



2008 Open Forum for
Standards Developers



Update on Recent Legal Developments Affecting Standards Organizations

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Open Forum for Standards Developers
June 24–25, 2008

- The views expressed here are mine alone and do not necessarily reflect the views of Jones Day or any Jones Day client

FTC/DOJ Involvement in Standards

- **FTC Dell Complaint and Consent**
- **FTC Unocal Complaint and Consent**
- **FTC Rambus Liability Decision**
- **FTC Rambus Remedy Decision**
- **DOJ Business Review Letters**
- **FTC/DOJ Antitrust & IP Report**
- **FTC N-Data Complaint and Consent**

Summary of Agency Positions

- **Can't intentionally misrepresent (Unocal)**
- **If disclosure obligation, can't intentionally conceal (Rambus)**
- **If disclosure, SSO can ask for terms (IP Report)**
- **Can't promise terms, then renege (N-Data)**

Issues Addressed as of Jan. 1, 2008

- What is source of duty to disclose?
- Must an SSO require disclosure?
- Potential liability for misrepresentation?
- How to calculate RAND?
- Does RAND permit injunctive relief?

Pending Issues as of Jan. 1, 2008

- Liability for negligent conduct?
- Does RAND replace disclosure?
- How to calculate RAND in absence of lawful licenses?
- Can a RAND offer be withdrawn?
- Can a subsequent owner be liable based on conduct of a previous owner?
- Can SSO members negotiate royalties collectively?
- Different terms to non-members?

N-Data Complaint

- **IEEE 802.3 Committee standards for ethernet**
- **National Semiconductor promoted its patented NWay technology**
- **National Semiconductor written commitment – if NWay used in standard, would license any implementer for \$1000/company**
- **Years later, new patent holder N-Data demanded higher royalties and threatened lawsuits**

N-Data Complaint (continued)

— Injury to Competition & Consumers

- **Increased royalties**
- **Increases in prices of output products**
- **Decreased incentives to implement the IEEE standard**
- **Decreased incentives to participate in standard-setting activities**
- **Decreased incentives to rely on standards**

— Violation of Section 5, FTC Act

N-Data Decision & Order

Freestanding Section 5, FTC Act

- **Unfair Method of Competition**
 - **Conduct is “coercive” and “oppressive”**
 - **Adverse impact on prices**
 - **In the context of standard-setting**

- **Unfair Act or Practice**
 - **Industry locked in to the standard**
 - **Substantial consumer injury**
 - **No countervailing benefit**

N-Data Decision (continued)

— Former Chairman Majoras Dissenting Statement

- **Opposes use of Section 5, FTC Act unsupported by Section 2, Sherman Act**
- **No improper conduct at the time the standard was adopted, therefore no exclusion**

— Commissioner (now Chairman) Kovacic Dissenting Statement

- **Opposes use of Section 5, FTC Act in this case**

N-Data Public Comments

□ Support

- Association Corp. Counsel
- AAI/Consumer Fed./Public Patent Fund
- Dell
- Cisco/IBM/Oracle/Sun
- Prof. Lande
- VITA
- 14 State Attorneys General

□ Oppose

- N-Data
- Voluntary Trade Council

□ Questions

- Alliance Telecom. Industry Solutions
- ABA Science & Tech. Law
- AIPLA
- GTW Associates
- IEEE
- Intellectual Ventures
- TIA

Lessons of N-Data

- **Subsequent acquirer of patents may face consequences for former owner's conduct**
- **Subsequent misconduct may not create liability under Section 2, Sherman Act, absent exclusion at the time the standard is set**
- **FTC willing to apply Section 5, FTC Act independently of Section 2, Sherman Act**
- **Limits of Section 5, FTC Act are unknown**

Rambus Liability Decision*

FTC Docket No. 9302 (August 2, 2006)

- **“JEDEC’s policies (fairly read) and practices, as well as the actions of JEDEC participants, provide a basis for the expectation that . . . members would not try to distort the process by acting deceptively with respect to the patents they possessed or expected to possess.” (p. 66)**
- **“Rambus’s course of conduct constituted deception under Section 5 of the FTC Act. Rambus’s conduct was calculated to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products.” (p. 67)**

***Reversed by the D.C. Circuit**

Rambus Liability Decision*

FTC Docket No. 9302 (August 2, 2006)

