Update on Recent Legal Developments Affecting Standards Organizations

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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- Can a RAND offer be withdrawn?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?
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’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)
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
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
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”