CONCURRING OPINION OF COMMISSIONER JON LEIBOWITZ
IN THE MATTER OF RAMBUS, INC.
DOCKET NO. 9302

I. INTRODUCTION

Rambus's deception of JEDEC and its members injured competition and consumers alike. The company exploited the DRAM standard-setting process for its own anticompetitive ends. JEDEC's members – including Rambus – understood that this information was to be gathered and shared to benefit the industry and its consumers as a whole, yet Rambus effectively transmogrified JEDEC's procompetitive efforts into a tool for monopolization. As detailed in the Commission's Opinion, such conduct meets all the requisite elements of a Section 2 violation.

It would be equally apt, though, to characterize Rambus's conduct as an "unfair method of competition" in violation of Section 5 of the FTC Act. Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws[1] themselves, but also the policies that those laws were intended to promote. At least three of these policies are at issue here. From the FTC's earliest days, deceitful conduct has fallen within Section 5's province for its effects on competition, as well as on consumers.[2] Innovation – clearly at issue in this case – is indisputably a matter of critical antitrust interest.[3] In addition, joint standard-setting by rivals has long been an "object[] of antitrust scrutiny" for its anticompetitive uses, notwithstanding its great potential also to yield efficiencies.[4] In this case, Rambus's deceptive conduct distorted joint

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[1] 15 U.S.C. § 12 (a) (2006). The antitrust laws include the Sherman Act and the Clayton Act (as modified by the Robinson-Patman Act). The FTC Act is not an antitrust law.

[2] Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 772 n.9 (1999) ("That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established). *Cf.* F.T.C. v. Algoma Lumber Co., 291 U.S. 67, 79-80 (1934) (finding a false advertisement to be unfair competition)."; F.T.C. v. Winsted Hosiery, 258 U.S. 483 (1922) (per Brandeis, J.) (holding that false labeling that misled consumers constituted unfair competition against competitors). *See also* F.T.C. v. Gratz, 253 U.S. 421, 427 (1920) (holding that "unfair methods of competition" do not apply to practices that were "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly"). Notably, the *Gratz* view of Section 5's scope was later abandoned as *too narrow*. F.T.C. v. R.F. Keppel & Bros., Inc., 291 U.S. 304 (1934).

[3] *See generally* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/innovationsrpt.pdf.

[4] *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500-01 (1988) (holding that "private standard-setting associations have traditionally been objects of antitrust scrutiny" because of their potential use as a means for anticompetitive horizontal agreements, but that the associations' "potential for

standard-setting decisions and innovation investments in ways that seriously injured the operations of the competitive market to the detriment of consumers; it thereby transgressed the policies and spirit of the antitrust laws in all three respects. While respondent's behavior before JEDEC might well have been challenged solely as a pure Section 5 violation, Complaint Counsel did not litigate this theory before the administrative law judge. Thus, I write separately to discuss and reemphasize the broad reach and unique role of Section 5.

I also address the scope of Section 5 because some commentators have misperceived the Commission's authority to challenge "unfair methods of competition," incorrectly viewing it as limited, with perhaps a few exceptions, to violations of the Sherman and Clayton Acts.[5] Others are unclear just how far Section 5 can reach beyond the antitrust laws.[6] Regardless of the reasons for these cramped or confused views, a review of Section 5's legislative history, statutory language, and Supreme Court interpretations reveals a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize.

The Commission, in my view, should place greater emphasis on developing the full range of its jurisdiction and making it more clear to the bar, the public, the business community, and potential antitrust malefactors what Section 5 embraces and what it does not. Although the Commission has not left fallow its Section 5 jurisdiction to challenge conduct outside the antitrust laws, neither has the Agency fully exercised or explained it. In discussing Section 5 in the context of Rambus, I hope to encourage the Commission (and its staff) to develop further and employ more fully this critical and unique aspect of our statutory mandate. If we do, benefit will accrue both to consumers and to competition.

II. THE MANDATE UNDERLYING SECTION 5

A. Legislative History

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procompetitive benefits" has influenced "most lower courts to apply rule-of-reason analysis to product standard-setting by private associations"). *See also* TIMOTHY J. MURIS, BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, STAFF REPORT ON THE STANDARDS AND CERTIFICATION RULE 9 (1983) ("Standard setting can be misused to exclude competitors unreasonably, injuring consumers. The Commission can pursue anticompetitive restraints as unfair methods of competition, using a rule of reason approach, or as unfair acts or practices under the Commission's unfairness protocol, in each case weighing the benefits and costs of the challenged activity.").

5 *See, e.g.*, Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 765-66 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today . . . .").

6 Antitrust Law Special Comm., Am. Bar Ass'n, REPORT ON THE ROLE OF THE FEDERAL TRADE COMMISSION, 58 ANTITRUST L.J. 53, 63-64 n.11 (1989) (observing that "[a]lthough it is well established that Section 5's ban on 'unfair methods of competition' permits the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts, there is a debate about how far Section 5 reaches beyond those Acts.").

Debates regarding the need for, and nature of, a "federal trade commission" roiled for more than a decade prior to its creation in 1914.[7] These debates involved four of the most brilliant minds of the time – Roosevelt, Taft, Wilson, and Brandeis – and coalesced into a significant issue in the election of 1912.[8] One of the flashpoint events that led Congress to act was the *Standard Oil* case, in which the Supreme Court in 1911 adopted "rule of reason" analysis for the Sherman Act's prohibition on "restraints of trade."[9] Many within and outside of Congress viewed the Supreme Court's reasonableness test as judicial invention – what some more recently would term "legislat[ing] from the bench"[10] – that threatened both to undermine Congress's aim in passing the Sherman Act and to yield inconsistent applications from court to court.[11]

Congress's bipartisan reaction was to create an administrative agency with antitrust expertise, an enforcement mandate *more expansive than that of the antitrust laws*, and the structure and flexibility to identify, analyze, and challenge new forms of "unfair methods of competition" as they developed.[12] Legislators in the Congressional debates repeatedly expressed these goals. Senator Robinson, for example, indicated that "unfair methods of competition" encompassed practices that constituted "unjust, inequitable, or dishonest competition."[13] Senator Pomerene and Senator Thomas both stated that the proposed Act would authorize the Commission to determine whether certain forms of business conduct constituted unfair methods of competition, regardless of whether that conduct involved a restraint of trade.[14] Senator Newlands, the Chairman of the Senate Commerce Committee, responded to concerns about this process by explaining that "[y]ou can not [sic] take a body of five men, intelligent men,

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7 The FTC's predecessor, the Bureau of Corporations, was created in 1903.

