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Working Party No. 3 on Co-operation and Enforcement

POTENTIAL PRO-COMPETITIVE AND ANTICOMPETITIVE ASPECTS OF TRADE/BUSINESS ASSOCIATIONS

-- United States --

16 October 2007

To be held on 16 October at the International Energy Agency (IEA), 9 rue de la Federation, PARIS 75015, starting at 10 am.

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1. The large majority of trade association activity is pro-competitive or competitively neutral. A trade association may, for example, perform an important information-gathering function that would be difficult for its members to perform individually, or it may have as a principal function the establishment of standards that protect the public or allow the interoperability of components made by different manufacturers. The association may represent its members before legislative bodies and governmental agencies, a competitively-neutral activity that may serve the socially desirable function of improving the information upon which governmental decisions are made. If done carefully and with adequate antitrust advice, these legitimate goals can be accomplished without undue antitrust risk.

2. Trade associations and their members sometimes fail to take account of antitrust issues, however, which can result in their engaging in illegal conduct. The most obvious example is outright price-fixing, bid-rigging, or market division by members at trade association meetings or, more likely, separate sessions on the margins of a meeting.

3. In the first sections of the paper we discuss the antitrust implications of various trade association activities, such as collecting and exchanging economic information, antitrust compliance procedures, facilitating and/or organizing restraints on competition, and membership issues. In the last two sections, we discuss antitrust issues relating to standard setting.

1. Collection and Exchange of Economic Information by Trade Associations

4. U.S. courts have long recognized the utility of statistical information collection by trade associations. As the Supreme Court stated as far back as 1925 in *Maple Flooring Mfrs. Ass'n v. United States*,[1]

> It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.

5. Exchanges of price information can pose significant anticompetitive risks, however, particularly in concentrated industries, and are analyzed under the rule of reason. "An exchange of price information that is not part of a price-fixing scheme still may be upheld if it is unlikely to have an anticompetitive effect on prices or if the exchange has a legitimate business purpose that offsets any likely anticompetitive effect in a rule of reason analysis."[2] As a general rule, information exchanges involving cost or other data rather than price, and historical data rather than current or future data, are less likely to raise antitrust concerns; aggregated data managed by an independent third party, in which particular suppliers or customers are not revealed, also raise fewer concerns. The U.S. antitrust agencies have set forth detailed views on dissemination of price and cost data among health care providers in the 1996 DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care (Health Care Statements). The DOJ has issued numerous business review letters relating to proposed information exchanges by various trade associations, available at http://www.usdoj.gov/atr/public/busreview/letters.htm.

[1] 268 U.S. 563, 582-83 (1925).

[2] ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007), at 95.

2. Examples of Trade Association Antitrust Compliance Procedures

6. Trade associations can serve an important compliance function, by holding meetings and seminars and inviting speakers from the antitrust enforcement agencies or the antitrust bar. This kind of antitrust advice is often the first line of defense for preserving competition and can be more effective and efficient than trying to prosecute violators after the fact. The antitrust compliance activities of trade associations help to avoid anticompetitive conduct by both the associations themselves and of their members.

7. The antitrust agencies do not review or approve antitrust compliance programs. There are, however, certain obvious characteristics of a good trade association antitrust compliance program. Every compliance program should include a clear statement of the trade association's commitment to comply with the antitrust laws, accompanied by a set of practical dos and don'ts, so that every employee and member can understand them. A policy statement is, however, only the beginning. The trade association should have an active training program that includes in-person training by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from actual experiences. The instruction should also include education as to the consequences of antitrust violations for the trade association, the members, and individual employees.

8. Counsel responsible for a trade association's antitrust compliance program should attend trade association meetings and pay close attention to the association's activities. Most importantly, the program should include periodic antitrust compliance audits that look for certain "red flags." Among other things, it is important to determine (i) whether the positions of the attendees at trade association meetings match the purpose of the meeting, (ii) whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data, (iii) whether meetings are attended by counsel, (iv) whether there is an agenda for the meetings and a record of what was discussed, and (v) whether there is a pattern of meetings in foreign countries.

