Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

ASPEN PUBLISHERS VOLUME 19 • NUMBER 9 • SEPTEMBER 2007

How to Keep the Fox Out of the Henhouse: Monopolization in the Context of Standards-Setting Organizations

By Erica S. Mintzer and Logan M. Breed

As technology becomes an evermore omnipresent part of our daily lives, industry-wide standards regarding technology play an increasingly prominent and critical role in the modern economy. The benefits that derive from developing standards are considerable, and when conducted with the proper safeguards, the vast majority of such activities create little antitrust risk despite the fact that the antitrust laws are generally skeptical of collaboration between or among competitors. It is widely recognized that, done properly, the development of standards can promote competition and economic efficiency by facilitating product interoperability, creating open networks, ensuring public safety, and disseminating product information. Although the need for standards is not new, the information economy has increased their use, especially that of compatibility (or interface) standards.

Compatibility standards enable interoperability and interchangeability among complementary products. By ensuring that products from a variety of suppliers will work together, these standards can reduce costs for consumers and producers. Such standards are commonplace in everyday life, with examples ranging from the mundane, such as electrical plugs and outlets, to the more novel or cutting-edge, such as ATM cards and networks and standardized Internet protocols.

Erica S. Mintzer is counsel at Hogan & Hartson LLP, where her practice includes representing technology companies on a wide spectrum of antitrust matters. **Logan M. Breed** is an associate at the firm. The authors thank George O'Brien for his research assistance and insights. The authors can be reached at *esmintzer@hhlaw.com* and *lmbreed@hhlaw.com*, respectively.

Standards-Setting Organizations and the *Rambus* Decision

Standards may be established cooperatively by industry participants or they may be *de facto*, or naturally occurring, as a result of widespread market adoption without any official recognition (*e.g.*, the Microsoft Windows operating system). In the former case, industries often establish standards through the use of a standards-setting organization (SSO).[1] An SSO is a voluntary, non-governmental group comprised of industry participants whose goal is to develop and agree upon an appropriate standard. Within this context, however, there is the potential for both unilateral (*i.e.*, single-firm) and collective abuse that violates the antitrust laws. These abuses may reduce the incentives to participate in future attempts to create industry-wide standards that will benefit consumers.

Historically, the antitrust focus on SSOs has been on collective activities that have hindered competition.[2] These cases have focused on concerns regarding collusion (*e.g.*, companies using the SSO to facilitate price fixing) and exclusion (*e.g.*, companies using the SSO to freeze out a competitor). As a result, there is a fairly well-developed body of case law that applies § 1 of the Sherman Act, which prohibits agreements in restraint of trade, to industry standards-setting activities.

Standards-setting may also implicate conduct by a single actor, however, as evidenced by the Federal Trade Commission's (FTC) recent ruling against Rambus, Inc., in July 2006.[3] Section 2 of the Sherman Act prohibits certain anticompetitive conduct by a monopolist that creates or enhances monopoly power. In the *Rambus* case, the FTC determined that Rambus had joined an SSO and then deliberately concealed and affirmatively misrepresented its patent position to the other members, leading them to believe that they could incorporate certain technology into the standard without incurring any royalty fees. Once the standard was established, Rambus asserted its patents against SSO members and demanded what many viewed as supra-competitive, or monopoly, royalties. This situation is known as patent ambush or hold up. In other words, a fox has entered the henhouse.

If a technology lacks effective substitutes precisely because an SSO chose to include it in a standard and the costs of switching are prohibitively high, the owner of patents on that technology may be able to hold up firms that want to implement the standard by setting onerous licensing terms that it could not have brokered in negotiations before the standard was set. Knowing that the cost of abandoning the newly developed standard may be prohibitive, the holder of the patent is in a position to demand supra-competitive royalty terms for its essential patent. FTC Chairman Majoras summarized this situation in the following terms:

> [B]efore lock in [of the new standard]—or "*ex ante*"—technologies compete to be the standard, and no patent-holder can demand more than a competitive royalty rate. After lock in—or "*ex post*"—the owner of the chosen technology may have the power to charge users supra-competitive royalty rates—rates that may ultimately be passed on to consumers in the form of higher prices.[4]

The *Rambus* case is the most recent matter in which the FTC considered the legality of patent hold up in the standards-setting context and was the first such case to be fully litigated. In *Rambus*, the FTC determined that Rambus' deliberate concealment of its patent position from fellow SSO members and subsequent assertion of those patents after the standard was established violated the antitrust laws. In a separate remedy opinion, the FTC determined that it has broad remedial powers, including ordering royalty-free compulsory licensing. Nonetheless, the agency chose not to impose such a severe remedy, and instead conducted a detailed analysis to determine the royalty rates that would have been established if Rambus had disclosed its patent position.

