

PUBLIC

UNITED STATES FEDERAL TRADE COMMISSION

Docket No. 9302

In the Matter of
RAMBUS INC.,
A CORPORATION

AMICUS CURIAE BRIEF OF
THE AMERICAN ANTITRUST INSTITUTE
IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (“AAI”) is an independent, not-for-profit organization dedicated to economic research, the study of the antitrust laws, and public education. The directors of the AAI, Jonathan Cuneo, Esq., Albert H. Foer, Esq., and Professor Robert Lande of the University of Baltimore Law School, authorized this filing. The Advisory Board of the AAI consists of 66 prominent lawyers, law professors, economists and business leaders (the members of the Advisory Board and other information about the AAI may be found on its web site: www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and sustain the vitality of the antitrust laws.

AAI is supported by voluntary donations into its general treasury, and does not accept earmarked funds from private interests. A list of contributors of amounts in excess of \$1,000.00 is attached hereto as Appendix “A.”

The AAI has two primary concerns. First, this case reaches to the heart of how antitrust law should function in connection with standard-setting involving intellectual property rights. Antitrust law is well-suited to redress and deter conduct which may frustrate or delay the emergence of the pro-competitive benefits of standard-setting organizations. Moreover, the scope of antitrust law should not be artificially limited in a manner that inhibits it from accommodating new factual circumstances created by the interplay of standard-setting and intellectual property rights.

Second, the AAI is concerned with the perpetuation of well-settled principles of

antitrust law as they apply to high-technology and “new economy” industries as well as in more traditional contexts. As a non-profit research and educational organization, the AAI believes that its independent perspective can assist the Federal Trade Commission (the “Commission” or “FTC”) by presenting an unbiased antitrust framework in which to analyze the controversy presented in this case.

The AAI has no particular special insight into the underlying facts of this case, and therefore advocates a legal framework based on antitrust principles without supporting a particular outcome for or against any party.

I THE NATURE OF THE STANDARD-SETTING PROCESS

It is widely accepted that standard-setting may enhance economic efficiency by providing information to market participants about the suitability of a particular product for a given purpose, helping to determine the quality and safety of products, and satisfying compatibility and interoperability requirements between complimentary products or components.¹ The present case involves standards that promote interoperability, so-called “compatibility standards.” Unlike permissive safety or quality-control standards whose use is optional, compatibility standards are effectively mandatory and must be used in order to participate in the market. Compatibility standards are particularly important in industries characterized by demand-side scale economies (*i.e.*, “network effects”), such as computers and telecommunications.

On the other hand, standard-setting may also impede or prevent competition by excluding meritorious competing products or technologies from the market, locking-in inferior technologies and thereby retarding innovation, and by reducing the variety of differentiated but incompatible products or systems.

In bringing this action under Section 5 of the FTC Act alleging “unfair methods of competition” and alleged violations of Section 2 of the Sherman Act, Complaint Counsel have invoked the antitrust laws for the purpose of remedying a specific instance of competitive harm in the context of an effectively mandatory compatibility standard. The motivation for this prosecution, therefore, must lie in the belief that

¹See *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 487 (1st Cir., 1988), in which then Chief Judge Breyer described a standard-setting process that “brings about the very benefits that the antitrust laws seek to promote.”

antitrust enforcement can promote the pro-competitive aspects of standard-setting and/or diminish its anticompetitive effects. Insofar as antitrust precedent is not well-developed in this area of standard-setting, however, the Commission is being called upon to develop an analysis of the competitive dynamics of the standard-setting process largely *de novo*.² The Commission's reasoning and decision in this matter, therefore, are likely to have a substantial impact on how antitrust law applies to standard-setting activities and a profound effect on the future conduct of standard-setting organizations ("SSOs") and those who participate in them.

The Commission's decision should rest on a clear appreciation of the source of the pro-competitive benefits of the standard-setting process and a practical and economically sound theory of its potential for competitive harm. In addition, the role of the antitrust laws should be clearly delimited, and the appropriate antitrust principles applied to the facts of this case so that antitrust scrutiny will promote efficiency rather than counterproductive governmental or judicial intervention and will not chill legitimate activities that promote social welfare. Finally, the Commission must develop the principles necessary to fashion an optimal antitrust remedy.

²There is important Supreme Court precedent that examines the application of the antitrust laws to standard-setting, *e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), *Radiant Burners, Inc. v. Peoples Gas Light and Coke Company*, 364 U.S. 656 (1960). While these decisions offer some useful antitrust guidance, they deal with permissive standards such as safety approvals and building codes, and not compatibility standards in network industries for which no alternative exists. Of the reported decisions that do implicate the application of antitrust principles to compatibility standards, to our knowledge none of them establishes clear guidance for the resolution of the patent "hold-up" controversy in the present case under antitrust principles, see, *e.g.*, *Townshend v. Rockwell International Corp.*, 55 U.S.P.Q. 2d (BNA) 1011 (N.D. Cal. 2000), *Wang Laboratories, Inc. v. Mitsubishi Electric America, Inc.*, 103 F.3d 1571 (Fed. Cir.), *cert. denied*, 522 U.S. 818 (1997). But see *In re Dell Computer Corp.*, 121 F.T.C. 616 (May 20, 1996), a consent decree which is directly apposite.

A STANDARD-SETTING REPRESENTS “COMPETITION-BY-PROXY” WITH PRO-COMPETITIVE BENEFITS.

