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Welcome

We hope you enjoy reading the second 2006 issue of the newsletter published by the Intellectual Property Committee of the ABA Section of Antitrust Law. If you have comments or questions about the newsletter, or if you are interested in submitting articles, please contact one of us, Michael Lawrence, telephone: (408) 653-9040 or email: michael.lawrence@intel.com, or Henry Su, telephone: (650) 798-3528 or email: suh@howrey.com, or a member of our Editorial Board. As always, we are interested in your submissions, ideas, feedback and suggestions. If you are interested in joining the Intellectual Property Committee, please contact our Chair, Mark S. Popofsky, telephone: (202) 682-3530 or email: mpopofsky@kayescholer.com.

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Setting A Higher Standard: The FTC Takes A Tougher Stand On The Ways IP Owners Try To Influence Standard-Setting Organizations

By Robert G. Badal and Helen H. Cho[*]

I. INTRODUCTION

In our technology-based economy, companies are increasingly realizing the competitive benefits of developing industry-wide standards to make their products compatible. Rather than relying upon natural selection to sort out which competing technologies will survive (such as the costly format war between Betamax and VHS videocassettes in the late 1970s and early 1980s), competitors often collaborate in standard-setting bodies or trade associations (such as the American National Standards Institute and the Institute of Electrical and Electronic Engineers) to select which new technology should become the industry standard.[1] It is generally agreed that standard-setting can have positive effects in reducing costs, increasing information flow, facilitating interoperability and enhancing economies of scale. It is also recognized that standard-setting can artificially influence market structures and insulate companies from competitive market forces.[2]

Because of the potential competitive restraint associated with standard setting, antitrust regulators have monitored the activities of companies within the standard-setting environment in order to identify potentially anticompetitive conduct. The Federal Trade Commission ("FTC"), for example, has pursued several important cases involving alleged abuses of the standard-setting process. In 1996, the FTC obtained a consent decree against Dell Computer Corp. after the computer maker allegedly advised a standard-setting organization that it did not own patent rights concerning a proposed standard, and then later sought to enforce its undisclosed patent rights against firms that practiced the standard. The FTC alleged that such conduct arguably conferred monopoly power on Dell to the detriment of competitors and consumers.[3] More recently, the FTC initiated enforcement actions against Rambus Inc. and Union Oil Co. of California ("Unocal"), accusing them of manipulating standard-setting processes by failing to properly disclose their patent rights.[4] These three FTC actions shed light on an individual firm's responsibilities in standard-setting proceedings when the intellectual property of one firm becomes incorporated into an industry-wide standard.

Although the factual and legal issues are many and there are significant unresolved questions about the application of the antitrust laws to single-firm behavior in the standard-setting context, this article examines a few of the implications of these FTC proceedings. The article begins with a general discussion of the development of limited antitrust "immunity" for standard-setting activities; then examines each of the proceedings initiated by the FTC against Dell, Rambus and Unocal, and the overall implications of these proceedings for the standard-setting process and its participants. Finally, the article identifies a set of yet unanswered questions raised by these FTC proceedings.

II. LEGAL FOUNDATIONS FOR THE REGULATION OF STANDARD-SETTING

A. The Relationship Between Antitrust Law And Intellectual Property Rights

Antitrust law treats intellectual property as essentially comparable to any other form of tangible or intangible property. This principle is clearly spelled out in the U.S. Department of Justice's and the FTC's *Antitrust Guidelines for the Licensing of Intellectual Property* ("*IP Guidelines*"). The *IP Guidelines* provide:

[*] Mr. Badal is a partner, and Ms. Cho is an associate in the Los Angeles office of Heller Ehrman LLP, where they specialize in antitrust and intellectual property matters.

> An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain types of conduct with respect to intellectual property may have anti-competitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.[5]

This point was recently echoed in an October 2003 report issued by the FTC.[6] In other words, the Justice Department and the FTC will apply the same antitrust rules to conduct involving intellectual property that they would apply to conduct involving any other form of property.

Ordinarily, mere ownership of intellectual property will not be deemed to confer market power (*i.e.*, the power to control prices or restrict competition).[7] This general principle applies at least where the intellectual property, such as a patent, is one of a number of substitutable technologies that are available in the market.[8] The adoption of an industry-wide standard, however, may limit realistic alternatives to substitutable technologies, and the adoption of the standard may confer market power on the owner of the intellectual property that is not otherwise inherent in the intellectual property itself.[9] A patented technology may, for example, become essential to participation in the market because the adoption of a standard, in effect, precludes other patented technologies from being commercialized.[10] As a consequence, the intellectual property owner may obtain additional market power through the promulgation of a standard incorporating its intellectual property.