9. Counsel should not be satisfied, however, simply to review the association's official antitrust compliance policy, bylaws, agendas and minutes. Counsel must consider the possibility that these types of official documents may be nothing more than cover for conspiratorial conduct and that the official meetings may provide the opportunity and camouflage for collusion.

3. Examples of Trade Associations Facilitating Collusion and/or Organizing Naked Restrictions of Competition

10. In recent decades, the antitrust agencies have generally not encountered trade associations that have organized naked restrictions of competition, such as price-fixing, bid rigging and market allocation. This is partially due to the level of sophistication of U.S.-based trade associations about the antitrust laws. Even more likely, however, it is attributable to the fact that individuals and companies that engage in such conduct realize that, to avoid detection, collusion must be conducted covertly. The open involvement of a trade association could only increase the chances that the conspiracy would be disclosed to the Division through the amnesty program or otherwise.

11. On occasion, however, the Division has encountered trade associations that have facilitated collusion. One such example involved a trade association of wirebound box manufacturers, two of which the Division prosecuted for a 20 year conspiracy to allocate customers. In that case, the trade association kept records of its members' customers. When one of the association's members (member A) made a sales call on a potential customer, member A contacted the association to determine if the potential customer was already being serviced by one of the association's members. If the customer was already being

serviced by one of its members (member B), the trade association would provide a code letter. The code letter identified a certain section of the United States on a secret map kept by the association and its members. Through the use of the code letter and the secret map, member A knew that member B serviced the customer. Member A then called member B to see what member A should bid or quote to ensure that member B kept the customer.

4. Examples of Members Using Trade Association Activities to Cover Unlawful Collusion, without the Knowledge of the Trade Association

12. More frequently, the Division has encountered examples of trade associations that have provided cover for collusion. One of these examples involved a conspiracy among five major citric acid manufacturers to fix prices and allocate sales volumes for citric acid worldwide from March 1991 through June 1995. The industry's trade association, the European Citric Acid Manufacturers' Association (ECAMA), was a legitimate trade association but was used to provide cover for the cartel. One of the witnesses in the related lysine trial testified in court that ECAMA gave the citric acid conspirators "good cause" to be together at the particular location for the official ECAMA meetings. Since the conspirators were all attending the official meetings in any case, it was convenient to meet the day before the official meetings to fix the prices of citric acid and set market shares. Consistent with the purpose of being a cover for illegal activity, ECAMA took steps to prevent its formal activities from crossing the antitrust line.

13. Another example was the trade association subcommittee formed for the sole purpose of providing cover for the lysine conspiracy. The lysine conspiracy involved price-fixing and volume allocation agreements in the world market for lysine from June 1992 through June 1995, affecting over $1 billion in sales. Early in the lysine conspiracy, the conspirators formed an amino acid working group or subcommittee of the European Feed Additives Association for the purpose of providing cover in the same way that they observed that ECAMA was providing cover for the citric acid conspiracy. The subcommittee provided a false, but facially legitimate, explanation as to why the conspirators were meeting. One witness in the lysine trial described the lysine trade association as a "good reason to get together." Another witness described the trade association as "camouflage" for the "unofficial meeting" where the conspirators would meet to "agree on the price [of lysine]." To maximize the cover the subcommittee provided, the conspirators created sham documents under the association's imprimatur to conceal the conspirators' true activities. For instance, one witness prepared, in his words, a "phony" agenda for a subcommittee meeting in Paris in October 1992 in order to attach a legitimate purpose to a conspiratorial meeting. In fact, none of the issues on the agenda were discussed at the meeting.