Standard-setting in markets where compatibility requirements are high can correct for market outcomes that may be inefficient, such as the proliferation of incompatible products, components, or multiple networks. Firms engaging in consensus standard-setting in network industries are not side-stepping market competition, but shifting the focus of market competition from the size and nature of the network to the technical merits and prices of the products and components sold by individual competitors.³ Competitors engaged in compatibility standard-setting do so in order to compete “in the market” rather than “for the market.” The contest “for the market” in the standard-setting context is a kind of “competition-by-proxy,” in which firms designate technical experts to determine the nature of the network on behalf of a market which, if left to its own devices, is likely to arrive at an inefficient outcome.

Provided it is free of distortion, bias, or manipulation by private interests (a condition which is operationally defined below), the competition-by-proxy that takes place in an SSO can enhance social welfare not only by refocusing competitive resources along traditional dimensions, but also by broadening the size and potential scope of the chosen network. SSO standards can provide an agreed-upon technical base

³“Agreeing on a standard may eliminate competition between technologies, but it does not eliminate competition altogether. Instead, it channels it into different and (to economists) more conventional dimensions, such as price, service, and product features.” Besen, S.M. and J. Farrell “Choosing How to Compete: Strategies and Tactics in Standardization,” *J.Econ.Pers.*, vol. 8, no. 2, (1994) 117–131. See also Katz, M.L. and C. Shapiro, “Systems Competition and Network Effects,” *J.Econ.Pers.*, vol. 8, no. 2, (1994), 93–115: “For systems that are compatible, the locus of competition shifts from the overall package (including network size) to the specific cost and performance characteristics of each component individually” [citation omitted].

on which to build new products or components and thus facilitate entry by smaller or niche competitors who may not be able to enter a market dominated by a *de facto* proprietary standard.

A standard-setting process “free of distortion, bias, or manipulation by private interests” is one in which the choice of a standard rests solely on a neutral evaluation of the costs and benefits of a proposed technical solution. While technical merit is the basic criterion on which a properly functioning SSO will base its decision, technical merit cannot be isolated from cost. In many fields such as computers and telecommunications, technical solutions are *very rarely* unique, *i.e.*, without competing alternatives available at some cost.

It follows, therefore, that decision-makers in an SSO must have adequate and reasonably complete knowledge of both the technical merits and the expected cost of the alternative solutions being considered. It is no more reasonable to expect that an SSO that lacks knowledge of the cost of the various alternatives will choose the most efficient standard than it is to expect that an SSO that lacks technical expertise will choose the most efficient standard.

ALJ McGuire clearly recognized that the merits of any given proposed standard is based on its “cost-performance” attributes, given that *275 paragraphs* of the initial decision (F. 1128–1402) were devoted to findings supporting the proposition that no equal or superior alternative to Rambus’ technology on a cost-performance basis would have been available to JEDEC in a “but for” world in which the SSO during the standard-setting process had been aware of Rambus’ relevant patents or patent

applications.

The initial decision relied heavily on the outcome of ALJ McGuire's attempt to second-guess what JEDEC would have done in the hypothetical case that during its deliberations JEDEC had knowledge of Rambus' patents or patent applications, and thereby a better appreciation of the expected cost of its DRAM standards. Attempting to do so through expert testimony about the technical merits and costs of the alternative choices that JEDEC might have faced in such counter-factual circumstances, however, reveals a lack of appreciation for the level of expertise and the consensus dynamics that characterize standard-setting. Were it possible (or even conceivable) that an individual decision-maker such as an ALJ at the FTC could hear testimony from a handful of hired experts and arrive at a decision equivalent to the result of an unbiased formal standard-setting process within an SSO, the numerous industry experts who participate in SSOs, the consensus building in which they engage, and, indeed, SSOs themselves, would be totally superfluous.

The invalidity of the ALJ's approach is discussed in connection with the application of antitrust principles, *infra*, but two points are relevant here. First, standard-setting involves an exceedingly complex process of consensus building that cannot be duplicated by an ALJ or anyone else acting without the benefit of input from representatives from a broad cross-section of interrelated industries. To be sure, whether there existed *plausible* alternatives at the time the JEDEC standard was adopted is one of the conditions necessary to support a finding that Rambus' conduct

was anticompetitive.⁴ But the ALJ went far beyond determining that such plausible alternatives existed by concluding that none of these alternatives would have in fact been chosen in a “but for” world in which JEDEC was fully informed of Rambus’ proprietary interests in the standard and the royalties it intended to charge.

The second key point is that when an SSO lacks material information, it cannot properly discharge its pro-competitive competition-by-proxy function of choosing an appropriate standard on a cost-performance basis.

B WHEN INTELLECTUAL PROPERTY IS INCORPORATED INTO A STANDARD, ITS VALUE MAY BE ENHANCED, AND SUCH ENHANCEMENT MAY BE EITHER PRO-COMPETITIVE OR ANTICOMPETITIVE.

Standard-setting by its nature is exclusionary, in the sense that alternatives not chosen as standards may often suffer a competitive disadvantage. When standards are permissive, alternatives to components that fail to achieve approval continue to be available, or the non-standard item may still be marketed for other uses. On the other hand, when effectively mandatory standards are developed to satisfy compatibility requirements, producers and purchasers usually have no other alternative because of the limited utility of substitutes.

Switching from an improvidently determined compatibility standard to an alternative standard will usually entail substantial costs. Switching costs include the

⁴See *infra*, §IV.A., for a discussion of the condition that at least one plausible alternative must be available to the SSO in order for standardization to enhance the economic value of a patent. Apparently, the ALJ concluded that not one but several plausible alternatives would have been considered by JEDEC in a hypothetical “but for” world.

cost of re-standardization, the cost of incompatibility with an installed base, and the forfeiture of sunk costs invested by firms tooling-up to comply with the chosen standard. These costs are additive, and can easily make modification of a compatibility standard economically infeasible. This tends to entrench agreed-upon compatibility standards and lock-in its exclusionary effect.