In the wake of this ruling, SSOs have undertaken actions of their own to prevent future cases of anticompetitive hold up. Some have required each SSO member to make a full disclosure of its intellectual property (IP) rights that may be infringed by a standard, along with a commitment to license the IP on reasonable and non-discriminatory terms (RAND). But in some cases, the patent holder may view RAND differently from an implementer or potential licensee of the technology. To mitigate this, some companies operating under RAND choose to engage in *ex-ante* bilateral negotiations (*i.e.*, between a single licensee and the licensor).

Historically, SSOs have been hesitant to engage in joint *ex-ante* discussions regarding pricing out of a concern that they might run afoul of the antitrust laws. However, after *Rambus*, some organizations have been exploring policies to further protect themselves from hold up. Seeking to refine their policies without tripping over the antitrust laws, at least two SSOs have asked the Department of Justice Antitrust Division (DOJ) to weigh in on the permissible scope of *ex-ante* negotiations. This article discusses the *Rambus* case, the subsequent DOJ reviews of SSO activities, and the steps that SSOs can take to protect themselves going forward.

Rambus: There Was Clearly a Fox in the Henhouse

On July 31, 2006, in a first-of-its-kind ruling, the FTC unanimously held that Rambus had engaged in unlawful monopolization by actively concealing and withholding information regarding its relevant patents and patent applications that were highly material to the Joint Electron Devices Engineering Council (JEDEC) standards-setting process for synchronous dynamic random access memory chips (SDRAM). The FTC's opinion followed years of litigation that had favored Rambus, and it was the first time that the FTC imposed liability on a single firm for subverting the standards-setting process.[5] Although *Rambus* is the first fully litigated case on this issue, it follows two other instances in which the FTC sought enforcement against unilateral conduct in the standards-setting process. Both of those cases, whose predicate facts were similar to those in *Rambus*, were resolved by consent orders.[6]

A brief statement of the facts from *Rambus* is warranted. Rambus participated in JEDEC meetings from 1991 until its withdrawal in 1995. The company's withdrawal was precipitated by two events: (1) JEDEC's request that Rambus commit to RAND licensing terms, which Rambus refused to do, and (2) the consent order that the FTC entered with Dell Computer Corporation in a case with similar facts. The *Dell* consent order resolved allegations of unfair methods of competition under § 5 of the FTC Act based on Dell's attempt to enforce patents against companies adopting the VL-bus standard after certifying to the SSO that it had no relevant patents. Rambus engaged in similar conduct, but also went a step further. While JEDEC was deliberating over which technology to incorporate into the standard, Rambus took the information that it had gathered from those deliberations and intentionally amended its pending patent applications to ensure that they covered the standard. After its patents issued, Rambus asserted them against memory vendors. The FTC found that Rambus' intent to deceive was calculated and deliberate. The same degree of willfulness was not alleged in *Dell*.

The FTC held that Rambus' conduct constituted monopolization in violation of § 2 of the Sherman Act and § 5 of the FTC Act.[7] The FTC based its finding on an underlying duty of good faith and used a deception-based standard to assess Rambus' conduct. Both of these are more common in § 5 consumer protection cases than monopolization cases under § 2. In doing so, the FTC determined that Rambus' deception gave it monopoly power over the JEDEC standards for two memory standards—SDRAM and DDR SDRAM. The *Rambus* case differed from the traditional monopoly case, which focuses on predatory or exclusionary conduct, because the FTC based its finding on *deceptive* conduct that allowed Rambus to achieve its dominant position. In doing so, the FTC overtly borrowed from the law of deception applied by the FTC's Bureau of Consumer Protection. The FTC determined that Rambus had engaged in deceptive conduct that included affirmatively stating that it had no relevant IP until after the standard was adopted and using information learned from the SSO to amend patent applications to cover key parts of the proposed standard. In particular, the FTC found that Rambus had "capitalized on JEDEC's policy and practice—and also on the expectations of the JEDEC members"—by (1) refusing to disclose its patents and applications and (2) actively and consistently misleading JEDEC about its efforts to seek patents that would cover implementations of the JEDEC standards over the course of six years of frequent interaction.[8]