8 Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (providing the most thorough examination of the FTC's creation and the competing forces and philosophies that gave the agency its ultimate form and powers). *See also* Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Neil Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 229 (1980).

9 Standard Oil Co. v. U.S., 221 U.S. 1 (1911).

10 *See, e.g.,* 140 CONG. REC. 10,109 (1994) (statement of Sen. Thurmond during Senate hearing on nomination of Justice Breyer).

11 *See, e.g.*, 47 CONG. REC. 1,225 (1911) (statement of Sen. Newlands).

12 Another, related Congressional response, also in 1914, was passage of the Clayton Act, 15 U.S.C. § 12, which, *inter alia*, contained specific provisions regarding discriminatory pricing, tying, stock acquisitions, and interlocking directorates.

13 51 CONG. REC. 12,153 (1914) (statement of Sen. Robinson).

14 51 CONG. REC. 12,161 (1914) (statement of Sen. Pomerene); 51 CONG. REC. 12,197 (1914) (statement of Sen. Thomas). In Senator Cummins's view, the discretion and judgment of the Commission should not even be subject to judicial review. 51 CONG. REC. 12,151 (1914) (statement of Sen. Cummins).

composed as this body will be of lawyers, economists, publicists, men engaged in industry, who will not be able to determine justly whether the practice is contrary to good morals or not."[15]

Section 5 was not enacted merely to mirror the antitrust laws. Senator Cummins, one of the bill's main proponents, squarely addressed this issue on the Senate floor when he responded to the question, "why, if unfair competition is in restraint of trade, [are we] attempting to add statute to statute and give a further remedy for the violation of the [Sherman Act]?" Senator Cummins replied that the concept of "unfair competition" seeks:

> to go further [than "restraints of trade"] and make some things offenses that are not now condemned by the antitrust law. That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.[16]

Echoing this point, he later described Section 5 as new substantive law that would involve the Commission in activities beyond the simple enforcement of antitrust law.[17] Many other legislators similarly expressed their intent and understanding that Section 5 would extend beyond the Sherman Act.[18]

While the Act's legislative history makes its "sweep and flexibility . . . crystal clear,"[19] the plain language of the statute further bolsters this conclusion. If Congress had wanted Section 5's reach to be merely coterminous with that of the Sherman Act, it easily could have written the

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15 51 CONG. REC. 12,154 (1914) (statement of Sen. Newlands). Had he made his comment in more recent times, Senator Newlands doubtlessly would have phrased it to apply to a body of five men and women.

16 51 CONG. REC. 12,454 (1914) (statement of Sen. Cummins). Senator Cummins, an "insurgent" Republican, was a member both of the Commerce Committee, which prepared the Commission bill, and the Judiciary Committee, which prepared the bill that became the Clayton Act. He authored the "Cummins Report," which provided critical support for the Commission bill and helped influence its ultimate content.

17 51 CONG. REC. 12,613 (1914) (statement of Sen. Cummins).

18 *See, e.g.*, 51 CONG. REC. 14,333 (1914) (statement of Sen. Kenyon, remarking that the proposed federal trade commission "can take hold of matters that not in themselves are sufficient to amount to a monopoly or to amount to restrain [sic] of trade"); 51 CONG. REC. 14,329 (1914) (statement of Sen. Nelson, stating that the FTC Act "can be used in a lot of cases where there is no trust or monopoly"); 51 CONG. REC. 12,135 (1914) (statement of Sen. Newlands, observing that although "[a]ll agree that while the Sherman law is the foundation stone of our policy on [appropriate business conduct], additional legislation is necessary").

19 F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 241 (1972). *See also* F.T.C. v. Cement Inst., 333 U.S. 683, 693 (1948) ("All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages."); *Id.* at 693 n.6 (offering many citations to the Congressional Record).

statute accordingly. There would have been no logic in doing so, of course, since the Sherman Act already existed.

In drafting Section 5, Congress did not mimic the Sherman Act or try to enumerate a list of unfair practices. Rather, the Senate Report explains, Congress left it to the Commission "to determine what practices were unfair" because "there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others."[20] To ensure there would be no misunderstanding, Congress carefully crafted the term "unfair methods of competition" to distinguish it from the narrower common-law concept of "unfair competition."[21] Thus, Congress made clear its intent, both to those who would later enforce Section 5 and those who would be subject to its strictures, that this provision was not confined to the collection of violations then-recognized in antitrust or common law, but rather conferred a broader and more adaptable authority on the Commission.[22] Now, as more fully developed by the courts and Commission, Section 5 permits the FTC to challenge conduct outside the bounds of the antitrust law that (a) violates the policies that underlie the antitrust laws or (b) constitutes incipient violations of those laws.

B. Supreme Court Interpretations

The FTC's statutory mandate comes not just from the legislature of almost a century ago. For more than 70 years, an unbroken line of Supreme Court opinions has interpreted Section 5 as encompassing a broader array of behavior than the antitrust laws.[23]

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[20] S. Rep. No. 63-597, at 13 (1914) (internal quote omitted).

[21] H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.) ("There is no limit to human inventiveness in this field. . . . If Congress were to adopt the method of definition, it would undertake an endless task."); *Keppel*, 291 U.S. at 310-12, n.2 (stating that the Conference Committee substituted the phrase "unfair methods of competition" for "unfair competition" to ensure that the scope of the FTC Act would not be "restricted to those forms of unfair competition condemned by the common law.").

[22] *See Keppel*, 291 U.S. at 310 ("It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.").

[23] *See Sperry & Hutchinson*, 405 U.S. at 244 (commenting that, after *Keppel*, "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior."). Prior to the 1934 *Keppel* case, Supreme Court opinions tended to articulate a narrower view of Section 5's range. *See, e.g.,* F.T.C. v. Raladam Co., 283 U.S. 643 (1931); *Gratz*, 253 U.S. 421. Notably, however, even *Gratz*, which was authored only six years after the FTC's creation, emphasized Section 5's use to redress conduct such as that at issue in the present case, namely, "deception, bad faith, fraud, or oppression, or [practices that are] against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.* at 427.

