

4th International Conference on Standardization and
Innovation in Information Technology

21 September 2005

Geneva

US & EU Regulatory Competition in ICT Standardization Law & Policy

Jane K. Winn

Professor & Director

Shidler Center for Law, Commerce & Technology

University of Washington School of Law

Seattle Washington USA

US & EU Regulatory Competition in ICT Standardization Law & Policy

- What is regulatory competition?
- Special features of competition to regulate of global ICT networks
- US regulation of ICT standardization
- EU regulation of ICT standardization
- Multilateral coordination of ICT standardization
- Conclusion

Regulatory Competition

- Tiebout: regulatory diversity may be better than harmonization
- Sovereigns compete to attract mobile resources (labor, capital)
- US state regulation of corporations and race to bottom
- Pollution laws and problem of externalities
- State/federal management of banking risks – dysfunctional competition

Special Features of Competition to Regulate ICT Networks

- Network effects: not competition for mobile resources but to direct growth of network to benefit local interests
- Speed of innovation: risk of irrelevance if delay to assess public interest
- Wide range of “regulators” competing:
 - Formal versus informal
 - National versus multilateral
 - De facto versus de jure

US Law & Policy

- Private sector leads in standard setting, government supports private sector
 - No requirement that national standards be harmonized
- Strong intellectual property rights
- Police fairness of standard developing to prevent fraud and anti-competitive behavior
- Government adopts private standards for procurement
- Government procurement budgets can create incentives for desired innovation
- Limited public mandates for health, safety, environment

US Regulation Case Studies

- Electronic commerce authentication
 - E-SIGN Act and UETA are technology neutral, market should decide what authentication is appropriate
 - But market is not producing standards only competing proprietary technologies
- Data protection
 - Failure of 25 year experiment in letting market decide appropriate level of protection produces epidemic of identity theft
 - Suggestion that FDIC could help coordinate development of standards roundly rejected by private sector

EU Law & Policy

- Regional government coordinates work of standard developing in member states
 - National standards bodies required to withdraw conflicting superceded standards
- Strong IPR?
- Prevent anti-competitive manipulation of processes
- Coordinate work of regional and multilateral standards organizations
- Direct government subsidies for development of standards as public goods
- Co-regulation: New Approach Directives

EU Regulation Case Studies

- Electronic commerce authentication
 - Electronic Signature Directive promotes a specific technology (New Approach “Lite”)
 - Commission subsidized efforts of EESSI
 - Lack of adoption in private sector
- Data protection
 - Why no co-regulation of standards for privacy enhancing technologies?
 - CEN Workshop Agreements

Multilateral Governance

- Is coordinated response possible?
 - Problem of framing: US suspicion of government intervention; EU commitment to socialization of risk
 - Perspectives on legitimacy of de jure international organizations and informal international organizations
- Agenda: greater accountability for consortia?
 - Recognize limited number consortia
 - Post hoc review as a substitute for ex ante representation of public interest
 - Manageable IPR policies
 - More effective conformity assessments

Conclusion

- EU advantage in implementation but recognizes need to make defense of public interest more nimble
- US advantage in innovation but options to expand oversight of consortia limited
- Will continued dominance of consortia in absence of oversight result in network fragmentation?