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The Standards Development Organization Advancement Act of 2004: A Victory for Consumer Choice?

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THE STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2004: A VICTORY FOR CONSUMER CHOICE?

Matthew Topic[*]

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I. INTRODUCTION

Few of us, when returning from our local music retailer or clicking "checkout" at our favorite Internet downloading service, pause to consider the small miracles of standardization required to make our listening experience possible. CDs are all the same diameter so that we need only purchase one type of CD player. A similar phenomenon exists for electronic music downloads.[1] Earphone jack inputs are all the same size, allowing us to purchase earphones from any number of manufacturers to be used on any number of audio devices,[2] as were the microphone inputs on the recording equipment used to capture the music in the first place.[3] From the Internet protocols enabling online browsing and downloading,[4] to the gasoline in the truck that brought the CDs to market,[5] to the smorgasbord of electronic devices plugged into uniform three-prong electrical outlets, standardization was ubiquitous. From low-tech to high, our's is an economy teeming with standards. Standards enable and drive the innovation in which we take immense pride and through which we enjoy a tremendous standard of living.

But there is a darker side. Some standards become so through competition. Rival firms develop rival standards, consumers try them out, and the best standard wins.[6] Other standards, however, are born through

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1. *See, e.g.*, Best Buy, http://www.bestbuy.com (search for "mp3 players") (last visited Apr. 6, 2007) (offering many different mp3 players, all of which play mp3 music files).

2. Searching bestbuy.com reveals a variety of styles of headphones, all of which terminate in either a 1/4" or 1/8" diameter plug, and many of which also offer a converter to change between the two options. *See, e.g.*, Best Buy, *supra* note 1 (search for "headphones") (last visited Mar. 15, 2007).

3. A search on www.asmash.com for "mixers" shows that all varieties use "XLR" and/or 1/4" diameter inputs. *See, e.g.*, Sam Ash, Mixers, *at* http://www.samash.com/catalog/groups.asp?GroupCode=sm_mixers (last visited Apr. 17, 2007).

4. *See* How Does the Internet Work?, http://www.vanderbilt.edu/Engineering/CIS/Sloan/web/es130/internet/intwork.html (last visited Feb. 5, 2007).

5. Notice the next time you fill up your tank that gasoline is available in certain octane increments.

6. Try finding a Betamax player or Betamax cassettes these days. VHS beat out Betamax in a head-to-head competition in the 1980s. *See, e.g.*, Seth A. Cohen, *To Innovate or Not to Innovate, That is The Question: The Functions, Failures, and Foibles of the Reward Function*

agreement. Rival firms decide among themselves what the standard will be.[7] One need not have a legally trained nose to detect the back-room smoke of cartelization.

This is the tension. On the one hand, standards, even those set by competitor agreement, allow new markets to flourish and resources to be used optimally toward efficient innovation. Consumers probably do not care what size holes are used in their electrical outlets, so long as they do not need to install three electrical systems in their homes. But sometimes the standard itself really does matter. Some electronic formats may be faster and better than others, but might yield a lower profit margin for producers, and so are less likely to be selected by competitors agreeing on a standard even though consumers might prefer them. The trick, then, is to develop a system that allows competitors to eliminate "wasteful" competition where the standard itself is unimportant in relation to the standardization, but prohibits competitors from using standards to keep from competing away profits where consumers would benefit from the battle of standards.

Much of modern antitrust thought, generally and with respect to standards, focuses on economic efficiency.[8] Less often is the effect of an antitrust rule on the ability of consumers to control the future of an industry considered. Consensus standards—those set by competitors by agreement—are a logical place to apply a consumer-focused antitrust model, since consensus standards, if reached without consideration of consumer preferences, make the consumer irrelevant.

In 2004, Congress passed the Standards Development Organization Advancement Act (SDOAA).[9] The SDOAA, in short, permits standard-setting organizations to register their activities with the Federal Trade Commission and Department of Justice in exchange for a "detrebling" of damages in any private suit arising out of the disclosed activities.[10] The SDOAA's protections have been widely utilized by organizations that have registered under its provisions, but the SDOAA has been virtually ignored in antitrust scholarship, despite its potential for illuminating the debate on how antitrust should regulate standards in the high-tech era.

Theory of Patent Law in Relation to Computer Software Platforms, 5 MICH. TELECOMM. & TECH. L. REV. 1, 15 (1998-99).

7. *See, e.g.*, ANSI, Standards Activities Overview, http://ansi.org/standards_activities/overview/overview.aspx?menuid=3 (last visited May 21, 2007).

8. *See generally* RICHARD POSNER, ANTITRUST LAW (1976); ROBERT BORK, THE ANTITRUST PARADOX (1978).

9. 15 U.S.C. §§ 4301-4305 (2004).

10. *Id.*

This Article examines the SDOAA in detail, and asserts that Congress intended that standard-setting organizations seeking the SDOAA's protection must include consumer representation in the standard-setting process. This should be understood as a victory for consumer-based antitrust theory, and should be taken seriously by courts and enforcement agencies going forward.

Part II provides a general background on standards and their antitrust treatment. Part III takes a close look at the SDOAA's provisions. Part IV discusses the consumer choice theory of antitrust commonly attributed to Professor Robert Lande and draws some conclusions about how the theory should be applied to collaborative standard setting. Part V examines the SDOAA's legislative history and determines that Congress wanted the SDOAA's protections to apply only to those organizations that include consumer representation. Finally, Part VI interprets the SDOAA's provisions in light of Congress's consumer choice concern, and offers practical suggestions for courts and enforcement agencies.

It is emphatically not the position of this Article that standards are bad or that all standard-setting organizations are cartels. Nor is the Article's position that economic efficiency is an unimportant or silly goal for antitrust. Rather, this Article applauds Congress's consideration of consumers in the standard-setting process in the belief that consumers are a necessary ingredient for the development of optimal standards.

