Antitrust Issues in Standard-Setting

ANSI

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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- Can RAND offer be withdrawn?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