5. Trade Association Organization of Anticompetitive Activity

14. A trade association may openly exceed its legitimate functions and organize anticompetitive activity. In *United States v. Association of Retail Travel Agents (ARTA),*[3] for example, the Division charged ARTA in connection with its efforts to orchestrate a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted a written policy calling for a minimum ten percent commission on hotel and car rental sales by travel agents, the elimination of all distribution outlets for airline tickets other than travel agents, and the payment of commissions based on full fares rather than the actual discounted prices. A few days later, ARTA hosted a press conference where it announced the content of this policy, and shortly thereafter, one of ARTA's board members announced that his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comport with the policy, and

[3] United States v. Ass'n of Retail Travel Agents, 1995-1 Trade Cas. (CCH) ¶70,957 (D.D.C. Mar. 16, 1995).

invited other travel agents to do likewise. Thereafter, at least one other board member made a similar announcement.

15. ARTA developed a position for its travel agent members on the prices and terms upon which they should be compensated, and then invited and encouraged members not to deal with travel providers that did not follow its prescription. The Division's complaint alleged that ARTA and its members agreed on commission levels and other terms of trade on which ARTA members and other travel agents should transact business with travel providers, and invited, encouraged and participated in a group boycott designed to induce travel providers to agree to those commission levels and terms of trade, all in violation of Section 1 of the Sherman Act. The case was settled by a consent decree in which ARTA was prohibited from "inviting or encouraging concerted action by travel agents or travel agencies to refuse to do business with specified suppliers of travel services or to do business with specified suppliers only on specified terms; and directly or indirectly adopting, disseminating, publishing, or seeking adherence to any rule, bylaw, resolution, policy, guideline, standard, objective, or statement made or ratified by an officer, director or other official of defendant that has the purpose or effect of advocating or encouraging any of the[se] practices."

6. Trade Association Rules that Inhibit Competition

16. Industry codes of conduct that restrain competition may be anticompetitive. The DOJ challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members (*National Soc. of Professional Engineers v. U.S.*[4]). In that case the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

7. Issues Associated with Trade Association Membership

17. In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.,* 472 U.S. 284 (1985), the Supreme Court addressed the exclusion of companies seeking membership in a wholesale buying cooperative of office supply retailers. The Court noted that the cooperative "permit[ted] the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensure[d] ready access to a stock of goods that might otherwise be unavailable on short notice." The asserted reason for expelling the plaintiff – failure to comply with a cooperative rule on disclosure of a change in stock ownership – was described as a "reasonable" rule which "may well provide the cooperative with a needed means for monitoring the creditworthiness of its members." The Court held that a rule of reason analysis was appropriate: "[w]hen the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition."

18. The DOJ and FTC have also applied a rule of reason analysis to membership in health care joint ventures, such as physician and multiprovider networks. The agencies' Health Care Statements "focus not on whether a particular provider has been harmed by the exclusion but on whether the exclusion reduces competition among providers in the market and thereby harms consumers. That analysis requires an assessment and balancing of potential procompetitive and anticompetitive effects, which in turn requires an

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4 *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978).

evaluation of the market structure, the basis for the exclusion, and the resulting competitive incentives, all of which are integral to a rule of reason analysis."[5]

8. Standard Setting: Exclusionary Conduct Through Product Certifications

19. The other major class of restraints are those designed to restrict competition, not within the group, but between favored firms and disfavored firms. The theme here is exclusion rather than collusion. An example is a seal of approval or other standard-setting activity. The first point to make about standard setting is that it will almost invariably be analyzed under the rule of reason, unless it is merely a device to enforce a price-fixing agreement by excluding new entrants or by punishing members who deviate from the cartel. Standards provide many pro-competitive benefits to consumers by providing them with information, by ensuring that products of different manufacturers are compatible with each other, and by keeping unsafe products out of the marketplace. Rule of reason treatment is therefore generally appropriate when analyzing standards issues.

20. The second point is that market power is an important factor in determining whether a standard can have an anticompetitive effect and therefore can be unlawful. If certification by a particular group is only one among many ways to be recognized by consumers as acceptable, deprivation of that certification is unlikely to have a significant competitive effect. If, on the other hand, failure to adhere to the particular standard would result in effective exclusion from the market, then there is much greater reason to be concerned about the appropriateness of such exclusions as do take place.