II. BACKGROUND ON STANDARDS

A. *Definitions and Various Types of Standards*

Standards have been defined in many ways. One definition is "any set of technical specifications that either provides or is intended to provide a common design for a product or process."[11] Another definition covers anything "taken for a basis of comparison, or . . . accepted for current use through authority, custom or general consent."[12] Examples of standards range from programming interfaces for Microsoft Windows that allow other software to interface with the operating system[13] to electrical plugs

11. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1896 (2002).

12. DAVID HEMENWAY, INDUSTRYWIDE VOLUNTARY PRODUCT STANDARDS 8 (1975).

13. *See* Lemley, *supra* note 11, at 1896.

and outlets that allow use of all electrical products anywhere in the United States.[14]

A helpful way of thinking of standards is to divide them into "uniformity" or "quality" standards.[15] Uniformity standards include variety simplification standards, which reduce the variety of offered products, and interchangeability standards, which ensure that products may be substituted for or work in conjunction with each other.[16] Quality standards include terminology standards, which create uniform terminology in describing and defining products; measurement standards, which create a benchmark for measuring the characteristics of products; testing standards, which make uniform the process for testing a product; and minimum quality standards, which require products to meet some threshold of quality.[17] Certification is the process of determining whether a given product satisfies a given standard.[18]

B. *Interchangeability Standards*

Interchangeability standards are linked to the concept of network effects. Simply put, network effects occur when the value of a product increases as more people use the same or interrelated products.[19] The often-mentioned example is a telephone system; as more consumers use a particular telephone system, each user has more people to call.[20]

As a network grows, so do incentives for manufacturers to enter the market for complementary products—telephones in the telephone network example—thus increasing competition, innovation, and consumer options in the complementary product market.[21] In this regard, standards can have benefits in a network environment independent of the positives or negatives of the particular standard itself.[22] That is, even if a particular telephone system is inferior to some other system, consumers will still have more people to call and more telephones from which to choose.

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14. *See id.*

15. Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471, 473 (1994).

16. *Id.* at 473.

17. *Id.*

18. *Id.*

19. Lemley, *supra* note 11, at 1896.

20. *See id.* Interchangeability standards span a range of technological sophistication, from railroad track gauge to color TV transmission standards. *See* James J. Anton & Dennis A. Yao, *Standard-Setting Consortia, Antitrust, and High-Technology Industries*, 64 ANTITRUST L.J. 247, 247 (1995).

21. *See id.* at 1896-97; *see also* Gerla, *supra* note 15, at 487.

22. *See* Lemley, *supra* note 11, at 1897.

Network effects may also reduce supply-side costs.[23] Both the standardized products themselves and inputs for the standardized products can be made using longer production runs and thus capture economies of scale.[24]

Interchangeability standards are not without their anti-competitive risks. When competitors agree on an interchangeability standard, consumers lose the ability to select products based on their unique characteristics.[25] Further, price-fixing and oligopoly can be facilitated because it is easier for competitors to monitor standardized products for compliance with the cartel agreement.[26]

Interchangeability standards can also inhibit innovation.[27] This happens in several ways. Once a standard is set and network effects have been achieved, consumers are less likely to jump ship to a new standard, even if it is superior to the existing standard.[28] The QWERTY typewriter has been the dominant keyboard configuration since the 1880s because a critical mass of typists learned the system early on.[29] This allowed QWERTY to survive a challenge in the 1930s by the more efficient Dvorak typewriter because employers would be required to retrain all of their typists.[30] Thus, firms often have less incentive, or perhaps even a disincentive, to engage in groundbreaking innovation that would displace an existing standard altogether. That said, firms have in some circumstances managed to displace entrenched standards. For example, superior bottle screw-tops successfully displaced existing standardized bottle caps, largely because the benefits were great and the cost of conversion was not.[31]

Interchangeability standards also affect the types of innovation that will occur in the standardized product industry. Pre-standardization, innovation tends to be focused on creating or improving products.[32] Once a product is standardized, however, firms developing new products that do not

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23. *See id.* at 249.

24. *See id.*

25. *See* Gerla, *supra* note 15, at 488.

26. *See id.*

27. *Id.*

28. *See* Melonie L. McKenzie, Note, *How Should Competing Software Programs Marry? The Antitrust Ramifications of Private Standard-Setting Consortia in the Software Industry*, 52 SYRACUSE L. REV. 139, 155 (2002).

29. Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns Into the Analysis of Collaborative Standard-Setting*, 47 EMORY L.J. 583, 595 (1998).

30. *See id.* at 596.

31. *See* Jack E. Brown, *Technology Joint Ventures to Set Standards or Define Interfaces*, 61 ANTITRUST L.J. 921, 924 (1993).

32. *See* Gates, *supra* note 29, at 602.

comply with the standard face enormous switching-cost barriers, and firms thus focus innovation on improving the process by which the product is made.[33] Where product innovation continues, it tends to be incremental rather than radical, or it is directed at the complementary products market that interchangeability enables.[34]

These potential effects on innovation demonstrate a key temporal component. While it is clear that a bad standard will have a negative economic impact by entrenching an inferior standard, a standard that is set too early in the life cycle of a particular product can also be detrimental because it will deter future product innovation and prevent superior products from ever developing.[35]

C. *Quality and Safety Standards*

Examples of quality and safety standards include the term "low fat," which is determined by a government standard[36] and "Snell approved" motorcycle helmets, which are governed by private standard setting.[37] These standards are often justified on health and safety grounds unrelated to competition and provide important information to consumers.[38] Some quality and safety standards are routinely adopted by governmental bodies.[39] Private standard setting and compliance testing relieves local governments of the burden of engaging in the activities themselves.[40] New market entry can also be facilitated, as manufacturers can be confident that, if they meet the standard, customers will exist for their product.[41] As the Supreme Court noted in *Indian Head*, "[w]hen . . . private associations

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33. *See id.*

34. *See id.* at 603-04.

35. *See id.* at 608.

36. *See id.* at 597.