Most recently, the Court in *Indiana Federation of Dentists* (*"IFD"*) observed that the standard for "unfairness" under the FTC Act is, "by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."[24]

The Court in *IFD* relied on *Sperry & Hutchinson*, the Court's most recent, substantive analysis of Section 5's history and breadth. In *Sperry*, the Court answered two critical questions:

> First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.[25]

Drawing on its review of Section 5's legislative history and other authority, the Court concluded that the Commission:

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, *considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws*.[26]

Supreme Court opinions prior to *IFD* expressed similar views. In *F.T.C. v. Brown Shoe Company*, the Court stated:

> [t]his broad power of the Commission is particularly *well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts* even though such practices may not actually violate these laws. . . .[27]

and further quoted *F.T.C. v. Motion Picture Advertising Service Company* for the proposition:

> [i]t is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . *to stop in their incipiency acts and practices which, when full blown, would violate those Acts* . . .

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24 F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citations omitted).

25 *Sperry & Hutchinson*, 405 U.S. at 239.

26 *Id*. at 244 (emphasis added).

27 F.T.C. v. Brown Shoe Co., 384 U.S. 316, 321 (1966) (emphasis added).

as well as to condemn as "unfair methods of competition" existing violations of them.[28]

I know of no Supreme Court case in the past 70 years that disagrees with these goals, contracts this scope, or disputes the flexibility and elasticity inherent in Section 5.[29]

C. Important Appellate Cases

In the early 1980s, courts of appeals rebuffed FTC efforts to apply Section 5 in three frequently-cited cases: *Official Airline Guides*, *Boise Cascade*, and *Ethyl*.[30] Each of these cases was decided before *IFD*, with its reliance on *Sperry & Hutchinson's* reiteration of Section 5's breadth. These appellate opinions support the propositions that Section 5 does not condemn pure conscious parallelism (*i.e.*, unaccompanied by any "plus factors") or conduct justified by an independent, legitimate business purpose. The decision in each, however, turns primarily on an evidentiary failure to demonstrate that the challenged conduct constituted an effort to acquire market power, tacitly collude, or manipulate price for anticompetitive purposes. *None* of these cases significantly constrains the FTC's authority to apply Section 5 to violations of the policies that underlie the antitrust statutes or that cause actual or incipient antitrust injury.

In *Official Airline Guides ("OAG")*, the FTC challenged the refusal by a monopolist/publisher of airline schedules to include in its compendium schedules of commuter airlines. This refusal to deal was discriminatory, unjustified, and injurious to commuter airlines in their competition with certificated airlines. The monopolist, however, did not act coercively, did not compete in the commuter airlines' market, where the antitrust injury occurred, and did not seek or have any prospect of gaining power in that market. Although the court acknowledged

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[28] *Id.* at 322 (quoting F.T.C. v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394-95 (1953) (emphasis added)). *See also* F.T.C. v. Texaco, 393 U.S. 223, 225-26 (1968).

[29] *See, e.g.,* Atl. Ref. Co. v. F.T.C., 381 U.S. 357, 369 (1965) ("As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that 'runs counter to the public policy declared in the' Act."); *Cement Inst.*, 333 at 694 ("[A]lthough all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations."); Fashion Originators' Guild of Am. v. F.T.C., 312 U.S. 457, 466 (1941) ("Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For 'it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.' . . . [I]t was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable."); *Keppel*, 291 U.S. at 312 n.2 (concluding from a detailed review of the legislative history that Congress wanted "unfair methods of competition" to confer a broad, flexible mandate that would exceed the "forms of unfair competition condemned by the common law").

[30] Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. F.T.C., 637 F.2d 573 (9th Cir. 1980); and E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984) [hereinafter *Ethyl*].

that FTC determinations as to what practices constitute an "unfair method of competition" deserve great weight,[31] it declined to uphold the Commission's order. Rather, it opted to characterize the respondent's action as a unilateral refusal to deal protected by *United States v. Colgate & Company*.[32] In explaining its decision, the court expressed concern that declaring such conduct unlawful would give the Commission too much latitude to substitute its own judgment for a respondent's independent business decisions that were taken without any anticompetitive purpose or prospect. In essence, although the challenged conduct was discriminatory and harmful, it did not violate the policies underlying the antitrust laws. The opinion does not discuss Section 5's jurisdictional breadth, and the facts of the case are so unusual that the case has little import for that legal issue.[33]

Boise Cascade involved the use of an industry-wide delivered pricing system. Industry members effected this system by including an artificial freight factor in the price charged to customers. The Commission contended that this practice tended to stabilize prices and therefore violated the Sherman and FTC Acts. The Ninth Circuit disagreed, however, concluding that the use of delivered pricing in this instance was a natural and independent, albeit consciously parallel, response to customer preferences. The court found no need to opine whether consciously parallel conduct, without more, could ever violate Section 5; it declined, however, to hold such behavior illegal *per se* where, as here, persuasive evidence of an anticompetitive effect was lacking. Although the court acknowledged "the unique features of the FTCA,"[34] it held that delivered pricing warranted the same legal assessment under both the FTC and Sherman Acts, since the relevant case law had been well-developed in both court and Commission litigation, as well as through prior Commission statements and practices on the issue. The court concluded that this history had resulted in a requirement that "the Commission must find either collusion or actual effect on competition to make out a §5 violation for use of delivered pricing."[35] The court

31 *Official Airline Guides*, 630 F.3d at 927 (citing *Cement Inst.*, 333 U.S. at 692-93, and *Atl. Ref.*, 381 U.S. at 367-68).

32 U.S. v. Colgate & Co., 250 U.S. 300 (1919).

33 In In re General Motors, 99 F.T.C. 464, 580 n.45 (1982), the Commission declared its position that the Second Circuit's decision was incorrect and that "unless it is repudiated by the Supreme Court we hold to our interpretation of the case law on arbitrary refusals to deal by monopolists. . . ." Nonetheless, a 2003 Commission letter observed that "the Commission has not issued a decision [since *OAG*] holding that a monopolist violated the FTC Act by using unfair methods of competition that affected customers in an adjacent market in which the monopolist did not operate." Letter from Fed. Trade Comm'n, to the U.S. Dep't of Transp. (Jun. 6, 2003) (on file with FTC Office of General Counsel).