There is ample precedent for this approach in the good faith requirements of consumer protection law,[9] but it is somewhat novel to characterize deception in the class of exclusionary conduct in an antitrust case based on a monopolization theory. The FTC found that Rambus had intentionally "played on [JEDEC's] expectations" to achieve an anticompetitive result.[10] In fact, Rambus provided a list of its patents to JEDEC but had "omitted the one patent that Rambus believed covered JEDEC's work."[11] In finding that a duty of good faith underlies the standards-setting process, the FTC stated, "Whether the SSO requires disclosure should be judged not only by the letter of its rules, but also on how the rules are interpreted by its members, as evidenced by their behavior as well as by their statements of what they understand the rules to be." Further, "If an SSO chooses not to require such disclosure, SSO members are still not free to lie . . . ." Thus, instead of parsing through the ambiguous JEDEC disclosure policies, the FTC based its determination on strong evidence of member's expectations. This is somewhat novel in antitrust law.

Significantly, the opinion struck a compromise position regarding the scope of Rambus' liability. The FTC did not find liability with respect to the most recently adopted relevant standard, DDR2 SDRAM, which is projected to account for approximately 70 percent of the market in 2007. The FTC found that JEDEC had adopted this follow-on standard after Rambus' conduct had been exposed (and Rambus had left the organization), and there was insufficient evidence that the prior deception led to the adoption of Rambus' technology in standards adopted after its departure. That is, the FTC concluded that there was insufficient evidence to demonstrate that the industry was locked-in to Rambus' technology, despite the presence of high switching costs, and a finding that but for the deception, another technology may have been incorporated into the initial standard.

While the FTC was able to reach a unanimous consensus that the administrative law judge's initial decision was wrong on almost every point, the commissioners struggled with the proper remedy. Therefore, the FTC required the parties to brief and argue the remedy issue separately. The FTC specifically requested the parties to propose means to determine "reasonable royalty rates" based on the existing record, "qualitative characteristics descriptive of appropriate relief," and "appropriate injunctive and other provisions that should be incorporated into the Final Order."[12]

The remedy phase raised interesting issues regarding the scope of the FTC's authority and purpose of its imposed remedies. Although the FTC had ordered royalty-free licenses in the past, this had been done through a negotiated consent order with the party. In *Rambus*, for the first time, the FTC explicitly held that it has the power to order compulsory licensing at FTC-determined maximum rates as a remedy for monopolization violations.[13] The opinion, authored by Chairman Deborah Majoras and joined by Commissioners Kovacic and Leibowitz, strongly defended the FTC's authority to order compulsory licensing at a royalty rate determined by the FTC based on the conditions that would have occurred but for the defendant's deception (*i.e.*, the *ex-ante* bargaining position of the parties), even if the result was a compulsory royalty-free license.

The parties, along with several *amici curiae*, submitted substantial briefs on the breadth of the FTC's remedial authority and the proper remedy on the basis of the record as interpreted by the FTC's opinion on the liability issue. In its filings and at oral argument on the remedy issue, Rambus argued that:

1. The FTC was empowered only to seek prospective cease-and-desist orders;

2. Rambus' current royalty rates under the JEDEC standards were competitive and reasonable compared to its rates for other comparable licenses; and

3. Therefore, the remedy should be limited to an order directing Rambus not to engage in deceptive conduct in future standard-setting.

On the other hand, FTC staff (and *amici*) argued that the FTC should impose a compulsory, royalty-free license for all of Rambus' patents that had been incorporated into JEDEC standards because, had Rambus properly disclosed its patents, JEDEC would have approved a standard that did not infringe those patents or required a royalty-free license. One issue that *amici* focused on was the role that a remedy would play in future SSO member conduct. Arguing that deterrence is a proper factor for the FTC to consider, some argued that, if Rambus had profited from its conduct, future SSO members might have an incentive to similarly game the system, undermining the integrity of SSOs in general.

