI receives notice that a proposed ANS may require the use of patented invention, **as a condition for the approval of the standard**, the **patent holder must submit** either:

 An assurance that the patent holder does not hold and does not anticipate holding any invention whose use would be required for compliance with the proposed ANS; OR




ANSI Patent Policy

 An assurance that: (1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard; or (2) A license will be made available to applicants under reasonable terms and conditions that are free of any unfair discrimination.

 A record of the patent holder's statement shall be placed and retained in the files of ANSI.



ANSI Patent Policy - Notice


 When ANSI receives the assurance from the patent holder, the standard shall include the following note:

Note: The user's attention is called to the possibility that compliance with this standard may require use of an invention covered by patent rights.

By publication of this standard, no position is taken with respect to the validity of this claim or of any patent rights in connection therewith. The patent holder has, however, filed a statement of willingness to grant a license under these rights on reasonable and nondiscriminatory terms and conditions to applicants desiring to obtain such a license. Details may be obtained from ANSI.



ANSI Patent Policy - Responsibility for Identifying Patents

 ANSI shall not be responsible for identifying all patents for which a license may be required by an ANS or for conducting inquiries into the legal validity or scope of those patents that are brought to its attention.



Early Patent Disclosure - Leadership Responsibilities

 *T1 Procedures Manual § 4.1.8(k) “TSC Chairman Responsibilities”*

 TSC Chairman shall advise the TSC membership that:

- ☺ Committee T1 has adopted the ANSI patent policy;
- ☹ Early disclosure of patents which may be essential for the use of standards under development is encouraged; and
- 💣* Disclosures made of such patents may not be exhaustive of all patents that may be essential for the use of standards under development, and that neither Committee T1, the TSC nor the TSC Chairman ensure the accuracy or completeness of any disclosure or whether any disclosure is of a patent that in fact may be essential for the use of standards under development.



Early Patent Disclosure - Leadership Responsibilities

 TSC Chair shall have recorded in the minutes:


☺ The advice in § 4.1.8(k) was provided;


☹ An opportunity was provided to TSC members to respond on the existence of any patents believed to be essential for use of a given standard; and


💣 Any responses given.



Patent Policy Principles


 Early disclosure of patents provides participants the opportunity to evaluate the appropriateness of standardizing the patented technology.


 Early disclosure of patents allows patent holders and prospective licensees ample time to negotiate terms and conditions of the license (outside of Committee T1).


 Any participant in the process -- not just the patent holder -- is permitted to identify or disclose patents that may be required for implementation of the standard.



Patent Policy Principles (cont'd.)


 Specific license terms and conditions, and the evaluation of whether such terms and conditions are reasonable and demonstrably free of unfair discrimination, are not properly the subject of discussion/debate at a standards meeting.

 If it is not possible for the potential patent holder to give an assurance until the standard process is at a mature age, it does not preclude a patent holder from giving an assurance that *if* its patent is required, it will license on reasonable terms and conditions.

 The patent Policy applies to situations involving (1) the discovery of patents that may be required for use of a standard subsequent to its adoption and (2) the initial issuance of a patent after adoption.



Copyright - the Law

 Copyright protects “original works of authorship” that are fixed in a tangible form of expression. Copyright Act of 1976 § 102(a).

 Copyright owners have the exclusive right to:

 reproduce;

 distribute; and


 create derivative works.

 Copyright works published after 3/1/89 need not bear a copyright notice to be protected under the law.



Copyright - Committee T1 Documents

Draft T1 Documents (pre-copyright affixation)

 Disclaimer - This is a draft document and thus, is dynamic in nature. It does not reflect a consensus of Committee T1 and it may be changed or modified. Neither ATIS nor Committee T1 make any representation or warranty, express or implied, with respect to the sufficiency, accuracy, or utility of the information or opinion contained or reflected in the material utilized. ATIS and Committee T1 further expressly advise that any use of or reliance upon the material in question is at your risk and neither ATIS nor Committee T1 shall be liable for any damage or injury, of whatever nature, incurred by any person arising out of any utilization of the material. It is possible that this material will at some future date be included in a copyrighted work by ATIS.