Another source of exclusion due to compatibility standardization is the expectation it creates in the market. When the characteristics of a network are standardized, markets will expect future products and systems to comply with the network design. Such “path-dependency” can perpetuate exclusion, further entrench an existing network, and pose a substantial barrier to alternatives that may even be superior on a cost-performance basis.

When proprietary intellectual property (“IP”) such as a patent is incorporated into a compatibility standard, switching costs and path-dependency serve to confer additional economic value in excess of the value of the invention embodied in the patent. That is, the *ex post* value of a patent (after adoption of an effectively mandatory standard requiring its use) will exceed its value *ex ante* (before adoption of the effectively mandatory standard), and sometimes by a wide margin. Standardization may therefore confer value on an invention that a patent alone cannot. Where the patent involved is essential for practicing the standard, high switching costs and entrenched market expectations can invest the owner of the patent with market power attributable solely to the fact of the patent’s standardization. Market power so acquired may or may not be legitimate, depending on the circumstances.

1 MARKET POWER RESULTING FROM STANDARDIZING
PATENTED TECHNOLOGY MAY BE PRO-COMPETITIVE
PROVIDED IT IS ECONOMICALLY JUSTIFIED AND RESULTS
FROM INFORMED STANDARD-SETTING GOVERNED BY
SUITABLE PRO-COMPETITIVE PROCEDURES.

Provided that an SSO is adequately informed of the expected costs and technical benefits of the alternatives under consideration, and its procedures are governed by “safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition,”⁵ the SSO may choose to adopt a standard that implicates a patent or other proprietary IP.

In general, there are three reasons that might justify the adoption by an SSO of a standard that includes patented technology.⁶ First, the patented technology may offer an advance over available alternatives in the form of cost savings in the implementation of the standard. Second, the patented technology may offer a technical advantage that imparts enhanced features or quality to standard-compliant products. Third, the patented technology may represent a substantial technical advance over available alternatives, and would become the *de facto* standard even in the absence of *de jure* standardization.

These categories are analytically convenient for several purposes, one of which is determining the legitimacy (*i.e.*, pro-competitiveness) of standardizing patented technology. Unless one of the foregoing justifications can be identified, it is unlikely

⁵*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509 (1988).

⁶See Patterson, Mark R., “Inventions, Industry Standards, and Intellectual Property,” *BerkeleyTech.L.J.*, vol. 17 (2002), 1043–1082.

that the standard-setting process has served a pro-competitive function, or that any resulting *ex post* market power has been legitimately acquired.

While at least one such justification is necessary to conclude that a compatibility standard incorporating patented technology is not anticompetitive, it is not sufficient. The standard must also have been adopted by the SSO with adequate foreknowledge of the patent and with reasonable expectations of the patentee's license terms *ex post*. This, in turn, depends on the presence of sufficient safeguards to avoid capture by private economic interests. Thus, the SSO must not only be aware of the potential for enhanced *ex post* market value of the patent, but it must also take adequate steps to constrain it. Were it otherwise, there would be no reliable basis on which to distinguish a legitimate efficiency justification from a sham intended to disguise an anticompetitive result.

2 **EX POST MARKET POWER THAT RESULTS FROM UNDER-INFORMED STANDARD-SETTING OR STANDARD-SETTING INSUFFICIENTLY CONSTRAINED BY SUITABLE PROCEDURES IS ANTICOMPETITIVE.**

The foregoing suggests that *ex post* market power attributable to standardization may nonetheless be pro-competitive provided it is supported by an efficiency justification and is the product of an adequately informed SSO operating under procedural safeguards sufficient to constrain such market power. On the other hand, where *ex post* market power attributable to the standardization of patented technology results from *under-informed* decision-making, or from a process that has been undermined by private interests, the standard-setting cannot be considered pro-

competitive nor the market power legitimately acquired.

With respect to permissive standard-setting, existing antitrust precedent establishes that avoiding such an anticompetitive outcome may be the responsibility of those participating in the SSO [e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)], the SSO itself [e.g., *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982)], or both [e.g., *Radiant Burners, Inc. v. Peoples Gas Light and Coke Company*, 364 U.S. 656 (1960)].

C PRO-COMPETITIVE STANDARD-SETTING REQUIRES AN INFORMED COST-PERFORMANCE EVALUATION OF AVAILABLE TECHNICAL SOLUTIONS, INCLUDING COSTS RELATED TO IP LICENSING.

The upshot of the discussion above is that pro-competitive standard-setting requires that the SSO is not only aware of the fact of the patent but also of the economic consequences of adopting a standard that necessarily infringes proprietary rights. The manner and terms under which the patented technology will be licensed are facts essential to the cost-performance calculus that forms the basis of the SSO's function.

A recent study by Professor Mark Lemley of 43 SSOs in the computer and telecommunications industries reveals an extremely wide variation in the policies of SSOs with respect to intellectual property.⁷ Four of the 43 have no written policy at all,

⁷Lemley, Mark A., "Intellectual Property Rights and Standard-Setting Organizations," *Cal.L.Rev.*, vol. 90 (2002), 1889-1973. See also Testimony of Mark A. Lemley, Department of Justice Antitrust Division and Federal Trade Commission, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy, *Standard Setting*, April 18, 2002, at 21-24.

two have a statement on their websites but no formal policy, and one is in the process of developing a formal policy. Of the remaining 36 SSOs with written policies, 24 of them require disclosure of intellectual property, and others require a commitment to royalty-free licensing irrespective of disclosure. Many disclosure rules cover only patents and not other IP. Only four SSOs impose on their members any duty to search the company's own files. Many of the SSOs with written IP policies require some form of *ex ante* licensing, most commonly a pre-commitment to license on reasonable and non-discriminatory ("RAND") terms, although very few promulgated any definition of a "reasonable" royalty. Nearly all SSOs permit private ownership of IP rights embodied in a standard, although most discourage it, and two SSOs flatly prohibit it.