The FTC ultimately rebuffed all of those positions. It held that its remedial authority is not limited to a forward-looking injunction; rather, it "extends to restoring, to the extent possible, the competitive conditions that would have been present absent Rambus' unlawful conduct."[14] It added that it has "wide latitude for judgment" on the proper remedy as long as it bears a "reasonable relationship to the unlawful practices that the Commission has found."[15] The opinion also affirmed the FTC's power to order royalty-free compulsory licenses when appropriate. However, the FTC declined to impose such a remedy in this case because it was not persuaded that the evidence sufficiently proved that JEDEC would have refused to implement Rambus' technology if Rambus had disclosed its patents or, in the alternative, that Rambus (or a company with substitutable technology) would have been willing to offer a royalty-free license in order to get its technology into the standard.

Instead, the FTC imposed maximum royalty rates that were greater than zero but less than Rambus' current rates, which reflected its *ex-post*, not *ex-ante*, bargaining position. In doing so, the FTC commissioners attempted to determine the rate that most likely would have resulted from negotiations between the parties before JEDEC adopted Rambus' technology (*i.e.*, when the industry had not yet invested in Rambus' technology and JEDEC had more bargaining power). To find the appropriate rate, they looked to Rambus' royalty rates for similar technologies and then made downward adjustments to reflect the differences in the perceived greater market value of Rambus' intellectual property rights in those other technologies and the declining value of the technology at issue over time. Pursuant to this analysis, the opinion established maximum rates of less than one percent, depending on the technology and other factors, for a three-year period. To "lend temporal and rate certainty" and to reflect the diminishing value of the technology over time, the maximum allowable royalty rate drops to zero after three years.[16]

FTC staff argued that the remedy should be applied to the DDR2 SDRAM standard, even though the FTC's initial decision did not find liability with respect to that technology, because (1) it bore a reasonable relation to Rambus' anticompetitive conduct and (2) it was necessary to cure the "hang-over of the long-existing pattern of [anticompetitive conduct]" (*i.e.*, it was necessary to restore competitive conditions).[17] The FTC found that it has the power to extend a compulsory license, including a royalty-free license, to standards created after the misconduct is uncovered if there is a sufficient causal link between the alleged misconduct and the development of the new standard. Nevertheless, the FTC decided not to apply the remedy to DDR2 SDRAM in this case because there was no finding of a causal link sufficient to show that DDR2 was within the scope of the "competition lost because of Rambus' deceptive conduct."[18]

Two commissioners filed separate opinions concurring in part and dissenting in part. Commissioner Rosch argued that the FTC should have awarded royalty-free licenses for users of the JEDEC SDRAM and DDR-SDRAM standards, that is, the standards for which the FTC found Rambus liable. According to Rosch, the record adequately supported the FTC staff's argument that JEDEC would not have incorporated Rambus' technologies but for Rambus' deception. Therefore, Rosch argued, since Rambus would not have been able to collect any royalties from users of the standards but for its anticompetitive conduct, the proper royalty rate is zero.[19] Commissioner Harbour went a step further, arguing that a royalty-free license should also have been imposed on Rambus' technologies included in the DDR2 SDRAM standard. She argued that the remedy espoused by the majority was insufficiently broad to restore the but for world because it did not include the DDR2 SDRAM standard.[20] Harbour believed that, from a practical perspective, giving Rambus permission to continue charging royalties and limiting the remedy to SDRAM and DDR SDRAM severely curtailed its effectiveness. This is because most major computer manufacturers now use primarily DDR2, even in their entry-level products.[21] Moreover, industry analysts predict that DDR2 products will comprise more than 77 percent of DRAM revenues in 2007 and more than 84 percent in 2008.[22] By excluding the commercially dominant standard, Harbour argued, the FTC's decision would have only a relatively marginal impact on the victims of Rambus' misconduct (and on Rambus' profits).

The FTC's fractured remedy opinions in *Rambus* leave some open questions regarding the proper scope and goals of the FTC's remedial power. Because there is no certainty regarding the outcome of the FTC's action—Rambus intends to appeal the FTC's decision—there may be lingering skepticism among SSO members regarding the integrity of the standards-setting process in some contexts. Often in an SSO there are many companies representing a variety of interests. Thus, while members have a common goal regarding developing a standard, they may have very different goals regarding the mechanisms for developing the standard; therefore, they may have different perspectives on the IP policies that should apply. For example, a technology company whose prime business is licensing IP may have very different ideas from a manufacturer that will generate its revenue through the sale of products that are compliant with a standard. As a result, many SSOs are interested in garnering more certainty about their members' IP positions and obligations before the relevant standards are set in stone.