21. The third point is that exclusion by an entity in the standard setting body is not necessarily unlawful, depending on the legitimacy of the reasons for exclusion. One important proxy for the legitimacy of the exclusion is the fairness of the process by which it was reached. The two most significant Supreme Court cases in this area arose from processes that were fundamentally flawed. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*[6], a manufacturer of safety devices for water boilers made competitive use of the position of one of its employees as a vice-chair of the relevant standards-setting subcommittee of ASME. To meet a competitive threat from another company, the employee worked with the chair of the subcommittee to request an opinion from ASME concerning the competitor's product. The chair then responded to the letter that he had helped draft, erroneously suggesting, on ASME stationery, that the competitor's product was unsafe and in violation of ASME's code. The employee was later commended in his personnel file for "efforts and skill in influencing the various code making bodies to 'legislate' in favor of [the manufacturer's] products." The Supreme Court upheld a finding of liability against ASME.

22. Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[7] a manufacturer of steel conduit for electrical wiring defeated an attempt by a competitor to get plastic conduit approved as safe for use in electrical wiring. It did so by "packing" a meeting of the National Fire Protection Association at which the relevant provisions of the National Electrical Code were to be discussed and voted upon. The Supreme Court held that the *Noerr-Pennington* doctrine[8] did not protect the manufacturer from liability for this abuse of the standards-setting process.

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5 ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007), at 480.

6 *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

7 *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988).

8 The *Noerr-Pennington* doctrine protects a defendant from liability for anticompetitive government actions and

9. Standard Setting: Interoperability Standards and Patent Hold Up

23. Industry standards are recognized as "one of the engines driving the modern economy."[9] Many industries have found it beneficial to develop standards to specify product dimensions, features, or interfaces that enable interoperability, including interchangeability, between products from competing suppliers. Interoperability standards enhance competition between rival products.

24. While interoperability standards may enhance competition, the selection of a technology for the standard may lead to the elimination of rival technologies, if the standard becomes generally accepted in the marketplace. But the efficiency of industry standard setting in selecting technologies through direct competition most often leads to a procompetitive outcome.

25. However, there is a risk that a party may manipulate the joint action involved in standard-setting process for anticompetitive exclusionary purposes through deception regarding patents and patent applications applicable to technologies that are selected for a standard. If a party holding a patent or patent application misleads the standard-setting process about its IP during the standard-setting process, rival technologies may be eliminated for reasons other than competition on the merits. After the standard has been published and the industry chooses to follow the standard, the patent holder may be able to command a higher licensing royalty for its patented technology then it could command if it had not misled the standard-setting organization or even to block use of the standard.

26. In this section, we describe first the potential procompetitive benefits flowing from interoperability standards. The paper then addresses how the standard-setting process may be manipulated for anticompetitive purposes by patent holders to secure monopoly power and deny the industry and consumers the potential procompetitive benefits expected from standard setting. Finally, the paper sets forth a framework of analysis, to determine whether a patent holder has manipulated the standard-setting process to acquire monopoly power, developed by the U.S. Federal Trade Commission in its recent decision in *Rambus, Inc*.[10]

9.1 Value of Industry Standard Setting

27. Acting through private standard-setting organizations, many industries have developed interoperability standards that enable interconnection of compatible products from different suppliers. These private standard-setting organizations select technologies for the standard using cooperative, consensus decision-making. The standards are voluntary, with each industry member deciding independently whether it wishes to offer a standard-based product.

28. Industry interoperability standards generally enhance competition to the benefit of consumers. Standards that facilitate interoperability among products typically increase the chances of market acceptance of the product, make the product more valuable to consumers, stimulate output, and enhance price competition.[11] By lowering the cost to consumers of switching between competing products and

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incidental anticompetitive effects resulting from the defendant's petitioning the government for such actions. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

9 U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 33, available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationand Competitionrpt0704.pdf.

