

A sepia-toned photograph of a classical statue depicting a muscular man holding a horse. The man is shown from the waist up, leaning forward with his right arm around the horse's neck. The horse is rearing up on its hind legs. In the background, a classical building with a dome and columns is visible.

2008 ANSI Legal Issues Forum

The FTC's Approach to Standards-Related Antitrust Issues Going Forward

Remarks by Melanie Sabo

Assistant Director

Anticompetitive Practices Division

October 22, 2008

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FEDERAL TRADE COMMISSION



- The views expressed here are mine alone and do not necessarily reflect the views of the Federal Trade Commission, and Commissioner, or other FTC staff

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What's Next?

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Rambus Update

- Petition for rehearing en banc denied
- Petition for Certiorari due Nov. 24, 2009
- Fundamental Error: Court declined to recognize that deceptive conduct that harmed the competitive process of selecting technologies for inclusion in industry-wide standard, having no justification or competitive benefits, and was at least a substantial contributing cause to the creation of monopoly power, should be recognized as “exclusionary” for purposes of § 2 analysis.



Rambus Update – Reasons to pursue Cert.

- **Case Presents Clean Legal Issue**
 - DC Circuit decided the case on the premise that Rambus had committed actions that amounted to deception
- **DC Circuit Applied Errant View of § 2 Law**
- **Very Important Issue with Broad Implications for Standards Setting Agenda**
- **Certain Companies Contacted SG to Petition for Supreme Court Review**



Rambus Update

- *An Alternative View:*

“In addition to allowing [SSOs] to experiment with alternative approaches for dealing with hold up, . . . antitrust law should avoid chilling efficient standards development activity. This objective applies with special force to the antitrust analysis for judging the legality of unilateral decisions by IP holders regarding communications about their IP during the standards development process and the terms at which they subsequently make their IP available. . . .



Rambus Update

“If antitrust law threatened IP holders with treble damages liability for conduct during or after the standards development process simply because – when viewed through the lens of hindsight once lock-in has already occurred – that conduct might subjectively appear as unfair or unjustified, the law would risk discouraging the very participation we value. For example, IP holders would have to think twice about participating in standards development activity if antitrust law established rules that would exact treble damages (or impose caps on royalty levels) for statements . . .



Rambus Update

“... that were not objectively false, or omissions made absent any clear duty to disclose, during a standard setting process just because a jury might later conclude that the firm’s communications about its IP were less forthcoming than the jury thought was sufficient to avoid lock-in.”

David L. Meyer, *How to Address “Hold Up” in Standards Setting Without Deterring Innovation by SDOs*, ABA Spring Meeting (March 26, 2008).



What's Next for Section 5

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Commission Ruling in N-Data

- In recent N-Data matter, technology proponent offered its patented technology for use in wired LAN standard
- Pursuant to SSO request for a licensing letter, patentee committed to 1,000/manufacturer royalty
- Industry relied upon royalty commitment and adopted standard
- Patent later sold to N-Data



Commission Ruling in N-Data

- Commission alleged that N-Data's refusal to license for \$1,000 was antitrust violation
- N-Data knew about the licensing commitment
- Commission believed repudiation of commitment harmed competition and consumers and was unlawful under FTC Act
- N-Data settled; agreed to charge \$1,000



Commission Ruling in N-Data

- Commission approved the issuance of a final consent order and letters to the commenters of record on September 22, 2008
- Public comments generally supportive that breach of a specific licensing commitment is antitrust violation
- The SSO in N-Data, the IEEE, stated that it supports the settlement outcome



Commissioner Jon Leibowitz



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Commissioner J. Thomas Rosch



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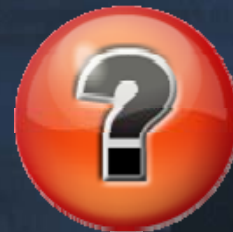




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Commissioner Pamela Jones Harbour



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YES



YES

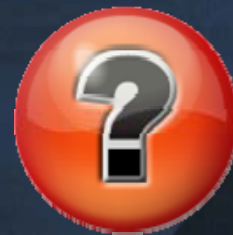


NO

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Chairman William E. Kovacic



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NO



YES



NO

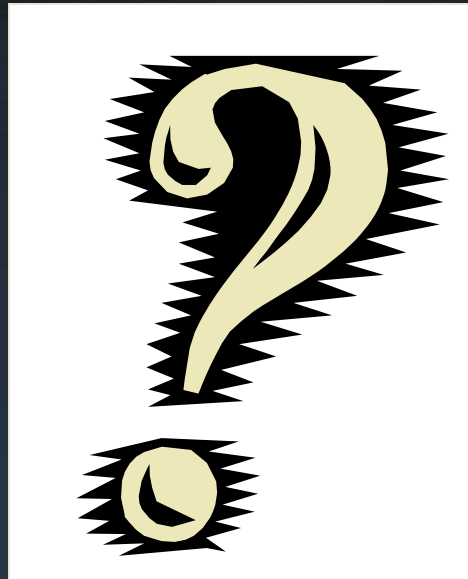


YES

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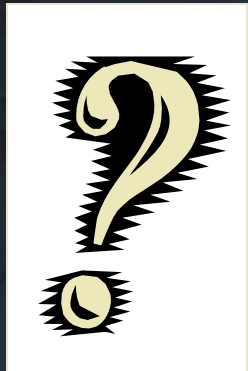


New Chairman



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YES



NO



YES



NO

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September 2009



YES



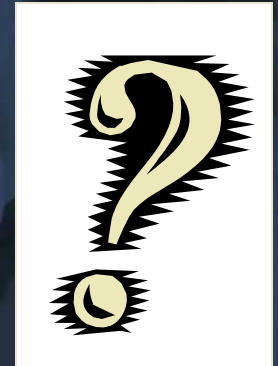
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NO



YES



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QUESTIONS FOR ANSI

- If FTC abandoned § 2 challenges to conduct that corrupts the Standards Setting Process, how would such action impact ANSI?
- How would it impact the standards setting process in general?
- What steps would ANSI take to prevent such conduct by members of its organization?



QUESTIONS FOR ANSI

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Hypothetical Scenario

- In a standard-setting situation with clear duties to disclose, a firm does not disclose a patent (because, e.g., it doesn't believe the patent is enforceable.) There are numerous equally good non-proprietary alternatives at the time. Technology covered by the patent is adopted by a flip of the coin. After lock-in, a new lawyer at the firm determines that the patent is enforceable and proceeds to enforce, creating a dangerous probability of monopolization. The firm/IP holder declines to offer RAND terms. In this case there is no bad intent or express commitment prior to acquisition of monopoly power. Because of lock-in and sunk investments, it will take at least 7 years before a non-infringing standard could be successfully implemented. Why should or shouldn't Section 5 reach this conduct? Is this a case of an accidental monopolist that should be actionable?