Among those SSOs with written IP policies, however, the details vary even further. Disclosure may apply to issued patents, or to patents applied for, or to applied-for patents that have been published. The duty may attach to IP of which the SSO participant is personally aware, or to the participant's firm, or only to participants that propose the standard in question. The timing of disclosure or licensing pre-commitments can range from the earliest practicable time to after the proposed standard has been well-developed and the SSO is close to a decision.

To the extent that the Lemley study reveals the various degrees to which an SSO considers the incorporation of IP into its standards to be a risk, imposing a unified approach on all SSOs may be misguided. To the extent that this variation reflects the relative lack of development of the governing legal principles that support a particular IP policy, a coherent application of antitrust principles in this case is likely to

encourage SSOs to develop policies that strengthen *ex ante* duties of disclosure and licensing pre-commitments.

II THE ROLE FOR ANTITRUST LAW

As a threshold matter, it bears mention that the applicability of antitrust law to the activities of SSOs is not universally accepted. By the reckoning of at least one well-recognized scholar, the variation in the rules of SSOs as they relate to IP suggests that antitrust law is not likely to be effective in promoting pro-competitive outcomes.⁸ Indeed, Professor Teece, in whom ALJ McGuire in his initial decision placed great confidence (F. 1404-1410) and on the testimony of whom rests several of the ALJ's key findings (see, in particular, F. 1435-1456), appears to favor the elimination of antitrust scrutiny of standard-setting activities altogether.⁹

But, this skepticism is a minority view, and most legal and economic scholars recognize that the application of antitrust principles to the activities of SSOs can promote their pro-competitive mission.¹⁰ Of particular importance in the present

⁸ “[I]f it's not a one size fits all world, then what do we do about antitrust? The answer is probably little.” Testimony of David Teece, Department of Justice Antitrust Division and Federal Trade Commission, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy, *Standard Setting*, April 18, 2002, at 68–69.

⁹ “The question though for this group is is there antitrust—is there a role for antitrust here. And I really have to scratch my head hard to find a role for antitrust. *** I mean I think that standards organizations need to think these issues through from the perspective of how can I get good quality standards in place in the marketplace quickly. And that is tricky. But, you know, layering antitrust on top of this, there aren't clear answers I think from an antitrust point of view. And therefore if you lay it on you create additional uncertainties which in fact come back to bite you ***.” *Id.* at 165–166.

¹⁰ See, Testimony of Timothy J. Muris, Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee (Nov. 7, 2001), available at www.ftc.gov/os/2001/11/muris011107.htm, and Carrier, Michael A., “Why Antitrust Should Defer to the
(continued...)

context is the role of antitrust law in constraining market power attributable to standardization as opposed to the technical contribution of the IP, in deterring the opportunistic exploitation of standard-setting, and in clarifying and encouraging the *ex ante* exchange of licensing terms and conditions.

The key goal of antitrust law as it relates to standard-setting involving IP is to counteract the incentive of parties to acquire market power through standardization. Antitrust law can deter owners of IP involved in standard-setting from inappropriate rent-seeking and opportunistic non-disclosure by limiting their prospective returns to the actual economic contribution of the technology. Where parties believe that antitrust courts will be hostile to *ex post* market power acquired through under-informed standard-setting or the manipulation of the process, they will be less likely to expend resources gaming the system or attempting to win a standards contest involving undisclosed IP.

Antitrust law can also help encourage the *ex ante* sharing of information about proposed license terms.¹¹ When antitrust courts are inclined to accept *ex post* market

¹⁰(...continued)

Intellectual Property Rules of Standard-Setting Organizations: A Commentary on Teece and Sherry”, *Minn.L.Rev.* 2019, 2026-31 (2003) (highlighting the “excess baggage” that Teece and Sherry impose on Antitrust.)

¹¹Unfortunately, the perception among many SSO participants is that *ex ante* licensing negotiations intensify rather than attenuate the risk of antitrust liability, so that antitrust concerns contribute to opportunistic behavior in the context of standard-setting rather than discourage it. See *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Report by the Federal Trade Commission (October, 2003) (“*FTC Report*”), Chapter 3, at 3: “Firms in the computer hardware and software industries indicated that antitrust concerns may be inhibiting joint discussions of licensing terms during the standard-setting process. They noted that antitrust has traditionally been suspicious of joint discussions of licensing terms arising prior to the adoption of a standard. Some panelists suggested, however, that such conduct is necessary for the efficient establishment of new standards (continued...)”

power as legitimate when licensing terms have been fully disclosed *ex ante*, parties will be encouraged to make their expectations for licensing known. Such pre-disclosed licensing terms should also be more likely to be accepted as satisfying RAND terms.

Finally, it is worth reiterating that SSOs do not always have strong incentives to prevent the symmetric *ex post* “cost shock” caused by surreptitiously incorporated IP. Antitrust law works to the benefit of the ultimate consumer when cost shocks that do not disadvantage any particular competitor will simply be passed through by intermediate suppliers.

III THE SCOPE OF SECTION 2 OF THE SHERMAN ACT AND SECTION 5 OF THE FTC ACT RELATED TO UNILATERAL CONDUCT IN STANDARD-SETTING.