10 *In the Matter of Rambus, Inc.*, FTC slip opinion (Aug. 2, 2006), 2006 FTC LEXIS 60 (2006), found at http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

11 *Id.* at 3.

services, interoperability standards enhance competition among suppliers. Especially in industries with network effects, a standard may enlarge markets by overcoming coordination failures among those interested in developing and using the standard, so that the products are available to, and used, by more consumers.[12]

29. Interoperability standards enhance competition in upstream markets, as well. The standard-setting process can function as an efficient substitute for selecting interoperable technologies through direct competition.[13] A standard-setting organization can compare competing technologies, patent positions, and licensing terms before an industry becomes locked into a standard.[14] Thus, the setting of a standard is, itself, a competitive process. In regard to upstream markets, the standard also may enhance competition among suppliers in regard to the means for implementing the chosen standard. Firms may thereafter compete on other product features not necessary for interoperability.

9.2 Potential for Abuse

30. Standard setting may pose risks to competition when it displaces the competitive process through which consumers commonly select technologies and products. Antitrust enforcement agencies remain watchful for possible abuses. Typically, however, the procompetitive benefits of standard setting outweigh these risks.[15] For this reason, antitrust enforcement has shown a high degree of acceptance of, and tolerance for, standard-setting activities.[16]

31. One risk of harm to competition in the standard-setting context arises when a patent holder participating in the standard-setting process subverts the process through deception. When a patent holder's intellectual property covers technologies under consideration for the standard, the standard-setting selection process may be distorted if the patent holder misleads the standard-setting organization to believe that it does not hold essential IP. This deception may obscure the relative merits of alternative technologies.[17]

32. Absent the patent deception, the standard-setting organization could either select a rival technology or secured protection against the patent holder from later asserting the patent to block use of the standard. Members also could seek to negotiate lower licensing royalties prior to the selection of its patented technology. "[K]nowledge of potential patent exposure, may [give a prospective user of the standard] powerful economic incentives to negotiate a license before the technology becomes standardized, based on a lower, *ex ante* value of the patented technology."[18]

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12 *Broadcom Corp. v. Qualcomm Inc.*, 2007 U.S. App. LEXIS 21092 (3rd Cir. 2007); April 30, 2007, U.S. Dep't of Justice Business Review Letter to the Institute of Electrical and Electronics Engineers ("IEEE), available at http://www.usdoj.gov/atr/public/busreview/222978.htm; *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 506-07 (1988); Areeda & Hovenkamp, *supra*, 2233; Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Remarks (Sept. 23, 2005), available at http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

13 *Rambus, supra*, at 36.

14 *Id.* at 36; *Broadcom*, *supra*.

15 *Broadcom, supra*; Areeda & Hovenkamp, *supra*, P 100a.

16 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988); *Rambus, supra,* at 33; *see also* Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4302, 4303 (providing that private standard-setting conduct shall not be deemed illegal per se, and insulating such conduct from treble damages).

17 *Rambus, supra,* at 28-29.

18 *Id.* at 35, 36.

33. While the standard-setting organization may be able to choose among various technological options during the standard-setting process, once the technological choice is made and the standard has been commercially adopted, it can be time consuming and expensive to adopt a different technology.[19] After the technology is chosen for the standard and others have incurred sunk costs, the relative cost of switching to an alternative technology or standard may increase significantly.[20]

34. The results of such deception may be that the patent holder is able "hold up" the industry and consumers for greater licensing royalties than it could have commanded if it had disclosed its IP prior to the selection of its patented technology. Patent hold up may undermine the potential efficiencies offered by standard setting by chilling participation in the standard-setting process.[21]

The Commission held in *Rambus*:

> Through a course of deceptive conduct, Rambus exploited its participation in JEDEC to obtain patents that would cover technologies incorporated into now-ubiquitous JEDEC memory standards, without revealing its patent position to other JEDEC members. As a result, Rambus was able to distort the standard-setting process and engage in anticompetitive "hold up" of the computer memory industry. Conduct of this sort has grave implications for competition. The Federal Trade Commission (FTC or Commission) finds that Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act.[22]

35. Consumers may be harmed when a deceptive patent holder blocks or inhibits use of a standard. When this anticompetitive harm exceeds the efficiencies gained from standard setting, the standard-setting process is no longer beneficial.[23]

9.3 Framework for Analysis of Manipulation of Standard-Setting Process Through Patent Deception

36. In view of this potential for anticompetitive abuse of the standard-setting process through patent deception, the U.S. Federal Trade Commission has developed a framework for analyzing whether possible patent deception leads to the unlawful acquisition of monopoly power in its recent decision in *Rambus*

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19 *Id.* at 35; April 30, 2007, DOJ Business Review Letter to the IEEE, *supra*, (before the standard was set when competitive alternatives may have been available without "the expense and delay of developing a new standard around a different technology."); *Broadcom, supra*.

20 U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 35, found at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationand Competitionrpt0704.pdf.

21 *Rambus, supra,* at 25 ("That conduct [to engage in patent hold-up], if established, might itself chill participation in cooperative standard-setting activities."), n.120 (one participant wrote that "[i]f we have companies leading us into their patent collection plates, then we will no longer have companies willing to join the work of creating standards."); U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 35-36, 35 n. 11 ("The potential for one party to hold up another party that has sunk investments specific to the [standard-setting] relationship may discourage that other party from investing efficiently in the collaboration in the first place."), available at http://www.ftc.gov/reports/innovation/ P040101PromotingInnovationandCompetitionrpt0704.pdf.

22 *Rambus*, *supra*, at 3.

23 *Rambus, supra,* at 33.

Inc.[24] That proceeding focused on standard setting by the Joint Electron Device Engineering Council (JEDEC), an industry-wide, voluntary standard-setting organization that developed standards for interchangeable computer memory technologies, among other products. Respondent Rambus participated in the JEDEC standard-setting process and held IP covering computer memory technologies included in the JEDEC standard.

37. In *Rambus*, the Commission concluded that respondent Rambus had engaged in a course of deception regarding its patents and patent applications that constituted unlawful exclusionary conduct. Under U.S. antitrust law, exclusionary conduct is conduct other than competition on the merits that appears reasonably capable of making a significant contribution to creating or maintaining monopoly power.[25] If "'a firm has been attempting to exclude rivals on some basis other than efficiency,' it is engaging in exclusionary conduct."[26] In the standard-setting context, "distorting choices through deception obscures the relative merits of alternatives and prevents the efficient selection of preferred technologies."[27] Thus, deception may lead to the exclusion of rivals on some basis other than efficiency. The Commission pointed out in its *Rambus* opinion that it is "extraordinarily difficult to justify" misleading a standard-setting body about patents.[28]

38. In *Rambus*, the Commission found its own 1983 Policy Statement on Deception ("Deception Statement") useful in determining when conduct may be deceptive and exclusionary and not competition on the merits.[29] The Deception Statement sets forth a framework of analysis to determine when "representations, omissions, and practices" are deceptive and unlawful. The policy statement is based upon the belief that "vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation and increasing the specificity and amount of information available to consumers."[30] Deception harms competition because consumers who prefer a competitive product are wrongly diverted.[31]

39. Under the Commission's Deception Statement, a commercial communication is deceptive if it contains a representation or omission of fact that is likely to mislead a member of the target audience acting reasonably under the circumstances. In addition, the representation or omission must be material to the target audience's conduct or purchasing decision.[32]

40. The Commission found that Rambus distorted the JEDEC selection process through a course of deceptive conduct. Rambus concealed from the standard-setting organization pending patent applications covering technologies being considered by JEDEC for the standard. Years later, once the standard was established and adopted by the industry, Rambus sued firms practicing the standard, for patent infringement. The Commission found that Rambus had made potentially deceptive omissions through its continuing concealment of patents and patent applications and made outright misrepresentations by giving

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24 *Id.* at 28.