37. *See* Gates, *supra* note 29. *See also* Snell Memorial Foundation, Snell Helmet Testing Programs (explaining Snell's various performance tests for its helmets), http://www.smf.org/testing.html (last visited May 21, 2007).

38. Gerla, *supra* note 15, at 489, 491.

39. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495 (1988) (National Fire Protection Association's National Electrical Code); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 559 (1982) (various mechanical codes).

40. *See* Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126, 129-30 (6th Cir. 1980) ("Many states do not have adequate facilities to properly test whether or not a product complies with . . . health and safety standards.").

41. *See* Gerla, *supra* note 15, at 492-93; *Eliason Corp.*, 614 F.2d at 129 ("Uniformity [resulting from a standard] helps promote nationwide competition and enables manufacturers who elect to comply with NSF standards to be reasonably sure that they will not have to modify their product in order to meet the different requirements of many jurisdictions.").

promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition[,] . . . those private standards can have significant pro[-]competitive advantages."[42]

Quality and safety standards can also reduce consumer choice in a manner that can be particularly troublesome. Consumers often make purchasing decisions on the basis of both quality (whether that means accuracy of result, durability, or some other measure) and price.[43] If competitors agree not to manufacture products that fall below some quality threshold, consumers are denied the option of trading off quality for price in a manner than might better suit their needs.[44] If the standard merely provides information to consumers, however, without an agreement not to produce products that do not comply with the standard, anti-competitive potential largely falls away.[45]

Quality and safety standards come in two varieties: specification and performance. Specification standards identify certain technical aspects that a product must satisfy.[46] For example, a standard may require that piping be a certain thickness.[47] Where a specification standard is used, firms that produce products compliant with the standard have an incentive and greater opportunity to reduce competition by excluding potentially competing products that perform the same function in a new manner that does not satisfy the specification.[48]

Performance standards do not require products to meet a certain technical specification. Rather, they require that a product demonstrate a set level of quality through its performance, regardless of the product's technical specifications.[49] Continuing the piping example, a performance standard would require that the piping withstand a certain amount of

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42. *Indian Head*, 486 U.S. at 501.

43. *See* Gerla, *supra* note 15, at 490-93.

44. *See id.* at 489-90.

45. *See id.* at 491.

46. *See* Gates, *supra* note 29, at 651.

47. *See id.*

48. *See* Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 559, 561 (1982) ("Obviously, if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace"; manufacturer "successfully used its position within ASME in an effort to thwart Hydrolevel's competitive challenge"); *see generally* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (effort by steel conduit manufacturers to exclude polyvinyl chloride conduit from inclusion in the National Electrical Code).

49. *See* Gates, *supra* note 29, at 650.

pressure or heat to be certified.[50] Performance standards encourage innovation by providing incentives for firms to provide the same quality in new ways with less fear that their products will not be certified.[51] This innovation encouragement is not free, however. It is generally more expensive to determine whether a product satisfies a level of performance than a particular specification.[52]

D. *Uniformity and Other Standards*

Variety simplification, or uniformity, standards, such as uniform package size, can assist consumers in comparison shopping and in understanding products, and thus increase competition.[53] Industry-wide economies of scale can also be achieved through variety reduction.[54] Some economies result from each firm's internal standardization, such as where Company A produces only blue chairs, achieving an economy of scale in the painting portion of production. These economies would occur regardless of industry-wide standardization. As more firms agree to a uniformity standard, however, upstream economies of scale are also achieved, for example, in production of blue paint.

Uniformity standards also reduce or even eliminate consumer choice and can lead to a loss of particular product features, product feature competition, and a motivation to innovate.[55] In the extreme, uniformity standards, like interchangeability standards, have been used historically to facilitate price-fixing.[56]

Terminology, measurement, and testing standards provide consumers with additional product information, and so long as the information is not misleading, are generally pro-competitive.[57] These informational standards

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50. *See id.*

51. *See id.*; *see also Hydrolevel*, 456 U.S. at 560 (time-delayed boiler cut-off arguably superior to currently-used instant cut-off); Office of Mgmt. & Budget, Executive Office of the President, OMB Circ. No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (1998) [hereinafter A-119] ("In using voluntary consensus standards, your agency should give preference to performance standards.").

52. *See* Gates, *supra* note 29, at 653.

53. *See* Gerla, *supra* note 15, at 484.

54. *Id.* at 484-85.

55. *See id.* at 485-86.

56. *Id.* at 486.

57. *See id.* at 488; *see also* Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 487 (1st Cir. 1988) (Breyer, J.).

allow consumers to compare products more readily, and thus facilitate price competition.[58] Further, where these standards lack the force of law, consumers remain free to purchase non-certified products, and manufacturers of those products are left with avenues to promote those products.[59]

E. *Certification*

Accurate certification decisions related to antitrust-compliant standards are generally considered pro-competitive.[60] Erroneous certification decisions, however, deprive consumers of the pro-competitive benefits of the standard and may lead to erroneous purchasing decisions, and obviously harm the firms that suffer an erroneous refusal to certify.[61] These harms are exacerbated when the standard has been adopted by a government agency as law because the victim firm cannot even attempt to persuade consumers that its product is nonetheless safe and effective. Because liability for erroneous certifications made in good faith may deter beneficial certification activity, however, certification decisions made as a result of reasonable procedures that are actually followed should be protected.[62]

F. *The Standard-Setting Process*

While the SDOAA addresses only standards reached by voluntary consensus among competitors, standards are set in other ways as well. "De facto" standards arise and are maintained purely through the operation of the market.[63] Microsoft Windows is one ready example. The computer industry never collectively decided to interoperate with Windows over

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> The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer or a buyer to determine whether a particular coupling is, in fact . . . a CISPI coupling. . . . Clamp-All would suffer injury only as a result of the defendant's joint efforts having lowered information costs or created a better product.

Clamp-All Corp., 851 F.2d at 487.

58. *See* Gates, *supra* note 29, at 598.

59. *See* Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 296 (5th Cir. 1988).