The elements of the offenses of monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2, are well known, and need not be repeated here. The offense of engaging in an “unfair method of competition” or “deceptive acts or practices” as defined by Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, are somewhat broader.

The Supreme Court made this point forcefully in *F.T.C. v. Sperry and Hutchinson Co.*, 405 U.S. 233 (1972), when it stated:

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

¹¹(...continued)
because some companies are using patents strategically.”

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.

405 U.S. at 239. Based on its prior cases, the Court concluded that “unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor [are] unfair practices in commerce confined to purely competitive behavior.” *Id.*, at 244.

Noting 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,” the Court cited with approval the Commission’s own statement of the factors it considered in determining whether a practice not in violation of the antitrust laws nor deceptive is nonetheless unfair.¹²

Similarly, in *F.T.C. v. Texaco, Inc.*, 393 U.S. 223, 225 (1968), the Court held that “Congress enacted §5 of the Federal Trade Commission Act to combat *in their incipency* trade practices that exhibit *a strong potential* for stifling competition. In large measure the task of defining ‘unfair methods of competition’ was left to the

¹²“(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” Trade Regulation Rule on Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. 8324 (FTC 1964), *withdrawn*, 30 Fed.Reg. 9485 (FTC 1965), superceded by the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§1331-1340 (2000).

Commission” [emphasis added]. The Court noted that “[w]hile the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.” 393 U.S., at 226 [citations omitted].

In 1980, a Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction¹³ specified three elements that constitute an unfair act or practice: (1) the injury must be substantial, (2) the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces, and (3) the injury must be one which consumers could not reasonably have avoided. In the 1983 Hearings on Standards and Certification, the Commission took the position that the misuse of standard-setting could be challenged under the unfairness protocol.¹⁴

The FTC Act Amendments of 1994¹⁵ codified the *Unfairness Protocol*, defining an unfair act or practice as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not

¹³Attached to Commission letter to Senators Ford and Danforth (Dec. 17, 1980) *reprinted in* H. Rep. No. 98-156, at 33 (1983) (“*Unfairness Protocol*”).

¹⁴See Statement of Timothy J. Muris, Director, Bureau of Consumer Protection, Accompanying the Final Staff Report on the Standards and Certification Rule (April 1, 1983), at 9: ([S]tandard 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.”)

¹⁵ Pub. L. No. 103-312, 108 Stat 1691, 1695, codified at 15 U.S.C. §§41-57c (2000).

outweighed by countervailing benefits to consumers or to competition.”¹⁶ The Commission has noted that a “substantial injury” is one that “does a small harm to a large number of people, or if it raises a significant risk of concrete harm.”¹⁷

The Commission thus has wide latitude to condemn practices that may as a technical legal matter fail to violate the letter of the antitrust laws, or even fail to be deceptive, but nonetheless are injurious to the competitive process. This having been established, however, the remainder of this *amicus* brief will closely track accepted antitrust principles in its analysis of the conduct alleged in this case.

IV CIRCUMSTANCES UNDER WHICH AN IP OWNER SHOULD BE FOUND LIABLE UNDER THE ANTITRUST LAWS IN THE CONTEXT OF STANDARD-SETTING UNDER A RULE-OF-REASON ANALYSIS

The preceding discussion provides a suitable framework for the application of antitrust principles to the acquisition of market power through standardization in circumstances in which the SSO either lacked sufficient information, lacked sufficient procedural safeguards, or was captured by private economic interests. The following discussion is confined to the potential liability of an SSO participant acting unilaterally, and makes the assumption that the purpose of the standard-setting is to arrive at an open compatibility standard freely available to implementors. The overall goal is to distinguish desirable licensing of technical advances from opportunistic exploitation of the standardization process.

¹⁶15 U.S.C. §45(n) (2000).

¹⁷*Unfairness Protocol*, *supra* note 13.

A THE IP OWNER POSSESSES *EX POST* MARKET POWER
ATTRIBUTABLE TO THE STANDARDIZATION IN EXCESS OF *EX ANTE* MARKET POWER

The antitrust laws should not come into play unless a participating IP owner whose technology has been adopted into a compatibility standard thereby acquires *ex post* market power attributable to the standardization. This is an issue of market demand.¹⁸ While differentiating between the various sources of demand for a product or component may seem daunting, such issues are faced and resolved with regularity in patent litigation. The same principles which permit a patent court to derive an estimate of a reasonable royalty for an invention that enables a feature of a larger product can be used to estimate the value of the technical contribution of a patent above and beyond the value attributable to the standard.

Under this rule, patents which are so revolutionary that they would have become the *de facto* standard regardless of action by an SSO are not likely to derive any additional market power from standardization. With respect to the other two types of technical contribution, cost savings for implementors and additional features for the standardized product, demand reasonably related to the value of these technical contributions over the next best alternative is a legitimate return, while demand related to the absence of substitutes due to standardization is not.

One source of direct evidence of the value of the technical contribution of a patent is the royalty rate charged *ex ante*. To the extent that evidence of Rambus' *ex*

¹⁸“Only when the invention has independent technical value will there be additional buyers who provide a demand for the invention above and beyond the demand for the standard.” Patterson, *supra* note 6, at 1058.

ante royalty rate is available in the present case, it reflects the fair market value of Rambus' technology and the apportionment procedure is fairly straight-forward. If the evidence shows that the royalty rate for substantially the same type of technology was 0.75% of sales *ex ante* but 3.5% *ex post*, it is reasonable to conclude that approximately 78% of the royalty claimed *ex post* is due to the standardization. ALJ McGuire apparently made no attempt at such an apportionment, but appeared to have treated the case as "all-or-nothing" with respect to the royalties to which Rambus claimed it was entitled. Neither outcome is likely to work substantial justice.