25 *Id.* at 28.

26 *Id.* at 28, *quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), *quoting* R. Bork, *The Antitrust Paradox* 138 (1978).

27 *Id.* at 28-29.

28 *Rambus* at 36, *quoting Aspen Skiing*, *supra*, at 605 n.32 (1985).

29 Federal Trade Commission, 1983 Policy Statement on Deception, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13, 205 at 20, 911-912, found at http://www.ftc.gov/bcp/policystmt/ad-decept.htm,

30 Deception Statement, *supra*, at n.58

31 *Id.* at n.58.

32 Deception Statement, *supra*, at 175.

evasive and misleading responses to questions about its patents.[33] Furthermore, the Commission found that Rambus facilitated its patent hold up by using information derived from the standard-setting process to develop a patent portfolio that would cover JEDEC's standard.[34]

41. In its analytical framework set forth in *Rambus*, the Commission identified several additional requirements for finding deceptive conduct in the context of standard setting unlawful exclusionary conduct while preserving the procompetitive outcome of standard setting.[35]

42. In its decision, the Commission found that JEDEC operated a cooperative decision making process. It concluded that JEDEC members had reason to believe that the environment would be free from deceptive conduct.[36] Because of this expectation, JEDEC members were "likely to be less wary of deception" and "anticompetitive effects therefore [were] more likely to result."[37]

43. Second, the Commission concluded that deception in the standard-setting context must be wilful before finding it harmful to competition.[38] Without a requirement for wilfulness, innocent but erroneous statements about patents may be found unlawful. The Commission was concerned that applying its Deception Statement without finding willfulness may create a disincentive for firms to participate in standard-setting organizations and undermine the potential efficiencies flowing from the standard setting.

44. In *Rambus*, the Commission found that Rambus had engaged in patent deception deliberately. It found that Rambus had intentionally pursued its course of conduct consistent with a strategy to manipulate the standard-setting process.[39]

45. The usual elements for unlawful monopolization under U.S. antitrust law also must be established for patent deception to constitute unlawful exclusionary conduct in the context of standard setting. For example, there must be a causal relationship between the deception and the acquisition of monopoly power.[40] The deception must "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power."[41] Thus, if the patent holder's deception was not material to the selection process, then the deception would not constitute unlawful exclusionary conduct.

46. Additionally, the patent deception must lead to durable market power. If the industry can switch quickly and without substantial cost to alternative technologies or a new standard once the patent holder undertakes to assert its patents, the patent holder has not unlawfully acquired monopoly power. Where there are "quick fixes," there cannot be durable monopoly power.[42]

47. After concluding that Rambus had engaged in unlawful exclusionary conduct, the Commission found that the appropriate remedy to save consumers from the exercise of unlawfully acquired monopoly

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33 *Rambus, supra,* at 49-50.

34 *Id.* at 36-51, 66-67.

35 *Id.* at 28, 30.

36 *Id.* at 51-52, 66.

37 *Id.* at 34.

38 *Id.* at 30 and n.142.

39 *Id.* at 51, 71.

40 *Id.* at 73-74.

41 *Id.* at 28, *quoting* III Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Para. 651 f, at 83-84 (2nd ed. 2002).

42 *Id.* at 33.

power was to restrict the patent holder from collecting a royalty amount greater than the amount that Rambus likely would have commanded had it not misled the standard-setting body. The Commission concluded that the remedy should be forceful enough to restore ongoing competition and inspire confidence in the standard-setting process without being unduly restrictive and thereby undermine the attainment of procompetitive goals of standard setting.

48. Rambus has appealed the Commission decision. The case is currently pending before the United States Court of Appeals for the District of Columbia Circuit.