60. *See* Gerla, *supra* note 15, at 520; *see also* DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 58 (1st Cir. 1999) ("it is not intrinsically an antitrust violation for an organization to limit its endorsement to those who meet its published standards unless the standard itself is shown to be anticompetitive").

61. *See* Gerla, *supra* note 15, at 520-21, 525.

62. *See id.* at 521.

63. *See* Lemley, *supra* note 11, at 1899.

other operating systems. Rather, Windows achieved a dominant place in the market and the substantial network effects in the computer industry made Windows the standard.[64]

Standards are also set by government bodies.[65] Standards in high-definition television and the Internet are recent examples.[66] Increasingly, all levels of government look to the private sector to create standards.[67]

G. *Antitrust Treatment of Standard-Setting Organizations*

Section One of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[68] As interpreted by the courts, this language prohibits concerted action by two or more firms that unreasonably restrains trade.[69] Some practices, like price-fixing by competitors, are so obviously anti-competitive as to be per se illegal, so the actual effect on competition need not be shown to condemn the practice.[70] Other practices are more complicated and are not found illegal until a thorough analysis of the effect on competition in the particular market shows the practice to be an unreasonable restraint.[71] This is known as "rule of reason" analysis.[72]

Standard-setting activities have generally been subject to rule of reason analysis.[73] A standard-setting organization (SSO) does not necessarily

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64. *Id.* Of course, "purely through the operation of the market" is a bit naïve. Microsoft engaged in anti-competitive practices to maintain its operating system dominance, which shows that de facto standards are not necessarily or universally correlative with consumer choice. *See generally* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

65. *See id.*

66. *Id.*

67. *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996) ("[e]xcept [as otherwise provided], all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies"); *see also* Standards Development Organization Advancement Act of 2003, Hearing on HR 1086 before the Task Force on Antitrust of the House Committee of the Judiciary, 108th Cong. 14-15 (Apr. 9, 2003) (comments of Earl Everett, Director of Safety Engineering, Georgia Department of Labor) ("Codes of . . . standard-developing organizations are generally accepted as proper and effective guidelines in determining safety and quality of various products.").

68. 15 U.S.C. § 1 (2004).

69. *See, e.g.*, WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 2.2. (2006).

70. *See id.* § 2.9.

71. *See id.*

72. *See id.*

73. *See* Livenzey v. Am. Contract Bridge League, No. 82-3325, 1985 WL 2648, at *9 (E.D. Pa. Sept. 12, 1985) ("Although the ACBL acts as an extra-judicial body, its practice does not facially appear to be one that would always tend to restrict competition."); *see also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 497-98 (1988) (judge correctly instructed the jury

violate the antitrust laws simply by refusing to certify a product as compliant with the standard.[74] Rather, a plaintiff must show either that the SSO or its members discriminated against the plaintiff in refusing to certify the product, or that the conduct as a whole "was manifestly anti[-]competitive and unreasonable."[75] It has not been enough to show only that the standard is disputable or has some effect on markets.[76]

The procedures used to set standards have been an important factor in the rule of reason analysis of standards setting. While "the absence of procedural safeguards in the process of making business decisions 'can in no sense determine the antitrust analysis,'"[77] many courts have required plaintiffs to show that the standard-setting process was improperly manipulated[78] and have been reluctant to consider the technical merits of a standards decision.[79] While procedural irregularities in establishing a standard are relevant to antitrust treatment of SSOs, "the antitrust laws are not intended as a device to review the details of parliamentary procedure."[80]

An SSO's status as a nonprofit does not exempt it from antitrust scrutiny.[81] If an SSO has the capacity to engage in anti-competitive behavior (such as by expelling members), it can be subject to antitrust liability.[82] Private SSOs can be held liable for antitrust violations by their

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to use rule of reason in standard-setting case); *In re* Circuit Breaker Litig., 984 F. Supp. 1267, 1277 (C.D. Cal. 1997) ("A standard-setting organization does not per se violate antitrust laws by refusing to certify a product.") (citations omitted).

74. *In re Circuit Breaker Litig.*, 984 F. Supp. at 1277. *See* Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1988) ("We hold that a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer.").

75. ECOS Elec. Corp. v. Underwriters Labs, Inc., 743 F.2d 498, 501 (7th Cir. 1984); *see also* Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126, 129 (6th Cir. 1980).

76. *See* DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57 (1st Cir. 1999).

77. *Consol. Metal Prods., Inc.*, 846 F.2d at 293 (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 293 (1985)).

78. *See, e.g.*, Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst., 287 F. Supp. 2d 1038, 1048 (D. Ariz. 2003); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 488 (1st Cir. 1988).

79. *See, e.g.*, *Heary Bros. Lightning Prot. Co.*, 287 F. Supp. 2d at 1060; *Consol. Metal Prods., Inc.*, 846 F.2d at 297 ("An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability.").

80. Jessup v. Am. Kennel Club, Inc., 61 F. Supp. 2d 5, 12 (S.D.N.Y. 1999).

81. *See* Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 576 (1982).

82. *See* Livenzey v. Am. Contract Bridge League, No. 82-3325, 1985 WL 2648, at *8 (E.D. Pa. Sept. 12, 1985).

agents under an apparent authority theory.[83] It is into this background that Congress stepped with the SDOAA.

III. STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2004

The SDOAA[84] extended favorable antitrust treatment to "standards development organizations" (SDOs).[85] In Congress's view, technical standards are critical to the promotion of innovation and competition,[86] yet SSOs remained potentially liable for treble damages under the antitrust laws.[87] This potential liability was said to be exacerbated unfairly by the National Technology Transfer and Advancement Act of 1995,[88] which requires federal agencies to use, to the extent practicable, privately developed standards in place of government-specific standards, and resulted in wider-spread use of private standards.[89]

An SDO is defined under the SDOAA as "a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus[,] in a manner consistent with the Office of Management and Budget Circular Number A-119."[90] The term does not include the parties participating in the SDO, such as the competing firms that are members of the SDO.[91]

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83. *Hydrolevel*, 456 U.S. at 558-59.