How to Guard the Henhouse: Guidance from the Federal Antitrust Agencies

The *Rambus* decision provides some broad guidance, but it is not a panacea for hold-up issues. Because the standards-setting process itself can create the market power necessary to demand such supra-competitive prices *ex-post*,[23] SSOs accordingly have sought to design *ex-ante* licensing policies that will mitigate the effects of patent hold up. One of the most common approaches has been to operate the SSO under a RAND regime, possibly accompanied by bilateral licensing negotiations among SSO participants.

This system has worked well for most SSOs. However, some organizations are interested in understanding more precise licensing conditions *ex-ante*, but have been reluctant to demand this because, as noted above, the collaborative standards-setting process has been subject to antitrust challenges regarding collusion among competitors. In the wake of the cases finding § 1 liability, many SSOs implemented rules that strictly forbid all activities that could potentially result in antitrust liability, including discussions about future licensing terms. Until very recently, SSOs were hesitant to discuss royalty rates for fear that such a discussion could be interpreted as an agreement on royalty rates in violation of the antitrust laws.

The FTC and DOJ have attempted to clarify their policies toward *ex-ante* licensing discussions through speeches by government officials that have recognized the pro-competitive aspects of *ex-ante* licensing discussions. For example, FTC Chairman Majoras[24] and the former Assistant Attorney General for Antitrust Hewitt Pate[25] have presented speeches in which they indicated support for a rule-of-reason analysis to apply in these situations. Chairman Majoras noted the difficult position in which SSOs find themselves: On one hand, they would like to avoid patent hold up; on the other, the SSOs must be wary of exposing themselves to antitrust scrutiny for any joint *ex-ante* royalty discussions or negotiations. Nevertheless, such discussions may be reasonably necessary to avoid patent hold up and therefore would not be *per se* violations of the Sherman Act. Rather, they would be reviewed under the rule of reason, a balancing test that determines whether the conduct at issue has a net pro-competitive effect.

Therefore, an analysis of licensing policies that require or encourage *ex-ante* declarations must balance the potential pro-competitive benefits against the risks of anticompetitive effects. Chairman Majoras described three possible harms.[26] First, SSO members may collectively force individual patent holders to offer licensing terms below a competitive level. Second, *ex-ante* licensing policies may not be reasonably necessary to address patent hold up if bilateral, rather than joint, negotiations would be as effective. Third, *ex-ante* discussions of licensing terms can afford SSO members the opportunity to fix prices. Following *Rambus*, two other DOJ officials have given speeches on this topic echoing these ideas.[27]

In addition, an April 2007 report by the two federal antitrust agencies recognizes that *ex-ante* consideration of licensing terms can be pro-competitive and that joint *ex-ante* consideration would generally be subject to the rule of reason. Such *ex-ante* considerations are most likely to be reasonable when the adoption of the standard will confer market power on a patent holder. The report concluded that:

- An IP owner's unilateral announcement of licensing terms, without more, does not violate the antitrust laws.

- Bilateral *ex-ante* negotiations are unlikely to warrant antitrust scrutiny.

- "The Agencies take no position as to whether SSOs should engage in joint *ex ante* discussion of licensing terms."[28]

This last bullet is important, as it recognizes that different SSOs may want to adopt different disclosure and/or licensing policies. In fact, the report acknowledges that it is "fully within the legitimate purview of each SSO and its members" to decide what the SSO should require in terms of patent or licensing disclosures.[29] As long as companies are "playing by the rules of the SSO," these policies and practices should be accorded deference.

The DOJ has also provided advice through the issuance of two business review letters, which are letters that are solicited by a company or organization seeking guidance on a particular question of antitrust law. DOJ issues business review letters to provide the "agency's enforcement intentions with respect to a specific type of prospective business conduct."[30] In the past year, DOJ has responded to two requests for business review letters addressing the antitrust concerns of *ex-ante* licensing policies proposed by VMEbus International Trade Association (VITA) and International Electrical and Electronics Engineers, Inc. (IEEE). These proposals offered two slightly different solutions to the problem of patent hold up. In both cases, DOJ announced that it had no intention of challenging the proposed conduct.

