



Antitrust Issues in Standard-Setting

ANSI

Geoffrey D. Oliver
Assistant Director, Anticompetitive Practices
Federal Trade Commission

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



Recent FTC Involvement in Standard-Setting

- Dell
- Rambus
- Unocal
- FTC/DOJ IP Hearings



Pro-Competitive Benefits of Standard-Setting

- Supreme Court
 - Allied Tube
 - Hydrolevel

- FTC/DOJ IP Hearings
 - (Rapp, Deutsch, Lemley)

- See also Rambus – CC Appeal Brief at 31-33



Potential Anti-Competitive Effects of Standard-Setting

- Misuse of Standard-Setting to Restrict Entry
 - Allied Tube
 - Hydrolevel
- Misuse of Standard-Setting to Gain Monopoly Power
 - Dell consent decree
 - Rambus complaint
 - Unocal complaint
 - See also generally FTC/DOJ IP Hearings



The IP Hold-Up Problem

- Ex ante, SSO members often can select among competing technologies
 - - select alternative to patented technology
 - - bargain down royalty rates

- Ex post, industry may be locked in to use of a patented technology



The IP Hold-Up Problem

- FTC/DOJ IP Hearings
 - (Shapiro, Lemley, Grindley, Rapp, Peterson)
- Rambus
 - CC Appeal Brief at 32-35
 - AAI, Economists' Amicus Briefs
- Unocal
 - Expert testimony



Issues

- Does antitrust law apply to single-firm SSO misconduct?
- What is source of duty to disclose?
- Potential liability for misrepresentation?
- Liability for negligent conduct?
- Does RAND replace disclosure?
- How to calculate RAND?
- Can SSO members negotiate royalties collectively?
- Different terms to non-members?
- Can RAND offer be withdrawn?



Does antitrust law apply to single-firm misconduct in connection with standard-setting?

- No
 - Rambus ID at 253-258
- Yes
 - Dell majority and dissenting opinions
 - Rambus – CC Appeal Brief at 31-41
 - Unocal complaint
 - Rambus amicus briefs
 - FTC/DOJ IP Hearings (in general)



What is the source of a patent-holder's affirmative duty to disclose?

- None, if business reason not to
 - Rambus – Res. Answering Brief at 108-115
- SSO's clear and unambiguous rules only
 - Rambus ID at 259-260
- SSO's purpose, procedures, rules, good faith
 - Rambus – CC Appeal Brief at 41-49
 - Rambus -- JEDEC + SSO Amicus Briefs
- Antitrust law independent of SSO's rules
 - Rambus: AAI and Economists' Amicus Briefs



Absent disclosure rules, may a patent-holder be liable for an affirmative misrepresentation?

- Yes
 - Unocal complaint
 - Unocal consent decree



Can a Patent-holder be liable for a negligent misstatement or failure to disclose?

- Yes
 - Dell complaint
- Possibly
 - Dell majority opinion
- No
 - Rambus ID at 295-300
 - Dell dissenting opinion



Is a patent-holder excused from disclosure if it charges RAND?

- Yes
 - Rambus ID at 323-326
 - See also *Symbol Tech v. Proxim*

- No
 - Rambus – CC Appeal Brief at 77-100
 - Rambus – CC Reply Brief at 84-88



How is a RAND rate calculated?

- Ex ante, based on pre lock-in bargaining position
 - Rambus – CC Reply Brief at 86-88
 - Rambus: AAI Amicus Brief
 - FTC/DOJ Hearings

- Ex post comparisons
 - Rambus ID at 324-325



Are SSO members permitted to negotiate royalty rates collectively?

- FTC/DOJ IP Hearings
(Peterson; Kattan; Farrell; Shapiro; Vishny)
- Former FTC Chairman Muris
- Former Assistant AG Pate
- FTC Chairman Majoras (9/23/05 Speech)



Must a patent-holder offer identical terms to companies that do not participate in the standard-setting organization?

□ ?



If a patent-holder promises RAND terms, can it later withdraw its offer?

□ ?



Conclusions

- Standard-Setting is usually pro-competitive
- Under some circumstances, patent enforcement may undermine pro-competitive benefits
- FTC is dealing with novel, complex issues
- We welcome your input