Copyright - Committee T1 Documents


Final T1 Documents

 Copyright © 2000 by Alliance for Telecommunications Industry Solutions. All rights reserved.

No part of this publication may be reproduced in any form, in an electronic retrieval system or otherwise, without prior written permission of the copyright holder - ATIS.



Policy for external use of T1 Documents

 Encourage use of full T1 Document.

 Allow the development of “*delta document*” provided appropriate recognition and references are made to the source T1 Document.



Copyright - Committee T1 Documents


-  In certain cases, especially those regarding training materials, text books and other industry documents, ATIS will grant a limited right to use, reproduce and/or distribute certain portions (typically < 20 % of entire document) provided the appropriate attribution is given to Committee T1.
-  Requests should be submitted to ATIS legal in writing (e-mail okay) and detail what specific portion of a standard will be used and for what purpose.



Guidelines for Electronic Mail

Electronic mail provides a convenient and efficient forum for interested parties to communicate about common issues.

However, e-mail messages should never include information or statements that may be:

 Libelous Information - A libelous statement is one that contains: (1) false information; (2) malicious information; (3) statements that are injurious to the reputation of another.


 Copyrighted Information (without prior written consent to distribute).


 Antitrust Sensitive



Guidelines for Use of Letterhead

The following are guidelines for the use of T1 and Technical Subcommittee letterhead:


 T1 letterhead may be used only by the T1 Chairman, the T1 Vice Chairman and the T1 Secretariat. All other persons are prohibited from using T1 letterhead except where the T1 Secretariat gives its prior consent to such use.


 Technical Subcommittee letterhead may be used only by the Technical Subcommittee Chairman or the Technical Subcommittee Vice Chairman at the direction of the Technical Subcommittee Chairman. All other persons are prohibited from using Technical Subcommittee letterhead except where the T1 Secretariat gives its prior consent to such use.



Guidelines for Use of Letterhead (cont'd.)

 T1 and Technical Subcommittee letterhead may be used by authorized individuals only in connection with T1 or Technical Subcommittee business.


 Authorized individuals may use T1 and Technical Subcommittee letterhead only in their capacities as T1 or Technical Subcommittee officers.


 Any questions regarding the use of T1 and Technical Subcommittee letterhead should be directed to the T1 Secretariat.



Guidelines for Use of Business Cards


Business cards reflecting representation of Committee T1, may be used only pursuant to the following guidelines:


 Only the Chairman and Vice Chairman of a Committee is authorized to use a business card reflecting his or her representation of the Committee, and only after demonstrating to the Secretariat a need for such use.


 Use of business cards by Committee members or participants other than the Chairman or Vice Chairman generally is not permitted, except to the extent that an individual is authorized by the Secretariat for such use. Requests for use of business cards by members or participants other than the Chairman and the Vice Chairman must be made to the Secretariat in writing and must demonstrate a need for such use.




Guidelines for Use of Business Cards (cont'd.)

 Said business cards may be used by authorized individuals only in connection with the business of the Committee.

 Authorized individuals may use said business cards only within the scope of their authority as an officer of a Committee or as an authorized individual (i.e., member or participant authorized per a special request).

 Authorized individuals may use said business cards only after obtaining, reviewing and signing a copy of these guidelines.


 Any questions regarding the use of business cards by officers of a Committee should be directed to the Secretariat.




Conclusion


 Prompt Consideration of Sensitive Legal Issues Can Enhance Both the Efficiency and the Quality of Committee T1's Work.

 As a committee leader, encourage your participants to consult you, the Committee T1 Chair and Vice Chair or ATIS legal, if:

 the committee does not meet the criteria for openness and due process;

 there is reason to believe that the committee or any participants are engaging in conduct which could raise antitrust risks or concerns; or,

 you become aware of an improper discussion of competitively sensitive topics.

 **CAVEAT:** be sensitive to e-mail blasts when addressing potential legal concerns.