84. Pub. L. No. 108-237, 118 Stat. 661 (2004) (codified at 15 U.S.C. §§ 4301-4305 (2004)).

85. From this point forward, this Article will use the term "SSO" to refer to standard-setting organizations in general and "SDO" to refer to those SSOs that qualify for the protections of the SDOAA.

86. *See* H.R. Rep. No. 108-125, at 3-4 (2003), *reprinted in* 2004 U.S.C.C.A.N. 609, 610-12.

87. *See id.* at 4-7 (citing *Hydrolevel*, 456 U.S. at 556; Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); and litigation against ASTM that settled but produced a "chilling effect").

88. Pub. L. No. 104-113, 110 Stat. 775 (1996) (codified at 15 U.S.C. § 3701 (1996)).

89. *See* § 102, 118 Stat. 661, 661-62 (2004) (findings).

90. 15 U.S.C. § 4301(a)(8) (2004)). A-119 directs federal agencies to use "voluntary consensus standards" in lieu of government-created ones. *See* A-119, *supra* note 51. A-119's definition of "voluntary consensus standard" is nearly identical to that of the SDOAA, and A-119 thus offers little additional guidance. *See id.* As will be discussed below, however, other policies and guidelines found in A-119 support a conclusion that adequate consumer representation in an SDO should be a requirement for an SDO to fall under the SDOAA's protections.

91. *See* 15 U.S.C. § 4301(a)(8).

The SDOAA's other key definition is "standards development activity," which is defined as "any action taken by [an SDO] for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities."[92] The term excludes exchange of "cost, sales, profitability, prices, marketing, or distribution" information not reasonably required to develop, promulgate, or assess conformity of a standard; market allocation; and conspiracies that would fix prices.[93]

Under the SDOAA, key substantive components apply to "standards development organizations engaged in a standards-development activity." SDOs are subject to rule of reason treatment,[94] liability limited to actual damages,[95] and recovery of costs and attorney's fees if substantially prevailing.[96]

In addition to satisfying the "standards development organization" and "standards development activities" definitions, to qualify for the recovery limitation, an SDO must file a written disclosure with the Attorney General and the Federal Trade Commission (FTC) that includes its name, principal place of business, and the nature and scope of the standards development activities in which it engages.[97] The disclosure must be filed within ninety days of commencement of the standards development activity.[98] The name, principal place of business, and general terms of the standards development activity are published by the Attorney General or FTC in the *Federal Register* within thirty days of their filing.[99] The

92. *Id.* (a)(7). Curiously, the SDOAA defines the term "technical standard" by reference to the National Technology Transfer and Advancement Act. *Id.* (a)(9), but the term is never actually used in the provisions of the SDOAA. An interesting question is whether the SDOAA would cover trade association rules like the refusal to share patient X-rays in *Indiana Federation of Dentists*. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986). This Article assumes that such activities would not constitute standards development activities under the SDOAA because the legislative purpose and history seem focused purely on standards that are technical in nature, as amorphous as that concept may be. As *Indiana Federation of Dentists* makes clear, however, trade association rules that deprive customers of the products they desire can be extremely anti-competitive, and the case for consumer representation in trade associations, if those associations are in fact covered by the SDOAA, is strong. *See id.* at 455.

93. 15 U.S.C. § 4301(c)(1)-(3) (2004).

94. *See id.* § 4302.

95. *See id.* § 4303.

96. *Id.* § 4304.

97. *Id.* § 4305(a)(2), (c).

98. 15 U.S.C. § 4305(a)(2).

99. *Id.* (b).

recovery limitation provision begins to apply thirty days from the SDO's filing.[100]

Since the passage of the SDOAA, nearly 300 registrations have been published in the *Federal Register*.[101] A sample of the registrations shows a diverse range of organizations and activities, including a variety of business standards developed by ASTM International,[102] Interactive Advertising Bureau,[103] and Industrial Truck Standards Development Foundation, Inc.[104]

IV. CONSUMER CHOICE THEORY & COLLABORATIVE STANDARD SETTING

This Article asserts that Congress, in passing the SDOAA, demonstrated a concern that consumer groups be included in the standard-setting process if an SSO is to receive the protections of the Act. This section therefore discusses the consumer choice view of antitrust with which the SDOAA neatly fits.

A. *Consumer Choice Theory Basics*

Neil W. Averitt of the FTC and Professor Robert H. Lande have written extensively on consumer choice and antitrust.[105] In their view, consumer choice, not economic efficiency, is antitrust's central concern.[106]

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100. *Id.* (c).

101. Using the search terms "15 U.S.C. 4301" and "standards development" and limiting results to those after July 31, 2004, produced 297 results on March 11, 2007. Some of these publications supplement earlier initial registration to cover additional activities.

102. 71 Fed. Reg. 18769 (Apr. 12, 2006).

103. Advertising guidelines that intended "to organize the industry to set standards and guidelines that make Interactive an easier medium for agencies and marketers to buy and capture value from advertising." 69 Fed. Reg. 61868-01 (Oct. 21, 2004).

104. Activities used to "develop, adopt, amend, publish and distribute voluntary national consensus standards for industrial trucks, including forklift trucks, and related components, attachments and equipment." 70 Fed. Reg. 76079-02 (Dec. 22, 2005).

105. *See, e.g.*, Robert H. Lande & Neil W. Averritt, *Using the Consumer Choice Paradigm: A Practical Guide* (forthcoming 2007); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001) [hereinafter *Consumer Choice*]; Robert H. Lande, *Proving the Obvious: The Antitrust Laws were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959 (1999); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

106. *See Consumer Choice*, *supra* note 105, at 503.