34 *Boise Cascade*, 637 F.2d at 581.

35 *Id.* at 582. Much of this history is based on a series of delivered and base-point pricing cases that reached their doctrinal limits in *Cement Institute*. 333 U.S. at 721 n.19 (holding that "[w]hile we hold that the Commission's findings of combination were supported by evidence, that does not mean that the existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act."). *See also* Triangle Conduit & Cable Co. v. F.T.C., 168 F.2d 175 (7th Cir. 1948). Shortly thereafter, the

was clear, however, to confine this requirement to situations involving delivered pricing; consequently, it does not materially affect the well-recognized scope of Section 5.

In *Ethyl* – perhaps the most misunderstood and frequently mis-cited case regarding the scope of Section 5 – the Commission challenged four producers of gasoline anti-knock compounds for their use of delivered pricing, most-favored nation clauses, 30-day advance notice to customers of price changes, and announcement of price increases in the press. The producers did not act collusively in adopting and employing these practices; rather, they followed industry tradition and responded to customer demand. The FTC concluded that the practices nonetheless violated Section 5 because they constituted interdependent conduct that substantially reduced competition in the market. The appellate court disagreed, however, because it did not find substantial evidence that the challenged practices led to an adverse competitive impact.[36] Thus, this case, like *Boise Cascade*, was not decided on grounds of statutory interpretation but evidentiary sufficiency.[37]

Despite the outcome, the court engaged in a significant analysis of Section 5 and reconfirmed that it extends to conduct that does not fall within the antitrust laws. In particular, the court noted that "Congress' aim was to protect society against oppressive anticompetitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled."[38] Subsequently the court elaborated that:

> [a]lthough the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar incipient violations of those statutes, and conduct which, although not a violation of the

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Commission declared that the use of base point pricing could violate Section 5, even when not adopted or implemented as part of a combination or conspiracy. INTERIM REPORT ON STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES, S. Doc. No. 27, 81st Cong., 1st Sess. 41 (1949) [hereinafter "Interim Report"]. In Congress, however, legislation was introduced to reverse this position, and FTC Commissioners were subjected to "demanding" questioning in Senate Committee hearings. The legislation was abandoned only "after a majority of the commissioners recanted and testified that Section 5 prohibits only conspiracies to adopt base point pricing." Mary Azcuenaga, FTC Comm'r, *Shimmers in the Penumbra of Section 5 and Other News*, Address Before the 13th Annual Antitrust and Trade Regulation Seminar XX (Jul. 9, 1992) at 9-11(on file with FTC Office of General Counsel); S. Doc. No. 27 at 59-63.

36 *Ethyl*, 729 F.2d at 140-41. The court noted that the FTC's majority opinion observed that non-collusive facilitating practices violate Section 5 only where the evidence demonstrates that they substantially lessen competition and reveal a "clear nexus" between the practices and the competitive harm. The court found such evidence lacking in this case. *Id*.

37 For a detailed discussion of the Commission analysis in *Ethyl* regarding facilitating practices, *see* Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WISC. L. REV. 887 (1983).

38 *Ethyl*, 729 F.2d at 136 (quoting Report of the Conference Committee, H.R.Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914)).

letter of the antitrust laws, is close to a violation or is contrary to their spirit. In prosecuting violations of the spirit of the antitrust laws, the Commission has, with one or two exceptions, confined itself to attacking collusive, predatory, restrictive or deceitful conduct that substantially lessens competition.[39]

Section 5's intentionally unparticularized phrase, "unfair methods of competition" is not, therefore, an all-encompassing, unfocused warrant as some would claim. Rather, it is a flexible and powerful Congressional mandate to protect competition from unreasonable restraints, whether long-since recognized or newly discovered, that violate the antitrust laws, constitute incipient violations of those laws, or contravene those laws' fundamental policies.[40]

III. LIMITING ATTRIBUTES OF SECTION 5

Congress had good reasons for leaving Section 5's metes and bounds unspecified. Any effort in the name of "guidance" to provide a detailed plat defining its coverage would undermine Congress's clear intent to create a statute with sufficient scope, elasticity, and adaptability to accomplish its purpose. Thus, the influential treatise, Antitrust Law, observes, that:

> [i]t is now commonly said that Federal Trade Commission § 5 is not confined by the prohibitions of the Sherman Act or the Clayton Act. Indeed, § 5 is not confined by antitrust concepts at all. It allows the Commission to condemn conduct that is "unfair" in senses "beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." Or as the Supreme Court more

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[39] *Id.* at 136-37 (citations and footnote omitted). *See also* F.T.C. v. Abbott Lab., 853 F. Supp. 526 (D.D.C. 1994) (relying on *Ethyl* and *Sperry & Hutchinson*).

[40] This same period, 1980-1984, also yielded significant FTC efforts to rein in the use of Section 5. The most important of these is In re General Foods Co., 103 F.T.C. 204, 364-66 (1984). In this case the Commission rejected application of Section 5 to an alleged attempt to monopolize where the evidence did not reveal a dangerous probability of success, an element that had long been required under Section 2 of the Sherman Act. In the Commission's view, the concept of an incipient attempt to monopolize was simply beyond parsing. Moreover:

> [w]hile Section 5 may empower the Commission to pursue those activities which offend the "basic policies" of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed.

Id. at 352. The Commission expressly limited its holding in this regard to the dangerous probability issue and declined to comment whether Section 5 required the same measure of intent as did Section 2 of the Sherman Act. Other significant Commission actions from this period that bear on Section 5 jurisdiction regarding competition policy enforcement include: In re Kellogg Co., 99 F.T.C. 8 (1982) (summarily dismissing the appeal of an initial decision rejecting allegations that non-collusive efforts to maintain shared monopoly control of the ready-to-eat cereal market violated Section 5); and In re Exxon Co., 98 F.T.C. 453 (1981) (terminating an investigation into shared monopoly in the petroleum industry).

recently put it, the "standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons."

We have no general quarrel with these holdings; our own concern is limited to § 5 holdings that follow "the letter or ... spirit of the antitrust laws.[41]

My concerns here are also confined to matters implicating "the letter or spirit" of the antitrust laws. Section 5's "standard of unfairness" in this regard may yet strike some as "elusive," but it is far from unknowable or unbounded. Congress's mandate is that Section 5 should supplement and bolster the antitrust laws by challenging conduct that not only violates the antitrust laws but that also falls within the "penumbra"[42] of those statutes. Two critical attributes of Section 5 – the limited consequences of a Section 5 violation, and the inherent relationship between Section 5's reach and the scope of the antitrust laws – help ensure that respondents find enforcement efforts under this mandate to be neither punitive nor overreaching.

