



Industry Trade Associations— Their Strengths and Limitations

WE'VE SEEN A LOT OF DISCUSSION about patents in our industry recently, probably the most interest I can ever recall; even the High End / Vari-Lite lawsuit didn't attract as much attention as the current cases. With all this controversy inevitably come some reasonable questions for the trade associations. More than once I've heard comments such as, "What are the Trade Associations doing about this?" or "Why don't ESTA and PLASA sort this out and stop their members fighting each other?" or finally, "Why doesn't the ESTA Technical Standards Program ban its members from obtaining patents in any area connected to standards?"

Well – why don't they? Isn't that what trade associations are for anyway, to police and mediate within the industry? The truth is that, in reality, these aren't roles that ESTA or PLASA are allowed to pursue or should take on.

These questions need to be considered within a broader understanding of what trade associations such as ESTA and PLASA and the Technical Standards Program (TSP) are and, perhaps more importantly, what they aren't. For example, you hear people talking about 'ESTA Standards' as if ESTA owns and creates these standards – it doesn't. In this case the trade association is a facilitator providing a structure that allows the many hundreds of people who get involved to write their own consensus standards within an established ANSI framework. That ANSI framework is key to the process as it is designed to ensure impartiality and fairness with input from anyone and everyone who has an interest – members or not. Totally open meetings and public review of any documents, for example, are key parts of the process and ensure that standards cannot be created by any particular cartel to further its own interests.

So – in the case of the TSP, ESTA acts as the secretariat, not a law maker or standards writer and everything done in the Technical Standards Program is consensus driven. Similarly ESTA and PLASA do not employ hordes of patent experts. To see the futility of that just take a look at the numbers; in total over 6 million US patents have been issued of which over 2 million are current. Each of those patents will likely contain multiple claims all of which are subject to personal interpretation and discussion. The trade associations cannot continuously search all patents and all applications to check that nothing going on in any standards meeting is impacted by patents.

Instead the approach has to be one of self-policing; every Working Group meeting opens with a request for input on patents when the individuals and companies represented are asked to

disclose knowledge of any patents, from any company (not just their own) which may be material to that particular standard. If a patent is disclosed and the consensus of the Working Group is that it is relevant and worthy of investigation (note it is the Working Group's decision – not ESTA's) then ESTA will contact the patent owner on behalf of the Working Group to request if the patent is available for license at a reasonable fee. That is all ESTA can do, the matter of specific licensing agreements is a private matter between companies and ESTA cannot get involved in that discussion. It is up to every company to decide for themselves if a product that they manufacture and their specific implementation of it is likely to infringe someone's Intellectual Property (IP) and to negotiate relevant licenses accordingly. ESTA cannot issue legal advice.

It is always possible that a specific implementation of a product designed to meet a standard could infringe someone else's IP. That would be true whether the standard existed or not. There are always design decisions in how you build a product and the trade associations cannot examine everyone's product ideas to determine if they are likely to infringe patents or not – that would be an unrealistic expectation. Again it is up to the individual companies to make their own determinations about IP.

In addition, trade associations have to take special care when it comes to any potential antitrust issues – every member has the right to be treated equally and fairly without bias or discrimination. You can see a direct need for this when some kind of lawsuit is going on – the trade association cannot, either in perception or fact, favor one party over the other. After a lawsuit is settled then action by a trade association in response to any complaints received through its Code of Conduct may be merited – but certainly not before.

The bottom line is simple - a trade association is not a law maker or enforcer, nor is it some kind of external disciplinary oversight body. A trade association is precisely what the name says, an 'association' of its members. Don't think of ESTA and PLASA as being an office in New York or Eastbourne – yes, those are the administrative hubs, but that's all they are. In truth ESTA and PLASA are their members – nothing more and nothing less. ■

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