Therefore, conduct that "limits the natural range of choices in the marketplace" should be condemned.[107] By focusing on consumer choice, antitrust will best be able to produce efficient markets, improve prices and quality, and "recognize and protect the important elements of innovation, variety, quality, safety and other aspects of non-price competition."[108] This latter group of concerns, especially innovation, quality, and safety, are particularly relevant here because they are several of the SDOAA's goals.[109]

While the consumer choice theory is largely normative, Lande and Averitt have convincingly argued that a great number of antitrust decisions can be explained in terms of consumer choice protection.[110] For example, much of the U.S. government's suit against Microsoft centered on the foreclosing effect that Microsoft's conduct had on the range of options for consumers.[111] In addition, while enforcement agencies have not focused on consumer choice, both the federal and state merger guidelines reference the potential effects of a merger on non-price competition.[112] The SDOAA should be listed among this recent growth of consumer choice theory.

B. *What Consumer Choice Theory Means for Standards*

In a very basic sense, SSOs are the antithesis of consumer choice: competition among products allows consumers to determine the future of a market; collaborative standard setting has the potential to eliminate the consumer entirely from the equation. This premise can be overstated, however, so some limiting guidelines are necessary.

Only in certain circumstances might standards actually eliminate or excessively limit consumer choice. Where an SSO's members lack sufficient market power and an SSO selects a standard different from what consumers would chose in a competitive market, competing firms will presumably stand ready and willing to take advantage of the SSO's mistaken perception of or deliberate disregard for consumer preferences. Thus, consumers remain essentially represented in the standard-setting process by nonmember firms.

Further, while standards that are routinely adopted by governments and given the force of law have seemingly immense anti-competitive potential, since producing nonconforming competing products becomes illegal, local

107. *See id.* at 503-04.

108. *See id.* at 504-05.

109. Pub. L. No. 108-237, § 102, 118 Stat. 661 (2004) (codified at 15 U.S.C. §§ 4301-4305).

110. *See Consumer Choice*, *supra* note 105, at 508-09.

111. *See id.* at 511-12

112. *See id.* at 515-16.

governments remain politically accountable and thus unable to ignore consumer preferences when deciding whether to adopt a given standard. Many local governments may lack the ability to analyze consumer preferences regarding a given code or adjust those standards to accommodate particularized consumer preferences. Indeed, the ability to develop better standards at a lower cost is what makes private standard setting so attractive.[113] Nonetheless, interested consumer groups, both on a local and national level, may voice their concerns about the cost and loss of preferred features resulting from a standard before local governments decide whether to adopt it.

Similarly, informational, quality, and safety standards that lack the power of law do not prevent competitors from offering consumers non-certified products that are cheaper (allowing consumers to trade off quality or safety for price) or accompanied by information explaining why the product is nonetheless superior.

If included in the standard-setting process, what might consumers add? Clearly the desires of consumers and of producers will not always align, particularly where the SSO members have sufficient market power to ignore consumer preferences. While the specifics of consumer desires will of course vary with the particular product being standardized (i.e., the array of particular features that consumers find preferable), two general observations can be made.

First, in the context of interchangeability standards, timing is important. As discussed above, an interchangeability standard freezes innovation in the primary product market but creates increased price and complementary product competition. Consumers, therefore, have a real interest in ensuring that SSOs set an interchangeability standard at the optimal time. That is, if consumers are sufficiently satisfied with the current state of technology in the primary product, they are more likely to support an interchangeability standard than if the range of features in the primary product is still inadequate. Because innovation is costly and risky, however, primary product firms have an interest in eliminating the costly innovation competition as soon as possible, and when they have actual market power, the ability to do so.

Second, in the context of quality and safety standards, consumers will often choose to trade off quality or safety for price. For this reason, binding quality and safety standards are generally considered more anti-competitive than standards that simply convey safety and quality

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113. *See* Pub. L. No. 108-237, § 102, 118 Stat. 661 (codified at 15 U.S.C. §§ 4301-4305).

information to the consumer without restricting choices.[114] Where an industry creates a binding quality or safety standard, however, perhaps even for pro-competitive reasons like economies of scale, the industry and consumers may diverge on where the quality/safety and price balance point should be struck. Certainly firms will prefer the point at which profit margins are highest, but that is not necessarily so for consumers.

V. CONSUMER REPRESENTATION AND THE SDOAA

One of the attributes of a "voluntary consensus standard" under the SDOAA is consensus, including "a process for attempting to resolve objections by interested parties. . . ."[115] The SDOAA does not define the term "interested party," but both the SDOAA's legislative history and the Office of Management and Budget Circular referenced in the SDOAA as the basis for definition of "standards development organization" support the conclusion that Congress intended consumers to be included as interested parties.

A. *References to Consumers in the SDOAA's Legislative History*

The SDOAA's legislative history references consumer representation. David L. Karmol, Vice President of Public Policy and Government Affairs for the American Nation Standards Institute (ANSI), spoke at length in the SDOAA hearings. ANSI has administered and coordinated private-sector standard setting for nearly 100 years.[116] ANSI's role is to accredit standard-setting bodies by determining whether an SSO incorporates "principles of openness and due process . . . and [ensures] that a consensus of all interested parties has been reached."[117] ANSI has approved approximately 11,000 standards, and represents the United States in international standards organizations.[118] Thus, Mr. Karmol's testimony is of considerable guidance in interpreting the SDOAA. His statements

114. *See supra* text accompanying note 48.

115. A-119, *supra* note 51.

116. *See* Standards Development Organization Advancement Act of 2003, Hearing on H.R. 1089 before the Task Force on Antitrust of the House Committee of the Judiciary (Apr. 9, 2003) (comments of David L. Karmol, Vice President of Public Policy and Government Affairs, American National Standards Institute) [hereinafter Karmol Comments]. *See also* American National Standards Institute, An Historical Overview, *at* http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (last visited May 21, 2007).

117. *See* Karmol Comments, *supra* note 116.

118. *Id.*

contain numerous references to consumer representation in the standard-setting process.