VITA's initial IP licensing policy required patent owners to offer RAND terms. Seeking more certainty, VITA's proposed licensing policy contained a two-part structure. First, each working group member developing a new standard must identify all known patents that may become essential to the implementation of the new VITA standard. Second, for any identified essential patent claims, members must announce irrevocable maximum royalty rates, either in dollar or percentage terms, and the most restrictive non-royalty terms that the member company will demand as part of its licensing. Patent holders can later submit less restrictive licensing terms as they desire. VITA's new policy also forbids working group members from negotiating or discussing specific licensing terms at all working group meetings, though members may consider the licensing terms as part of the standards-setting process. Finally, the new licensing policy provides an arbitration procedure to address any potential disputes.

IEEE's proposed policy differs in significant ways from that of VITA in that it does not obligate that a member disclose IP; instead, it identifies this as one of the options that a member may undertake. Under IEEE's proposed policy, each working group chair must request licensing information from all working group members identified as holders of potentially essential patents. However, members need not respond to this request. The proposed policy offers members five options:

1. A member may elect not to provide any licensing information.

2. Based on a good faith inquiry, a patent holder may submit a letter of assurance (LOA) stating that it does not believe that it owns any essential patent claims. This provision does not require that a company search its entire patent portfolio. Instead, it involves a good faith inquiry of individuals associated with the firm that have been involved with the development of the standard.

3. A patent holder can submit an LOA that states unconditionally that the patent holder will not assert any patent claims against any member using its essential patents to implement the new standard.

4. A patent holder may submit an LOA declaring that it will license any essential patents "without compensation" or at "reasonable rates" and otherwise subject to RAND guidelines.

5. The final option is to submit a LOA offering to license on a RAND basis while providing additional details such as maximum—or "not to exceed"—licensing terms.

At standards setting meetings, IEEE members are forbidden to discuss specific licensing terms. However, working group members would be permitted under the proposed policy to discuss relative costs of alternative standards, including relative licensing costs. The IEEE proposed policy does not provide any enforcement mechanism.

In both cases, the DOJ indicated that it would take no action against the proposed policies as described in the business review letters. Noting that standards-setting conduct is reviewed under the rule of reason, the DOJ emphasized that the proposed licensing policies had pro-competitive benefits. The novel element in these policies is the *ex-ante* disclosure of specific licensing terms. Not surprisingly, the DOJ focused its opinion on this feature of the policies. In particular, the DOJ noted that policies requiring or permitting disclosure of licensing terms would allow the standards-setting group to compare the potential costs of alternative standards, in addition to their relative substantive or technical merits:

> Requiring patent holders to disclose their most restrictive licensing terms in advance could help avoid [holdup] by preserving the benefits of competition between alternative technologies that exist during the standard-setting process . . . . Disclosure of this information, enforced by the requirement that nondisclosed patents be licensed royalty-free, permits the working group members to make more informed decisions.[31]

However, the DOJ cautioned that using a licensing policy as a cover for price fixing would still be challenged as *per se* violations of § 1 of the Sherman Act:

> Efforts to reduce competition by using the process as a cover to fix downstream prices would be a *per se* violation of Section 1 of the Sherman Act. The same would be true of efforts by patent owners to rig their declarations of licensing terms.[32]

Policies such as those proposed by VITA and IEEE permit SSOs to engage in standards setting with as much transparency as possible. This increased transparency on royalty terms can increase competition among those parties whose patents would be essential to a proposed standard. However, as the agencies noted, these approaches could lead to conduct that is anticompetitive. Moreover, strong disclosure policies create a number of tradeoffs because some firms may be reluctant to participate if they must commit to licensing terms in advance of knowing the true value of their IP. Strong disclosure policies also impose search costs that firms may not want to undertake. As the agencies' IP report recognized, not all SSOs choose to adopt disclosure rules, however, because "compliance with disclosure rules may slow down standards development, which could be particularly costly in fast-paced markets with short product life cycles [and] [c]omplying with differing disclosure policies in different SSOs can be costly to IP holders."[33] On the other side, such a policy provides greater assurances to the SSO members enabling them to confidently invest in the standard.