The need for apportionment between the inventive contribution of the patent and the collective action of the standards setting activity argues strongly in favor of *ex ante* negotiation of license terms:

One could think of X as representing the value or leverage that the patent provides in a competitive environment when routes other than adoption of the standard to which that patent would be essential remain open. However once there has been agreement on selection of a particular standard that requires use of that patent, the value or leverage that the patent provides is increased to $X+Y$. X is related to the inventive contribution of the patent. Y is related to the collective action of the standards setting activity. As the value of a patent is highly context dependent, X and Y are not readily susceptible of determination in the abstract. Instead, the value is best determined by conducting negotiation at the appropriate stage. *Ex ante* consideration of license terms is most likely to approximate X , while *ex post* consideration is most likely to result in $X+Y$.¹⁹

¹⁹Peterson, Scott K., "Consideration of Patents during the Setting of Standards," prepared for the Department of Justice Antitrust Division and Federal Trade Commission, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy, *Standard Setting Organizations: Evaluating the Anticompetitive Risks of Negotiating IP Licensing Terms and Conditions* (continued...)

Neither the IP itself nor the inclusion of the IP in a standard should give rise to a presumption of market power, but should be subject to proof. In the present case, market power was fairly evident in the four technology markets at issue. Were it not, however, it would have warranted greater analysis. If market power is defined as the power to raise prices over their competitive levels for a non-transitory period, “competitive level” in this context should mean the *ex ante* value of the invention.

A meaningful *ex ante* licensing pre-commitment should be evidence of *ex ante* price constraints, and that *ex post* market power has been legitimately acquired in the sense that it is related to the invention and not to the standard. Most commentators agree that *ex post* market power can be constrained through *ex ante* licensing, and, to a lesser extent, through *ex ante* pre-commitments.²⁰ The fact of such meaningful pre-commitments, therefore, should considerably lessen the risk of *ex post* antitrust scrutiny.

In light of the foregoing, it is surprising that ALJ McGuire concluded in the initial decision that a RAND pre-commitment by Rambus would have made no difference in the royalty rate and that JEDEC would not even have asked for a RAND pre-commitment even if it had been aware of Rambus’ proprietary interests (F. 1413-1419). The implication is that JEDEC’s members would have been indifferent to the

¹⁹(...continued)
Before A Standard Is Set, Nov. 6, 2002, at 6.

²⁰See, e.g., Swanson, Daniel G., “Evaluating Market Power in Technology Markets When Standards Are Selected in Which Private Parties Own Intellectual Property Rights,” prepared for the Department of Justice Antitrust Division and Federal Trade Commission, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy, *Standard Setting*, April 18, 2002.

acquisition by Rambus of market power and uninterested in taking measures to constrain it.

These findings are supportable if either a) Rambus' *ex post* royalty return was in fact *entirely* related to the technical contribution of its patents, and entirely unrelated to JEDEC's ignorance of the patents during the standard-setting process, or b) Rambus' inventions were so revolutionary that they were destined to become the *de facto* standard regardless of what JEDEC did or what its members knew. It is difficult to see how the evidence could have supported the first conclusion if no specific inquiry was made to apportion the source of demand between the Rambus technology and the standard itself. The second conclusion is belied by the consideration of alternatives—rejected by ALJ McGuire as being in his view inferior to the Rambus' standard on a cost-performance basis—which indicates that the four technologies were not revolutionary, but embodied incremental benefits.

B THE IP OWNER HAS ENGAGED IN ANTICOMPETITIVE CONDUCT FOR THE PURPOSE OF OBTAINING *EX POST* MARKET POWER ATTRIBUTABLE TO STANDARDIZATION

Anticompetitive conduct is a necessary predicate to antitrust liability. In the present context, two distinct types of conduct are relevant. The first is the failure to disclose information about IP relevant to a standard under consideration under circumstances in which the IP owner knew or should have known that the undisclosed information was material to the pro-competitive activities of the SSO. The second is the appropriation of information obtained as a participant in SSO activities for the

purpose of securing IP rights implicated by a proposed standard under consideration.

1 NON-DISCLOSURE OF RELEVANT IP UNDER CIRCUMSTANCES IN WHICH THE IP OWNER KNEW OR SHOULD HAVE KNOWN THAT DISCLOSURE IS NECESSARY FOR THE EFFICIENT SETTING OF A STANDARD MAY CONSTITUTE ANTICOMPETITIVE CONDUCT

Whether non-disclosure rises to the level of anticompetitive conduct requires a fact-intensive inquiry into the relevant circumstances. As discussed above, rules relating to IP disclosure vary greatly among SSOs. Such a variation should not influence the antitrust outcome. While the existence of certain rules can be probative of the importance placed by an SSO on information relating to IP connected with proposed standards, the absence (or perceived inadequacy) of such rules should not bar antitrust liability or provide a defense to otherwise actionable non-disclosure. Where a disclosure rule exists, its violation should not be determinative of anticompetitive conduct, but merely evidence of the anticompetitive nature of the conduct.

a SSO RULES RELATING TO DISCLOSURE ARE EVIDENCE OF THE SSO'S NEED FOR KNOWLEDGE OF RELEVANT IP IN THE STANDARD-SETTING PROCESS

Rules requiring or encouraging disclosure of IP reflect that the SSO considers proprietary interests to be a relevant factor for consideration in its standard-setting activities. The pro-competitive “competition-by-proxy” in which the selection of a standard is based on cost-performance criteria cannot function without sufficient information. Such rules put participants on actual notice of the SSO’s need for such information.