A. The Consequences of a Section 5 Violation Are More Limited than Those Resulting from a Violation of the Antitrust Laws

Section 5 violations involving conduct outside the antitrust statutes entail far more limited consequences than do violations of the Sherman or Clayton Acts. The FTC nearly always brings such cases as administrative litigation, and violations generally result only in cease-and-desist orders designed to prevent future violations and, on occasion, injunctive measures to help preserve or restore conditions for vigorous competition in the market.[43] In addition, although the Commission may seek disgorgement or restitution in competition matters, it must do so from a

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41 PHILLIP AREEDA, HERBERT HOVENKAMP & ROGER BLAIR, II ANTITRUST LAW ¶ 302h, p.21 (2d ed.) (Aspen Law and Business, 2000) (footnotes omitted).

42 *Sperry & Hutchinson*, 405 U.S. at 244 n.5 (quoting Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (Jul. 2, 1964) (codified at 15 C.F.R. pt. 408)). *See also* Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co., 810 F.2d 1289, 1292-93 (4th Cir. 1987); Mary Azcuenaga, FTC Comm'r, *FTC Enforcement: An Idiosyncratic Journey*, Address Before the 15th Annual Antitrust and Trade Regulation Seminar 5 (Jul. 7, 1994) (on file with FTC Office of General Counsel); Mary Azcuenaga, *Shimmers in the Penumbra of Section 5 and Other News*, *supra* note 35; William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 625-627 (1982).

43 *But see e.g.*, In re Xerox, 86 F.T.C. 364 (1975) (consent order compelling limited royalty free licensing of patents for dry paper copier technology).

court. Moreover, the Agency's policy is to request equitable monetary relief in such matters only where the violation is relatively clear.[44]

The FTC Act contains no provisions for private enforcement. A Commission action brought under Section 5 has little value in subsequent "follow-on" treble-damage litigation,[45] and proof of Section 5 violations, standing alone, provide no basis for seeking criminal penalties under the Sherman Act or comparable state provisions.

Because of these relatively mild consequences, Section 5 can fairly extend more broadly than the antitrust laws. This characteristic makes Section 5 especially well designed to apply in circumstances where exposing the respondent to treble damage jeopardy might be unfair or inappropriate, even though the conduct itself may warrant prohibition. Such circumstances might arise in situations involving unseasoned legal or economic theories, innovative business strategies, new or complex markets, or a substantially altered regulatory context.

The FTC Act also provides a right of review in the courts of appeals. Respondents are protected from both unfairness and surprise, especially because the review becomes increasingly searching as the violation becomes more novel. As the Second Circuit declared:

> As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.[46]

Although courts sometimes have overturned Commission determinations or remedies – typically on grounds that the evidence does not establish the offense or the order is broader than necessary – appellate courts have almost always reaffirmed the breadth of the FTC's Section 5 jurisdiction.[47]

Finally, the Agency does not enforce Section 5 in a vacuum. Congress also plays an active role, especially in oversight regarding the Commission's authority and statutory

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44 FED. TRADE COMM'N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (2003), *available at* http://www.ftc.gov/ow/2003/07/disgorgementfrn.htm. *See also* F.T.C. v. Mylan Lab., Inc., 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999) (mem.), *aff'd in pertinent part*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999).

45 *See* 15 U.S.C. § 16(a) (1984). "[I]n any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 [*i.e.*, Section 5]." *See also* Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1030 (9th Cir. 2001).

46 *Ethyl*, 729 F.2d at 137.

47 *See, e.g.*, *id*. at 136-137.

interpretations. FTC officials frequently appear before Congressional committees or meet with Congressional staff to describe or defend its policies or practices. Put differently, there are no secrets as to what the Commission is doing or what Congress wants us to do; insufficient, excessive, or misdirected zeal commonly invites scrutiny and correction.[48]

For example, Congressional reaction to the *Cement Institute* and *Triangle Conduit* decisions, as well as to the Commission's declaration that base point pricing could violate Section 5 even when not part of a conspiracy, induced a majority of the commissioners to reverse their position on this issue.[49] It was also Congressional uncertainty regarding the scope of the Commission's Section 5 authority to challenge "unfair acts or practices" that led the Commission to issue a "consumer unfairness statement" in 1980.[50] Then, in 1994, Congress went further and codified this statement, in substance, as Section 5(n) of the FTC Act.[51]

Agency officials have regularly incorporated the lessons of appellate and Congressional review into FTC practice, as they should. The Commission has long since put to rest the issues at the center of its most controversial Section 5 matters. It has not, for example, held unlawful the unilateral adoption or use of delivered or base point pricing since the Second Circuit issued its opinion in *Ethyl* 22 years ago. Nor, since that time, has the FTC condemned consciously parallel pricing in the absence of evidence of "oppressiveness" or some "plus factor" suggesting overt or tacit collusion. The Commission also terminated its two controversial shared monopoly matters.[52] This history gives me confidence that the FTC will be equally responsive in the future, even if we employ Section 5 more expansively, as we should.

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[48] *See* Kovacic, 17 TULSA L.J. 587 (1982).

[49] *See Boise Cascade*, 637 F.2d at 582; *see also Cement Inst.*, 333 U.S. at 721 n.19; Kovacic, 17 TULSA L.J. at 625-27. *See generally Triangle Conduit*, 168 F.2d at 176; Interim Report, S. Doc. No. 27; Azcuenaga, *Shimmers in the Penumbra of Section 5 and Other News*, *supra* note 35, at 9-11.

[50] Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, *included in* Letter from Chairman Pertschuk and Commissioners Dixon, Clanton, Pitofsky and Bailey to the Honorable Wendell H. Ford and the Honorable John C. Danforth (Dec. 1, 1980) (available as appendix to *Int'l Harvester Co.*, 104 F.T.C. 949, 1071 (1984)). This statement was based, in significant part, on Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (Jul. 2, 1964) (codified at 15 C.F.R. pt. 408), as quoted in *Sperry & Hutchinson*, 405 U.S. at 244 n.5. The Commission issued a companion policy statement regarding "deception" in 1983. Policy Statement on Deception, contained in Commission letter on deception to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy & Commerce, Oct. 14, 1983, appended to In re Cliffdale Assoc's., 103 F.T.C. 110, 174 (1984).