SSOs and their members should consider carefully the approach that best serves their needs—a RAND policy, a policy that allows *ex-ante* disclosure of licensing terms, a policy that requires *ex-ante* disclosure, or none of the above. The IEEE policy is interesting in that it permits each individual member to select, on a patent-by-patent basis, its preferred approach. Importantly, the FTC and DOJ have emphasized in their speeches on this topic that policies such as those proposed by VITA and IEEE are not the only possible alternatives available to SSOs, and both agencies have noted that antitrust enforcement in the standard setting arena should be cautious.[34]

Conclusion

The antitrust agencies have given their imprimatur to a variety of standards-setting IP disclosure policies. Because each SSO is unique, standards-setting bodies would be best served to address the IP policies through their operational rules, making disclosure obligations explicit. SSOs should recognize that varying policies impose different costs and benefits and should tailor their policies to best fit the goals of their members. In many cases, it may be beneficial to encourage *ex-ante* competition on both cost and technical dimensions. In other cases, a RAND regime may best serve the SSO's interests. The recent agency guidance leads SSOs in the right direction by permitting informed decision-making by SSO members, enabling competition on price and technical merits and allowing patent holders to protect the value of their property.

Given these recent policy statements from the antitrust enforcement agencies, SSO participants must pay close attention to the disclosure obligations, and if ambiguous, read them conservatively. Member participants in an SSO also must be well aware of the governing rules, as well as the practices and expectations of the other members. For members participating in good faith, the *Rambus* decision should not raise any alarms or liability concerns. Still, it is impossible to completely lock the door to the henhouse, and inevitably there will be openings for opportunism. SSO members are best situated to minimize such break ins and set out rules to prohibit anticompetitive conduct. There is a limit, however, to how onerous such rules can be before they impair the proper functioning of the organization. In this respect, continued FTC enforcement and agency guidance will assist in preventing future hold up.