In determining whether to accredit an SSO, ANSI requires that SSOs reach "consensus among all affected stakeholder groups that may include industry, government, organizations, consumers/labor interests, and other experts."[119] ANSI itself is a "unique partnership of industry; professional, technical, trade, labor, academic and *consumer* organizations; and some 30 government agencies."[120] In describing the various SSOs accredited by ANSI, Mr. Karmol noted that those SSOs included the voluntary participation of consumer groups.[121] ANSI requires that proposed standards be circulated "both to the consensus body and the public at large. . . ."[122] To be considered an ANSI-compliant standard, there must be sufficient evidence of "a substantive reasonable basis for its existence and that it meets the needs of producers, *users* and other interest groups."[123] Finally, Mr. Karmol stated that "ANSI has a strong tradition of working cooperatively with government as well as industry, organizations, and consumer interests."[124]

Given the influence of ANSI and the detailed descriptions given by Mr. Karmol, it appears that Congress's vision of SDOs under the SDOAA was something along the lines of ANSI-approved SSOs. Because Mr. Karmol's comments indicated that consumer representation was critical for ANSI approval, consumer representation as a factor in determining whether an SSO is indeed an SDO is consistent with the SDOAA's legislative history.

B. *OMB Circular*

The Office of Management and Budget (OMB) Circular A-119, referenced in the SDOAA as guidance for interpreting the meaning of due process for the purpose of determining who is an SDO, supports the view that the presence or absence of consumer representation in an SSO is an important factor in determining whether an SSO qualifies as an SDO under the SDOAA.[125] OMB Circular A-119 directs federal agencies to "use

119. *See id.*

120. *Id.* (emphasis added).

121. *Id.*

122. Karmol Comments, *supra* note 116.

123. *Id.* (emphasis added).

124. *Id.*

125. *See* A-119, *supra* note 51. "OMB's predominant mission is to assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies." OMB's Mission, Office of Management and Budget, www.whitehouse.gov/omb/organization/role.html (last visited May 21, 2007).

voluntary consensus standards in lieu of government-unique standards . . . except where inconsistent with law or otherwise impractical."[126] The Circular sets forth four goals: reduction of government costs, provision of incentives to establish standards that serve "national needs," economic growth, and increased "reliance upon the private sector to supply Government needs for goods and services."[127]

The Circular also guides federal agencies in their participation in the private standard-setting process in an effort to "increase the likelihood that [standards] . . . will meet both public and private sector needs."[128] Agencies "must participate with [private standard-setting bodies] in the development of voluntary consensus standards when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources."[129]

Agency participation in the private standard-setting process therefore places agencies in two representative roles. Agencies must represent the public interest, but also are themselves consumers of the goods and services being standardized. Thus, under the guidance of the Circular, federal agencies serve as consumer representatives in SSOs, both directly as the purchasers of goods and services, and indirectly as guardians of "national needs." Because the SDOAA references the Circular as definitional in determining what an SDO is, and because the Circular envisions consumer representation, such representation appears to have been within Congress's intent in enacting the SDOAA.

VI. INTERPRETING THE SDOAA IN LIGHT OF CONSUMER CHOICE

A. *Threshold Determination to Fall Under SDOAA in Private Litigation*

The SDOAA's protections apply to SDOs engaged in standard-setting activities. Further, the SDOAA has defined "SDO" fairly specifically to include representation of interested parties, consensus, and due process. While there have been no cases analyzing whether a particular SSO is covered by the SDOAA, it would seem that to give effect to Congress's goal of encouraging voluntary consensus standard setting, antitrust plaintiffs suing SSOs have an opportunity to challenge as an initial matter whether an SSO has in fact provided the procedural protections and

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126. A-119, *supra* note 51.
127. *See id.*
128. *Id.*
129. *Id.*

included the necessary parties required by the SDOAA. Because neither the Department of Justice (DOJ) nor the FTC certify an SSO as an SDO, there is in practice no other opportunity to challenge whether an SSO satisfies the definition provided in the SDOAA.

There is, of course, a strong incentive for SSOs that do not comply with the SDOAA's definitional standard to avoid the SDOAA altogether. SSOs that disclose their identities and activities to the DOJ and FTC have put themselves on the radar screens of those agencies, and thus risk enforcement action. Thus, FTC and DOJ enforcement policy should play a primary role in fulfilling the objectives of the SDOAA.

B. *DOJ/FTC Enforcement Following Disclosure*

Both the DOJ and the FTC have issued press releases pertaining to the SDOAA.[130] Neither release mentions any agency role beyond receiving registrations, verifying that the required information is present in the paperwork, and arranging for publication in the *Federal Register*. The DOJ's Antitrust Division Manual does make clear, however, that upon receipt of a notification under the SDOAA, the Division will first "determine whether the notification discloses information of antitrust concern that merits the opening of a preliminary inquiry."[131]

While there is not a DOJ policy on the SDOAA specifically, the Antitrust Division has addressed a pre-SDOAA SSO's activities in a business review letter issued pursuant to the Department of Justice's Business Review Procedure.[132] The review letter was sought by the American Welding Society (Society) in regard to its development of a robotic welding cell interface standard.[133] The Society was accredited ANSI.[134] While the Division stated that it lacked the information needed

130. *See generally* Press Release, Federal Trade Commission, FTC Notice on Implementation of the Standards Development Organization Advancement Act of 2004 (June 24, 2004), *available at* http://www.ftc.gov/opa/2004/06/sdoaa.htm (last visited May 21, 2007); Press Release, Department of Justice, Justice Department Implements the Standards Development Organization Advancement Act of 2004 (June 24, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/June/04_at_443.htm (last visited May 21, 2007).

131. ANTITRUST DIVISION MANUAL, NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993 (3d ed.), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/204293.htm (last visited May 21, 2007). The Manual refers to the NCRPA (which was amended by the SDOAA), but also to SDOs, so it appears that this policy applies to SDOs under the SDOAA. *See id.*

132. *See* 28 C.F.R. § 50.6 (2007).

133. *See* Letter from Charles A. James, Assistant Attorney General, Department of Justice Antitrust Division, to Douglas W. Macdonald, Esq., Wester, Chamberlain & Bean (Oct. 7, 2002) [hereinafter James's Letter] (on file with Department of Justice).