[51] 15 U.S.C. § 45(n) (2006).

[52] *In re Kellogg Co.*, 99 F.T.C. at 269 (summarily dismissing further appeal); *In re Exxon Co.*, 98 F.T.C. at 461 (dismissing the complaint without prejudice).

B. Section 5's Scope Is Hinged to That of the Antitrust Laws

As noted previously, when using Section 5 to enforce competition policy, the Commission and courts have largely confined Section 5's reach beyond the antitrust laws to incipient violations of those laws, and violations of those laws' underlying purposes. Because each of these categories finds its touchstone in the antitrust laws themselves, the application of Section 5 is necessarily hinged to the goals, interpretations, and analysis of conduct pursuant to those laws. These sources influence both the content and constraints for "unfair methods of competition," just as they provide both sense and substance for the Sherman Act's equally non-specific phrase, "restraint of trade."

The economic principles and analysis that guide application of the antitrust laws also guides competition policy enforcement under Section 5, notwithstanding the statutory differences. As the antitrust laws expand, shift, or contract, so too does Section 5 adjust and adapt. For example, antitrust analysis has lessened its concern with firm size and market concentration in recent decades and focused more on consumer welfare, innovation, and efficiency. Section 5 jurisprudence has traveled the same path, sometimes leading and sometimes learning. In my view, despite the important differences in breadth and effects, competition policy enforcement under Section 5 appears on balance to be as wise and well-reasoned – no more and no less – as under the antitrust laws.

Section 5's connection with the antitrust laws has led the Agency to rely on antitrust jurisprudence – the cases, principles, and associated economic analysis – as its most significant source of guidance. The Supreme Court articulated the nature of this reliance more than 40 years ago in *Atlantic Refining Company*, when it observed that:

> [i]t has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations. *Federal Trade Comm'n v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953). When conduct does bear the [central competitive] characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.[53]

Or, as the Fourth Circuit expressed more recently:

> In the area of anticompetitive practices, the FTC Act functions as a kind of penumbra around the federal antitrust statutes. An anticompetitive practice need not violate the Sherman Act or the Clayton Act in order to violate the FTC Act. However, the scope of the FTC is nonetheless linked to the antitrust laws. . . . The

[53] *Atl. Ref.*, 381 U.S. at 369-70.

> federal [sic] Trade Commission itself looks to antitrust principles in deciding whether § 5 of the FTC Act has been violated.[54]

Section 5 does not replicate the antitrust laws; the relationship between the provisions is better described as complementary rather than as congruent. In many instances, Section's 5's unique coupling of broad scope with modest consequences may prove to be the most apt enforcement tool. The critical connection between Section 5 and antitrust law and analysis, however, helps ensure that Section 5 remains in harmony with the laws it was designed to bolster and support.

IV. THE ELEMENTS OF A SECTION 5 VIOLATION

If we are to use Section 5 to enforce competition policy in a manner consistent with the intent of its framers, I suggest that there should be two requisite elements for a violation. The first is that the respondent must have engaged in identifiable, culpable conduct. The second is evidence of actual or incipient injury to competition.

<u>Conduct</u>. The conduct aspect of this test ensures that the respondent recognizes – or should have recognized – in advance that its conduct was inappropriate. This requirement is met where the respondent engages in actions that are "collusive, coercive, predatory, restrictive, or deceitful,"[55] or otherwise oppressive, and does so without a justification grounded in its legitimate, independent self-interest.[56] Unlike Section 2 of the Sherman Act, which requires proof of specific intent to prove the offense of attempted monopolization,[57] stand-alone applications of Section 5 do not require that element to establish an unfair method of competition. Nonetheless, firms are almost always aware of, and intend, the anticompetitive implications of the types of conduct that would be sufficient for a Section 5 violation. Significantly, although "unfair methods of competition" is not limited to the categories of conduct noted above, Rambus's conduct in this matter could easily have been characterized as falling within several of them.[58]

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54 *Chuck's Feed*, 810 F.2d at 1292-93 (citations omitted).

55 *Ethyl*, 729 F.2d at 137.

56 *See generally Boise Cascade*, 637 F.2d at 573 (finding independent, legitimate reasons for *Boise Cascade's* use of a delivered pricing system).

57 In contrast, Section 2 does not require a showing of specific intent to prove unlawful monopolization; for this offense, proof of general intent to engage in the challenged anticompetitive conduct will suffice. U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.3d 263 274 (2d Cir. 1979).

58 Significant information regarding the Commission's prosecutorial policies is available not only through the Commission's cases, but also its consent agreements and the testimony, speeches, and public communications of FTC officials.

Injury. Section 5 does not require proof of an actual injury to competition. Rather, established precedent holds that:

> a showing of an actual anticompetitive effect is unnecessary to prove a violation of Section 5 because that section was designed to stop [in] their incipiency acts and practices that could lead to violations of the Sherman or Clayton Acts.[59]

For conduct within the penumbra of the antitrust laws, it is sufficient if the competitive injury is only suspected or embryonic. While conduct violating Section 5 must bear a realistic potential for causing competitive harm, more manifest injury should not be required.

Other Section 5 standards. Other formulations of Section 5's requirements are worded differently, yet they are strikingly similar in substance. For example, the Second Circuit stated in *Ethyl* that:

> [i]n our view, before business conduct in an oligopolistic industry may be labeled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. If, for instance, a seller's conduct, even absent identical behavior on the part of its competitors, is contrary to its independent self-interest, that circumstance would indicate that the business practice is "unfair" within the meaning of § 5. In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.[60]

In essence, the Second Circuit held that a Section 5 cause of action may be predicated on: (a) evidence of tacit agreement, or collusive, coercive, predatory, or exclusionary conduct;[61] *or* (b)

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59 In re Coca Cola Co., 117 F.T.C. 795, 970 n.25 (1994) (citing *Sperry & Hutchinson*, 405 U.S. at 244, and In re Dean Foods Co., 70 F.T.C. 1146, 1289-90). The FTC also expressly "disagree[d] with respondent's legal premise" that it must demonstrate "an anticompetitive purpose or effect to find a violation of Section 5 where there is no violation of the Clayton or Sherman Acts." *Id.* at 915.