Notes

1. The acronym SDO, which stands for standards development organization, is frequently used in place of SSO.
2. For example, a leading case is Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), in which the Supreme Court affirmed a jury verdict against a group of manufacturers of steel conduit for electrical cable. These manufacturers conspired to preclude the use of plastic conduit by "packing" an annual meeting and thus biasing the voting process. *See also* American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) ("[A] standard-setting organization . . . can be rife with opportunities for anticompetitive activity.").
3. In re Rambus, Inc., 2006-2 Trade Cases ¶ 75,364 (F.T.C. Aug. 2, 2006), available at *http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.*
4. Deborah Platt Majoras, "Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade," at 3 (Sept. 23, 2005), available at *http://www.ftc.gov/speeches/majoras/050923stanford.pdf.*
5. *Compare to* Broadcom Corp. v. Qualcomm Inc., No. 05-3350 (D.N.J. Aug. 31, 2006) (slip opinion), which was decided one month after the FTC's *Rambus* liability decision. Broadcom alleged that Qualcomm monopolized the WCDMA technology market and chipset market by, among other things, inducing the SSO to adopt a standard by committing to license on FRAND terms and subsequently refusing to honor this FRAND commitment The court concluded that there was no antitrust violation. "Defendant's power to control the licensing of its patents is derived from the rights it enjoys as a patent holder. The adoption of an industry standard neither diminishes nor augments this exclusionary right." "It is the SSO's decision to set a standard for WCDMA technology, not Qualcomm's "inducement," that results in the absence of competing [] technologies." *Id.* at 20. The court found that the alleged inducement by false promise did not provide an antitrust cause of action. Broadcom's press release regarding the decision noted it was at odds with *Rambus*. Press Release, "Broadcom Corp., Dispute Remains as to Qualcomm's Anticompetitive Conduct" (Sept. 1, 2006), available at *http://www.broadcom.com/press/release.php?id=901149.*
6. In re Union Oil Co. of California, No. 9305, Decision & Order, (F.T.C. Aug. 2, 2005), available at *http://www.ftc.gov/os/adjpro/d9305/050802do.pdf* (consent order resolving allegations that Unocal engaged in exclusionary conduct and illegally acquired monopoly power by, among other things, misrepresenting to a standards-setting board that certain research was non-proprietary while pursuing patent claims that would enable it to charge royalties for technology compliant with the standard in violation of § 5 of the FTC Act); In re Dell Computer Corp., 121 F.T.C. 616 (1996).
7. *Rambus*, 2006-2 Trade Cases ¶ 75,364 at 119.
8. *Id.* at 4.
9. *See, e.g.,* Murray Space Shoe Corp. v. FTC*,* 304 F.2d 270, 272 (2d Cir. 1962) (holding that, in the context of a deceptive advertising claim under § 5, the FTC should assess the general impression the advertisement creates rather than engaging in a "hyper-technical" assessment of "the meaning of each word and phrase"); Federal Trade Commission Policy Statement on Deception, 4 Trade Reg. Rep (CCH) ¶ 13,205, at 20,911-12 (FTC Oct. 14, 1983).
10. *Rambus*, 2006-2 Trade Cases ¶ 75,364 at 66.
11. *Id.*
12. *Id.* at 120.
13. In re Rambus, Inc., No. 9302, Opinion of the Commission on Remedy (F.T.C. Feb. 5, 2007), available at *http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf.*
14. *Id.* at 6.
15. *Id.*
16. *Id.* at 24.
17. In re Rambus, Inc., No. 9302, Brief of Counsel Supporting the Complaint On the Issue of Remedy (F.T.C. Sept. 29, 2006) at 18, available at *http://www.ftc.gov/os/adjpro/d9302/060929ccrevisedremedybrief.pdf* (quoting FTC v. National Lead, 352 U.S. 419, 425 (1957)).
18. *Rambus*, No. 9302, at 30.
19. In re Rambus, Inc., No. 9302, Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part (F.T.C. Feb. 2, 2007) available at *http://www.ftc.gov/os/adjpro/d9302/070205roschstmnt.pdf.*
20. In re Rambus, Inc., No. 9302, Remedy Statement of Commissioner Pamela Jones Harbour, Concurring in Part and Dissenting in Part (F.T.C. Feb. 2, 2007), available at *http://www.ftc.gov/os/adjpro/d9302/070205harbourstmnt.pdf.*
21. *See id.* at 9.
22. *See id.*
23. *See* Hill B. Welleford, Counsel to the Assistant Att'y Gen. for Antitrust, US Dep't of Justice, "Antitrust Issues in Standard Setting," Address at the 2d Annual Seminar on IT Standardization and Intellectual Property (Beijing, Mar. 29, 2007), available at *http://www.usdoj.gov/atr/public/speeches/222236.pdf.* The *Rambus* case involved a situation in which the patent holder acquired this market power as a result of its deceptive and thus anticompetitive conduct. *See also* Majoras, *supra* n.4, at 4.
24. *See id.*
25. *See* R. Hewitt Pate, "Competition and Intellectual Property in the US: Licensing Freedom and the Limits of Antitrust," (June 5, 2005), available at *http://www.usdoj.gov/atr/public/speeches/209359.htm.*
26. Majoras, *supra* n.4,at 9-10.

27. Welleford, *supra* n.23; Gerald F. Masoudi, "Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property," Address at the High-Level Workshop on Standardization, IP Licensing, and Antitrust (Brussels, Jan. 18, 2007), available at *http://www.usdoj.gov/atr/public/speeches/220972.pdf*.
28. US Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) (IP Report), available at *http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf*.
29. *See id*. at 55.
30. Welleford, *supra* n.23; Masoudi, *supra* n.27.
31. Letter from Thomas O. Barnett, Assistant Att'y Gen., US Dep't of Justice, Antitrust Div., to Robert A. Skitol, counsel for VITA 9 (Oct. 30, 2006), available at *http://www.usdoj.gov/atr/public/busreview/219380.pdf*.
32. *Id*. at 9-10.
33. *See* IP Report, *supra* n.28, at 42-43. Interestingly, in its press release regarding the consent order in *Dell,* the FTC noted that its order "should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action. Nor does this enforcement action contain a general suggestion that standard-setting bodies should impose a duty to disclose." Federal Trade Commission, Press Release (June 17, 1996), available at *http://www.ftc.gov/opa/1996/06/dell2.shtm*.
34. Pate, *supra* n.25; Masoudi, *supra* n.27, at 11; Welleford, *supra* n.23, at 9.

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