The absence of such rules, however, does not suggest either that the SSO does not require such information to arrive at an efficient cost-performance evaluation or that an IP owner cannot be on actual notice of such a need. The lack of disclosure rules suggests only that the materiality of undisclosed IP information must be proven by other means.

b VIOLATION OF AN SSO RULE IS EVIDENCE OF INTENTIONAL ANTICOMPETITIVE CONDUCT BUT NOT A NECESSARY PREDICATE FOR ANTITRUST LIABILITY

The evidentiary significance of SSO rules in the antitrust context contrasts sharply with the great weight placed by ALJ McGuire on whether a JEDEC rule requiring disclosure of IP infringed by a standard existed, and, if so, whether Rambus violated such a rule (I.D., 260-269). This is in spite of the ALJ's apparent awareness of the well-settled proposition that statutes, regulations, or contractual rules are not coextensive with antitrust offenses, as evidenced by the reference (I.D., at 292) to *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir., 2000). *Goldwasser* and other cases cited by the ALJ stand for the proposition that an antitrust claim must be "freestanding" and not derivative of a violation of extrinsic rules. Determinations that JEDEC had a mandatory disclosure rule and that Rambus violated it may be indicative of Rambus' intent in failing to disclose IP, but are neither sufficient nor necessary to establish actionable anticompetitive conduct.

c CONDUCT WHICH IN ISOLATION MAY NOT BE EXCLUSIONARY UNLESS ACCOMPANIED BY AN UNDER-INFORMED ACT BY AN SSO MAY NONETHELESS BE ANTICOMPETITIVE.

Determining whether the conduct of an IP owner is exclusionary in the antitrust sense without regard to the context of the standard-setting process creates an untenable distortion. To apply antitrust notions of exclusionary conduct to the actions of parties isolated from the contributory effects of the standard-setting process itself immunizes parties intent on “gaming” an SSO. Indeed, the very concept of gaming suggests that the desired result cannot be accomplished by one party alone. Non-disclosure of an essential patent that is never adopted by a standard-setting body is, without more, entirely benign.

Indeed, the application of antitrust principles to conduct without consideration of the likely consequences of the actions of the SSO leads to an absurd result. ALJ McGuire, for example, cited with approval the following definition of exclusionary conduct from the government’s *certiorari amicus* brief in the case of *Verizon Communications, Inc. v. Trinko*, 540 U.S. ____, 124 S.Ct. 872, 2004 WL 51011 (Jan. 13, 2004): “Conduct is ‘exclusionary’ or ‘predatory’ in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition”(I.D., at 292).

Probably no strategic manipulation of the procedures of an SSO could under this test be considered anticompetitive. Without the complicity of the SSO, willful non-disclosure can have no exclusionary effect. Such non-disclosure *taken together* with the

subsequent ill-informed adoption of a standard saddled with IP, however, can easily be anticompetitive in its effect. Indeed, that is the gravamen of Complaint Counsel's case.

Obviously, the determination of whether any given conduct is anticompetitive requires consideration of the eventual or likely outcome, taking account of the intervening conduct of the SSO. Exclusionary conduct in the unilateral sense cannot be imported wholesale into the standard-setting context. To effectuate exclusionary purposes, it takes both opportunistic conduct by one party *combined with* the ultimate adoption of an IP-laden standard by the SSO. Exclusionary conduct through that result is by *concerted* action—despite the apparent or purported innocence of the SSO—which may be a more appropriate and useful antitrust principle for determining whether conduct is anticompetitive.

In the context of a cooperative venture such as standard-setting, the relationship of the parties will influence the participants' expectations. Standing mute in circumstances in which silence can be reasonably interpreted in a particular way should not give way to a defense based on the absence of affirmative "conduct." The inquiry into whether the failure to inform an SSO of material information should constitute anticompetitive conduct is naturally fact-specific, but in general reliance on a party's silence is justified in circumstances in which silence can reasonably be expected to be interpreted as a denial that the silent party possesses any such information.

With respect to whether confidential information should be required to be

disclosed, such as patent applications filed but not published, the extent to which the interests of SSOs should give way to legitimate trade secrecy interests is a matter of some debate. While U.S. patent law preserves the confidentiality of patent applications for a period of 18 months, other jurisdictions publish patent applications upon filing. Non-disclosure of published material, even if it is only published in a foreign jurisdiction, should not be permitted to trump an antitrust prohibition against non-disclosure that contributes to undermining pro-competitive standard-setting. But even when a patent application has not been published anywhere, the welfare loss associated with monopolization derived through the manipulation of standards-setting is likely to outweigh the benefit of preserving the confidentiality of a patent application during the initial period of its pendency.

Congress is expressly empowered to grant to authors and inventors the exclusive rights to their creations in order “[t]o promote the Progress of Science and useful Arts.”²¹ The temporary, qualified “monopoly” granted to patentees traditionally has been “justified *to the extent that they increased the pace of innovation and benefitted society at large.*”²² Patent rights thus exist in the first instance to benefit society, albeit

²¹U.S. Const., Art I, §8, Cl. 8 (1787).

²²Cohen, Linda R. and Roger G. Noll, “Intellectual Property, Antitrust and the New Economy,” *U.Pitt.L.Rev.*, vol. 62, no. 3, (2001), 453–473, at 473 [emphasis in original]. See also *Special Equipment Co. v. Coe*, 324 U.S. 370, 382 (1945) (“The patent is a privilege ‘conditioned by a public purpose.’ *** The exclusive right of the inventor is but the means to that end.” [citations omitted]) and *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966). With respect to copyrights, see *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”)

indirectly and through a direct benefit to private patentees. Presumably, the initial confidentiality of patent applications rests on a similar justification. Such confidentiality should not, therefore, shield those responsible for an anticompetitive outcome.