60 *Ethyl*, 729 F.2d at 139-40. *See also Abbott Lab.*, 853 F. Supp. at 536 (quoting, with apparent approval, the footnoted passage from *Ethyl*). The holding in *Boise Cascade*, 637 F.2d at 577, is not inconsistent with the quoted view. *Boise Cascade*'s holding that the FTC must demonstrate that the parallel pricing system helped to fix or rigidify market prices if proof of overt collusion is lacking merely reflects the court's view that a Section 5 challenge to non-collusive parallel pricing requires evidence suggesting that the conduct injured competition.

61 "Restrictive" and "deceitful" conduct probably also belong in this listing as well, since the court included them when noting the categories of conduct ("collusive, predatory, restrictive, and deceitful") to which the Commission has usually confined its Section 5 efforts, and the types of conduct ("collusive, coercive, predatory,

evidence of an anticompetitive intent or purpose; *or* (c) lack of an independent, legitimate reason for the conduct. Any of these characteristics will suffice as a predicate. Although *Ethyl* does not expressly require actual or incipient injury to competition, each of the three indicia mentioned above raises the prospect that the challenged conduct will harm competition.

Elaborating in a footnote, the court observed that "[t]he requirement [of oppressiveness] is comparable to the principle that there must be a 'plus factor' before conscious parallelism may be found to be conspiratorial in violation of the Sherman Act."[62] As examples, the court suggested that this "plus factor" requirement could be satisfied by conduct that "is contrary to the defendants' independent self-interest," that reflects a "strong motive on a defendant['s] part to enter an alleged conspiracy," or that may result in the "artificial standardization of products."[63]

The appellate court in *Ethyl* was discussing conduct in oligopolistic markets. Nonetheless, factors such as the ones mentioned – the list is not exhaustive – can help flag "unfairness" in other situations as well. Conduct contrary to a firm's legitimate, independent self-interest has frequently been a hallmark of predatory or exclusionary conduct by a dominant firm.[64] The presence of "oppressiveness" or an "anticompetitive intent or purpose," may help distinguish anticompetitive from vigorously competitive conduct.[65] Conduct that leads to the artificial standardization of products – often due to misuse of the standard-setting process – may serve to deter entry, exploit rivals, secure market power, or preserve dominance.[66]

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restrictive, or deceitful") beyond which, efforts to apply Section 5 tend to be more novel and therefore to warrant more searching scrutiny on appellate review. *Ethyl*, 729 F.2d at 136-137.

62 *Id.* at 140 n.10.

63 *Id.* (citations omitted).

64 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (observing that predatory pricing is unlikely, because it is contrary to a firm's *independent* self interest except when it has the ability to recoup its investment in the strategy); James Hurwitz & William E. Kovacic, *Judicial Standards of Predation: The Emerging Trends*, 35 VAND. L.REV. 63 (1982) (examining theories of predatory pricing and circumstances when pricing below various measures of cost will be contrary to a firm's legitimate self-interest and thus warrant legal condemnation).

65 In *Official Airlines Guide*, the court was swayed by the appellant's apparent lack of an anticompetitive motive or purpose for its refusal to deal, since OAG did not compete in the market where its conduct had its anticompetitive impact.

66 *See, e.g., Allied Tube*, 486 U.S. at 500-01. In the present case, Rambus's deceptive conduct *artificially* misdirected JEDEC's standard to one that fell within the respondent's secretly expanded patent claims, contrary to the organization's clear goals to avoid standards that would subject members to substantial royalty payments. The FTC has also challenged misdirection of standard-setting efforts in In re Union Oil Co. of Cal., 2005 WL 2003365 (2005) (consent resolving both Unocal's proposed merger with Chevron and a separate administrative case alleging that Unocal misrepresented to the California Air Resources Board that Unocal's research regarding low-emissions gasoline was non-proprietary) and In re Dell Computer Corp., 121 F.T.C. 616 (1996) (consent regarding FTC's allegation that Dell Computer failed to disclose its patent rights to the Video Electronics Standards Association despite the group's "affirmative disclosure requirements.").

The Areeda treatise offers a comparable formulation. It recommends that:

> [t]he Commission should feel free to "enjoin" any unjustified behavior that tends to impair competition and is capable of being differentiated adequately from permissible behavior.[67]

I agree.

In sum, where there is no identifiable, culpable conduct, there is no violation. "Culpable" in this respect does not require specific intent or actual antitrust injury. It must, however, display sufficient anticompetitive attributes – *e.g.*, oppressiveness, lack of an independent business justification, anticompetitive intent, predation, collusion, deceit, a tendency to impair competition – to warrant characterizing it as unfair, and be at least potentially injurious. Where such qualities are present, it is neither inappropriate nor unwise to find Section 5 liability.[68]

V. RAMBUS'S CONDUCT

Such anticompetitive attributes are clearly present here and, sadly, in abundance. Indeed, Rambus's attempts to deceptively subvert JEDEC's laudable standard-setting efforts is precisely the type of behavior that Congress envisioned would fall within Section 5's mandate.

In considering the application of a "stand-alone" Section 5 cause of action to this behavior, it is not necessary to restate the Commission's findings regarding Rambus's deception since these have been detailed elsewhere in the Commission Opinion. Nonetheless, a brief review of some of the most salient facts demonstrates that finding liability under a "stand-alone" Section 5 cause of action would have been fully appropriate in this matter.

Rambus's conduct occurred in the context of a standard-setting effort involving rivals. In most situations involving direct competitors, one might expect, and even encourage, bare-

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67 AREEDA, HOVENKAMP, & BLAIR, *supra* note 41, at ¶ 302h3. The treatise offers this statement in criticizing the concepts of "incipient violations" and "policy violations" of the antitrust laws, as they are presented in *Brown Shoe,* 384 U.S. 316, which expressly does not require proof of anticompetitive effects. Although I find these categories useful and well supported in Section 5's history, I agree that the use of Section 5 to enforce competition policy should require at least the tendency to impair competition.