- **“Rambus possess[es] monopoly power in the four key technology markets alleged” (p. 73)**
- **“Rambus’s conduct significantly contributed to JEDEC’s choice of Rambus’s technologies for incorporation in the JEDEC DRAM standards and to JEDEC’s failure to secure assurances regarding future royalty rates” (pp. 118-119)**

*** Reversed by the D.C. Circuit**

Rambus Remedy Decision*

FTC Docket No. 9302 (February 5, 2007)

- “On the current record, we can neither confirm nor reject the possibility that JEDEC would have preferred Rambus’s technologies over the alternatives, even with some reasonable royalty.” (p. 13)
- “in the ‘but for’ world Rambus’s royalty rates would have been negotiated under the constraint of a RAND commitment.” (p. 17)
- “The Commission will extrapolate *ex ante* SDRAM and DDR SDRAM royalty rates using as its starting point the RDRAM license agreements found in the record.” (p. 19)

* Reversed by the D.C. Circuit

Rambus Court of Appeals Decision

522 F.3d 456 (D.C. Cir. 2008)

- “[I]f Rambus’s more complete disclosure would have caused JEDEC to adopt a different (open, non-proprietary) standard, then its failure to disclose harmed competition and would support a monopolization claim.” (p. 13)
- “[I]f Rambus’s conduct merely enabled it to avoid [a RAND commitment and prior negotiation of royalty rates], such conduct, alone, could [not] be said to harm competition.” (p. 13)
- “[A]n otherwise lawful monopolist’s use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.” (p. 15)

Lessons from Rambus

- **Conduct does not violate Section 2 of the Sherman Act unless it is proven to have changed the content of a standard**
- **If a patent-holder's technology might have been incorporated in the standard at any price, the conduct cannot be proven to have changed the content of the standard**
- **Implications – under antitrust law**
 - **A RAND commitment or a specific royalty commitment may have little value**
 - **The amount that a patent-holder subsequently charges is irrelevant**

Broadcom v. Qualcomm -- Allegations

- **Qualcomm participated in the ETSI standards body**
- **Qualcomm induced ETSI to include its proprietary technology in the UMTS standard by falsely agreeing to license its technology on FRAND terms**
- **The industry became locked in to use of the standard**
- **Qualcomm breached its commitment by demanding**
 - **higher than reasonable royalties**
 - **discriminatory royalties**

Broadcom v. Qualcomm – Decision

501 F.3d 297 (3d Cir. 2007)

“Broadcom’s allegations, if accepted as true, describe actionable anticompetitive conduct.” (p. 313)

— **“We hold that**

- **(1) in a consensus-oriented private standard-setting environment,**
- **(2) a patent holder’s intentionally false promise to license . . . on FRAND terms,**
- **(3) coupled with an SDO’s reliance on that promise . . . , and**
- **(4) the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct.” (p. 314)**

Rembrandt Technologies

- **AT&T participated in ATSC to develop a standard for digital television**
- **AT&T promised to license its relevant patents on RAND terms**
- **FCC mandated adoption of the ATSC standard premised on RAND licensing of relevant patents**
- **AT&T's '627 patent was assigned to Rembrandt**

Rembrandt Tech. (continued)

- **Rembrandt has sued**
 - **4 major television networks**
 - **5 cable companies**
 - **5 TV equipment manufacturers**

- **Rembrandt is demanding 0.5% of all revenues derived from use of the standard**

- **Complaint filed with FTC**

Analogix Semiconductor v. Silicon Image

- **Silicon Image founded a private consortium to define the elements of the HDMI standard**
- **Silicon Image accused non-member Analogix of violating its copyrights and trade secrets covering its chip design**
- **Analogix accused Silicon Image of using its position to exclude competitors by manipulating the content of the HDMI standard to give itself an advantage**
- **Trial possible later this year**

Potential Future Developments

—U.S. Courts

- **FTC v. Rambus**
- **Micron v. Rambus; Hynix v. Rambus**
- **Broadcom v. Qualcomm**
- **Rembrandt Technologies**

—Federal Trade Commission

- **Use of Section 5, FTC Act**

—European Commission

- **Rambus**
- **Qualcomm**

—Japan

- **IP Guidelines**

—China

Conclusions

- Legal precedent likely to multiply and splinter
- Foreign jurisdictions likely to increase in importance
- SSOs and members likely to continue to confront intellectual property issues
- Members may need to plan for “self-help”