134. *Id.*

to conduct a rule of reason analysis on the Society's standard-setting activities, its position was that it had "no present inclination to challenge the Society's adoption of the standard endorsed by its Committee."[135]

The Division also made several statements that might provide guidance as to how the Division will pursue enforcement against SDOs. First, the Division made clear that it would not consider whether "we think one standard is better or worse than another."[136] Rather, the Division would look to whether the process for setting the standard had been abused and whether there was any anti-competitive conduct by the Society or its members.[137] Second, and important in the context of this Article, the Division noted that the Society was comprised of both producers and consumers of the product, and "there is little reason to believe that the latter would knowingly deprive themselves of reasonable competitive options."[138]

While the DOJ has given some indication that consumer representation in the standard-setting process is relevant in determining whether a standard is anti-competitive, in light of the SDOAA's shift away from private enforcement and toward agency enforcement against SSOs, additional guidelines pertaining specifically to the SDOAA should be developed.

Finally, SDOAA disclosures to the DOJ and FTC should provide a treasure trove of data that the agencies (and academics) can use to analyze trends in standards setting. For example, it would be helpful to know what percentage of SDOs are approved by ANSI or other experienced certification organizations, what industries are taking advantage of the Act, and what types of activities are involved. By cross-referencing this data against what we know about the types of industries and firms prone to or with a history of cartelization, agency enforcement efforts can be better focused.

C. *Determining Whether Consumers Are Represented*

Determining whether there is adequate consumer representation in an SSO to fulfill the goals of the SDOAA requires the courts and enforcement agencies to consider both the type of standard being developed and the make-up and status of the SSO. As discussed above, not all standards will result in the elimination of future consumer choice. Informational

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135. *Id.*

136. *Id.*

137. *Id.*

138. James's Letter, *supra* note 133.

standards such as seals of approval leave consumers free to purchase noncompliant products and noncompliant firms free to persuade consumers that their products are nonetheless desirable or even superior. The absence of consumer representation in the informational standard-setting process does not affect consumer choice and is not anti-competitive.[139] Safety standards that are adopted by governments and given the force of law, while resulting in the complete elimination of noncompliant products from the market, do not require consumer representation because consumers are free to persuade lawmakers not to adopt a standard because it removes desirable products from the market.

Where quality or safety standards are not adopted into law, and where they are not merely informational but rather include an agreement among SSO members not to produce noncompliant products, consumer representation is critical if the SSO members have market power. When this is the case, an SSO that does not include consumer groups or consider their objections as part of the consensus process has effectively dictated to the market what products will be available regardless of consumer preferences.[140] Such SSOs are anti-competitive and conflict with the goals of the SDOAA. Similarly, variety-simplification standards that include an agreement not to produce noncompliant products effectively eliminate choices from the market if the SSO members have market power.

Interchangeability standards should also require consumer representation. Because of the role that network effects play, a successful interchangeability standard effectively eliminates noncompliant products from the market or at least makes competition exceedingly difficult and discourages market entry. Further, the critical mass necessary to tip an interchangeability standard into a dominant position is less than full market power because network effects are snowball effects.[141] It is therefore critical that consumers be represented in the process of setting interchangeability standards. This ensures that the optimal mix of features are included and that the standard is not set too early in the life cycle of the industry, which would result in a prematurely installed base and stifle innovation.

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139. To the extent informational standards can be used to mislead, consumer fraud laws provide redress and deterrence.

140. If the SSO members lack market power, competing firms can continue to offer noncompliant products, and consumers are essentially "represented" by nonmember firms.

141. *See, e.g.*, Dennis S. Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 CORNELL J.L. & PUB. POL'Y 161, 173-74 (1999) ("When network effects are present . . . the market has a tendency to 'tip' in the direction of whatever firm gains an initial edge.").

Where it is essential that consumers be represented, the courts and enforcement agencies must also consider who represents consumers. In some instances this should be easy to determine. For example, where a standard is set for a machine used in producing an automobile part, the consumers are firms themselves. Including all consuming firms or a representative sample should ensure adequate consumer representation. Further, simply providing notice to those consumers should be adequate, as they will have both the incentive and means to participate should they so choose.

Representation for standards set for retail products is more complex. Private nonprofit consumer groups, such as Consumers Union, are potential representatives.[142] State or federal agencies or attorneys general can also represent the consumers who are their constituents and to whom they are beholden. Further, marketing information can serve as a proxy for, or additional measure of, consumer representation. If an SSO has gathered marketing information that describes consumer preferences and develops a standard with those preferences in mind, an SSO has not forced a less desirable product onto consumers. If the SSO has not gathered such information, has used survey techniques to manipulate a pre-desired result, or has acted contrary to the information, courts and enforcement agencies should examine the SSO more closely.

Finally, courts and enforcement agencies should consider whether the SSO has been certified by a credible certification organization such as ANSI. ANSI has considerable experience certifying SSOs and was influential in the passage of the SDOAA, so ANSI compliance should generally satisfy courts and enforcement agencies that an SSO has adequately represented consumers.

VII. CONCLUSION

Predicting an optimal outcome for consumers is a difficult task. Congress, courts, enforcement agencies, and private litigants attempt to do so, but the aftermath of any given antitrust rule or decision is often uncertain. This difficulty and uncertainty is particularly acute in the context of standard setting, since innovation and economic development depend on when, how, and what standards are set.

Perhaps the most appealing aspect of a consumer choice approach to antitrust analysis of standards is that it puts a greater amount of control

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142. *See* ConsumersUnion.org Web Site, http://www.consumersunion.org/ (last visited May 21, 2007).

over consumer well-being in the hands of consumers. Because standards are a complex and technical business, the debate over standards is often scientific or economic. A very basic premise can be easily overlooked in this debate: a free market economy flourishes because it is driven by consumer demand. Congress has taken an important step toward ensuring that standards are aligned with consumer preferences, and courts and enforcement agencies should take this guidance seriously as our reliance on standards continues to grow.