68 The Commission, on occasion, has used Section 5 in recent years to address conduct beyond the scope of the antitrust laws, usually in the context of invitations to collude. *See e.g.,* In re Valassis Communications, Inc. (FTC File No. 051 008) (Mar. 16, 2006), *available at* http://www.ftc.gov/os/caselist/051008/051008.htm. In my view, of course, Section 5 offers far greater potential and should be used more fully. While this concurrence discusses the limiting attributes of Section 5 and the predicates of a violation, it does not attempt to prescribe future generic or specific applications of the statute. That, hopefully, will be done by the Commission in future cases.

knuckled competition, including strategies based on secrecy, misinformation, and misdirection.[69] But standard-setting is not a typical "everyone for himself" competitive situation. It is one in which collaboration can yield a valuable result – in this case, the establishment of a useful foundation for future, competitive and innovative efforts. But it is also a setting in which a participant's deceptive strategies can usurp the group's efforts – and industry-wide force supporting them – to serve its own anticompetitive ends. Participants must play by the rules if the joint goal is to be achieved. If competition policy permits easy subversion of these joint efforts, however, then there is little justification in the first place for risking the collaboration among rivals that effective standard-setting often requires. From a competition policy perspective, standard-setting efforts such as JEDEC's are "high risk/high gain" activities. They can be particularly valuable, on balance, if procedures ensuring fairness are adopted and followed in good faith.[70]

In this instance, Rambus violated any reasonable conception of good faith and fairness, and the proximate, competitive impact of its conduct is clear. Rambus misled the standard-setting body with regard to its own intellectual property interests, while simultaneously participating in JEDEC to learn about the organization's developing standards. Based on this wolf-in-sheep's-clothing pose, Rambus was in a position to, and did, amend its own patent claims in order to secretly convert what was intended to be an openly available industry-standard into a private source of revenues.

For example, early during its participation in JEDEC, Rambus's JEDEC representative, Richard Crisp, learned what technologies were being considered for the SDRAM standard. Crisp related that knowledge to Rambus's patent counsel, and together they considered how to amend Rambus's patent claims so that they would cover the emerging JEDEC standard. Rambus even assigned an engineer to provide technical assistance and ensure the amendments would do their job. Rambus continued to use the knowledge gained at JEDEC to amend its patents in this manner. As noted in a December 1992 Rambus planning document, Rambus sought to "get a copy of the SDRAM spec and check it for features we need to cover as well as features which violate our patents."[71] Crisp's September 1995 statement to Rambus management further sums up Rambus's strategy. He urged that Rambus:

> should redouble our efforts to get the necessary amendments completed, the new claims added and make damn sure this ship is watertight before we get too far out to sea.[72]

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69 *Berkey Photo*, 603 F.2d at 281 (2d Cir. 1979).

70 *Allied Tube,* 486 U.S. at 500-01.

71 *See supra*, Commission Opinion, at 36-39.

72 CX 837 at 2.

Rambus's patent strategy relating to the JEDEC standard clearly had the imprimatur of its management. This strategy was known to senior executives at the company in 1992, implemented by an executive vice president, and approved by its CEO Geoff Tate.[73] Finally, Rambus's 1996 withdrawal letter further misled JEDEC members by omitting the only issued patent that Rambus believed covered JEDEC's DRAM standards, and including a patent that Rambus knew (or should have known) was entirely irrelevant.[74]

Rambus did not merely take advantage of the knowledge it gained at JEDEC to ensure it would cover the relevant DRAM standards in its own patent applications; it also did so in direct contravention of JEDEC's broadly-acknowledged purpose: to create consensus-based standards that reflect the interests of all of its members.[75] JEDEC participants' testimony at trial consistently emphasized the wish of JEDEC members to either avoid patented technologies or to secure protections against the unrestricted exercise of patent rights.[76] Even Richard Crisp understood that "[t]he job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible."[77]

While the Commission does not object to covert maneuvers and non-disclosure in typical head-to-head market competition, Rambus's end run around the standard-setting process goes too far. It undermines the policies of the antitrust laws that seek to promote useful innovation and permit joint efforts by rivals that may enhance competition and efficiency. As such, Rambus's conduct would be an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

Indeed, Rambus's behavior epitomizes what Senator Robinson in 1914 viewed to be the essence of unfair competition, namely "oppression or advantage obtained by deception or some questionable means. . . .".[78] Or, turning to more modern expressions, Rambus's behavior contravenes "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[79] It likewise runs afoul of the Second Circuit's statement in *Ethyl* that the Commission's role under Section 5 is to "protect society against oppressive

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73 *See supra*, Commission Opinion, at 37-42.

74 CX 887 (withdrawal letter); CX 5013 at 2 (Rambus memorandum noting that the '327 patent covered dual edged clocking).

75 *See, e.g.*, Becker, Tr. 1152; J. Kelly, Tr. 1784-85; CX 2767 at 1.

76 *See, e.g.*, Sussman, Tr. 1333; Landgraf, Tr. 1693-94; G. Kelley, Tr. 2393-96; Lee, Tr. 6598.

77 CX 903; Crisp, Tr. 2941-42.

78 51 CONG. REC. 12,248 (1914) (statement of Sen. Robinson).

79 *Sperry & Hutchinson*, 405 U.S. at 244.

anticompetitive conduct."[80] Indeed, that court expressly noted that one attribute of "oppressiveness" could be the "artificial standardization of products."[81] It is fair to say that, through its deceptive and exploitative conduct, Rambus effectively co-opted JEDEC's standard-setting process and rendered the JEDEC outcome "artificial."

VI. CONCLUSION

Rambus's abuse of JEDEC's standard-setting process was intentional, inappropriate, and injurious to competition and consumers alike. The Commission Opinion finds that these deceptive practices violate Section 2. Even if this conduct did not violate the Sherman Act, it would have fallen within Section 5's broader province had this claim been argued at trial.

As for our future enforcement efforts, the framers of the FTC Act gave the Agency a mandate – one unique to the Commission – to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional "penumbra" around them. The framers also gave the FTC deliberative processes for examining suspected incipient or policy violations of the antitrust laws, and provided remedial measures dedicated more to protecting and restoring competition than to punishing malfeasors. Although the Agency has not ignored its Congressional mandate entirely, we need to build on this foundation and further develop this aspect of our enforcement responsibility – and to use all the arrows in our jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers.

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[80] *Ethyl*, 729 F.2d at 136.

[81] *Id*. at 139 n.10.