Moreover, when voluntarily submitting to a standard-setting process intended to be open and pro-competitive, it is not unreasonable to require a patentee to relinquish any claimed trade secrecy protection for a patent application that includes claims that could be infringed by an adopted standard in circumstances in which non-disclosure would threaten the very purposes of the standard-setting process.

2 THE APPROPRIATION OF INFORMATION OBTAINED FROM STANDARD-SETTING ACTIVITIES IN FURTHERANCE OF OBTAINING IP RIGHTS OVER A PROPOSED STANDARD IS ANTICOMPETITIVE.

In addition to willful non-disclosure, Rambus is also alleged to have appropriated information about the progress and direction of JEDEC's standard-setting activities and incorporated it through continuation practice before the PTO for the purpose of ensuring that the eventual standard would infringe its patents. Such a use of continuation practice without a legitimate justification should be condemned as anticompetitive.

The deceptive or anticompetitive use of continuation practice in circumstances such as these is recognized in the *FTC Report* as a serious competitive problem

requiring a legislative remedy.²³ Until such a remedy is forthcoming, however, the Commission should recognize that the abuse of continuation practice in the standard-setting context can be particularly problematic. Justifications for the filing of continuations proffered by an SSO participant should be evaluated critically in light of the particular conduct involved, the timing of the continuation filings, the correspondence between the technical modifications of the patent claims and the work undertaken by the SSO, and any independent research and development activities by the putative patentee that might lend evidentiary support to the legitimacy of the justification.

C THE ALLEGED ANTICOMPETITIVE CONDUCT HAS DISTORTED THE SSO'S 'COMPETITION BY PROXY'

The final element in the antitrust evaluation is the identification of a competitive injury to the standard-setting process. The distortion or capture of a pro-competitive process by a private party is, by definition, anticompetitive. Whether or not an injury to the standard-setting process can be demonstrated to have been passed through to the ultimate consumer should be immaterial, and would contribute to an unnecessarily burdensome standard.

Injury to the standard-setting process should require a showing that reflects the foregoing analysis. Specifically, if the applicable quantum of proof establishes that there was a complete absence of any plausible technical alternative such that no

²³*Supra* note 11, Chapter 4, at 28: (“Continuation practice can allow opportunistic behavior, such as post-filing modification of patent claims to capture competitors’ products or processes that would not have infringed the original claims. Such opportunistic behavior can disrupt competitive activity.”)

further or different SSO deliberations would have occurred under hypothetical circumstances in which the anticompetitive conduct did not take place, then the injury requirement has not been satisfied. However, such a finding is not equivalent to concluding that the plausible alternatives that would have confronted the SSO *would not have been selected*. Indeed, the very attempt at such an after-the-fact analysis indicates that the SSO has been deprived of the opportunity to engage in full and complete deliberations, and establishes an injury to the competitive process.

The unexpected cost shock that results from under-informed standard-setting not only interferes with the efficient choice of an appropriate standard, but also undermines the pro-competitive *ex ante* pooling of disclosed patents that may be necessary to implement a standard. Multiple patentees often agree to pool patents connected with a standard to insure that implementation will be available on reasonable terms. When a patentee outside the pool makes unexpected *ex post* demands for additional royalties, the purposes of pro-competitive patent pooling are undermined. Such a prospect undercuts the motivation for patent pooling and thereby chills this pro-competitive activity.

V ANTITRUST REMEDIES

A DISGORGEMENT OF ROYALTIES ATTRIBUTABLE TO *EX POST* MARKET POWER NOT LEGITIMATELY ACQUIRED

Consistent with nature of the mechanism of harm engendered by an alleged distortion or capture of the standard-setting process, a violator should be subject to disgorgement of royalties earned as a result of the value of its IP attributable to its

standardization as opposed to its economic contribution based on technical merit. In cases in which pre-standardization licensing has established a course of dealing, direct evidence bearing on such an apportionment is available. Where no such *ex ante* licensing has taken place, indirect means of apportionment are available, including expert testimony and testimony from industry participants as to the value of a reasonable royalty based on market demand for the technology unrelated to demand for the standard.

B THE IMPOSITION OF A PENALTY

The disgorgement of royalties attributable to the standardization but not the technical contribution of the patent may not sufficiently deter attempts by patentees to insinuate proprietary technology into an adopted standard. Therefore, an additional penalty should be imposed. In the present circumstances, a suitable penalty would also take account of the useful life of the technical contribution of the relevant patents. Developments in the computer industry are notoriously fast-paced, and the useful life of an invention may be substantially shorter than the statutory life of a patent. Competent evidence is available to help estimate the duration of a given technical contribution. So limiting the duration of royalties to an innovation's useful life rather than the life of the patent is a measured and suitable penalty for a patentee intent on willfully distorting the standard-setting process.

C INJUNCTIVE RELIEF AGAINST THE FUTURE EXERCISE OF *EX POST* MARKET POWER NOT LEGITIMATELY ACQUIRED

Similarly, injunctive relief should be sought which prohibits the future collection

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2004, I caused true and correct copies of the *Amicus Curiae* Brief of the American Antitrust Institute in Support of Neither Party to be served as described below.

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Appendix "A"

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Listen.com
Mayer Brown & Platt
Mayer Brown Rowe & Maw
Milberg Weiss Bershad Hynes & Lerach
Morgan, Lewis & Bokius
Much, Shelest, Freed, et al.
National Association of Recording Merchandisers
National Consumers League
National Credit Reporting Association, Inc.
National Rural Electric Cooperative Association
National Rural Telecommunications Cooperative
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