B. The Development Of Limited Antitrust "Immunity" For Standard-Setting Activities

Section 1 of the Sherman Act forbids two or more firms from entering into an agreement or association in restraint of trade. The principal concern of Section 1 is that competitors may engage in collusion, substituting competition with collective action and thereby achieving an anticompetitive restraint that could not otherwise be achieved if each firm operated independently.[11] Section 1 thus facially creates an impediment to the adoption of industry-wide standards by groups of competitors who meet within the standard-setting context. Because participants in standard-setting are often horizontal competitors or are in a vertical commercial relationship with other participants in the process, their collective action ordinarily would raise antitrust concerns. Historically, collective action in the standard-setting arena was viewed with suspicion and hostility, and courts often treated such action as a potential *per se* violation of antitrust laws.[12]

Over time, courts and antitrust regulators began to apply a more nuanced approach toward standard-setting activities as they recognized that such activities often resulted in procompetitive benefits and economic efficiencies for business and consumers.[13] This more nuanced approach — under the rubric of the "rule of reason" — involves a fact-specific, detailed inquiry concerning the demonstrable effects of particular conduct on price and output. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.,*[14] the Supreme Court noted this shift in the antitrust treatment of standard-setting:

> [P]rivate standard-setting associations have traditionally been objects of antitrust scrutiny . . . When, however, private associations promulgate . . . standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that have led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.[15]

For example, in *NCAA v. Board of Regents of University of Oklahoma*,[16] the Supreme Court declined to apply the *per se* rule to an NCAA

"standard" that restricted the number of football games that could be televised for any individual member college as well as a corresponding NCAA standards with television networks that guaranteed minimum broadcasting prices. Such output limitations and price-fixing arrangements ordinarily would be condemned as illegal *per se*, but the Supreme Court noted that it was undisputed that the great majority of the NCAA's regulations enhance competition among member colleges and that it was therefore appropriate to consider the NCAA's justifications for its restraints. Although the Supreme Court ultimately invalidated the NCAA's regulation, it held:

> Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.[17]

Despite the greater deference shown to an industry-wide association's justifications for its conduct, the Supreme Court also has stood ready to impose antitrust liability in cases where it is alleged that members — to the detriment of some competitors — manipulated the standardization process for the benefit of one member. For example, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[18] the Supreme Court held that a standard-setting organization that publishes hundreds of codes for various areas of engineering and industry was subject to antitrust liability when one member company allegedly persuaded a subcommittee of the organization to deny certification to a competitor's product. According to the Supreme Court, the member influenced the subcommittee to disallow certification and then discouraged potential customers from buying the competitor's product because the product failed to satisfy the American Society of Mechanical Engineer's ("ASME") code. The Court observed that, "[a]lthough, undoubtedly most [ASME staff members] serve ASME without concern for the interests of their corporate employers, some may well view their position within ASME, at least in part, as an opportunity to benefit their employers."[19] The Court thus noted that the ASME subcommittee apparently applied its own internal rules "without any meaningful safeguard" to prevent a competitor from being unfairly excluded.[20]

Likewise, in *Allied Tube*, the Supreme Court held that a member of a trade association was subject to antitrust liability when it "packed" an annual meeting with members for the purpose of voting against another member's competing proposal. The Court observed:

> [B]ecause private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits . . . the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication.[21]

The Supreme Court observed that, during the standardization process, a firm remains free to "vigorously" argue scientific evidence that serves its own economic interest so long as it does so "before a non-partisan private standard-setting body."[22] According to the Supreme Court, "[w]hat petitioner may not do . . . is bias the process by, as in this case, stacking the private standard-setting body with decision makers sharing their economic interest in restraining competition."[23]

These Supreme Court cases paint a complex picture of the antitrust treatment of multiple-firm behavior in standard-setting organizations. While the Supreme Court recognizes that standard-setting activities can produce procompetitive benefits, it nevertheless will impose

antitrust liability when it is shown that the standard-setting organization or its processes were corrupted, manipulated or distorted by one competitor to disadvantage another.

III. FTC CASES APPLYING ANTITRUST LAWS TO SINGLE-FIRM BEHAVIOR IN THE STANDARD-SETTING CONTEXT

The FTC has initiated three major proceedings in the past decade against firms that allegedly manipulated the standardization processes of industry-wide groups.

A. *In the Matter of Dell Computer* [24]

In *the Matter of Dell Computer Corp.*, the FTC accused Dell of manipulating an industry-wide standard, which was adopted by a video electronics standard-setting organization. In 1992, the organization launched a series of meetings to evaluate a proposed standard for a computer "bus" — the communications hub between the computer's central processor and its peripherals. During these meetings, Dell actively lobbied other organization members to approve the proposed standard. At the same time, organization members were required to certify whether they owned any patents that read on the proposed standard. Although Dell had been granted a patent that covered aspects of the proposed standard, it certified that it had no such patents. Thereafter, the standard-setting organization adopted the proposed bus standard, which became a commercial success. Only then did Dell break its silence about its patent. Dell notified various computer manufacturers, which were practicing the organization's bus standard that it was entitled to receive royalties for alleged patent infringement.

The FTC accused Dell of engaging in anticompetitive business practices in violation of the Federal Trade Commission Act.[25] In a statement accompanying a consent decree, the FTC characterized the situations as follows:

> The Dell case involved an effort by the Video Electronics Standards Association ("VESA") to identify potentially conflicting patents and to avoid creating standards that would infringe those patents. In order to achieve this goal, VESA — like some other standard-setting entities — has a policy that member companies must make a certification that discloses any potentially conflicting intellectual property rights. VESA believes that its policy imposes on its members a good-faith duty to seek to identify potentially conflicting patents. This policy is designed to further VESA's strong preference for adopting standards that do not include proprietary technology.[26]

The FTC observed that, by failing to disclose its patent rights to other organization members as required by the VESA rules, Dell was able to manipulate and undermine the standard-setting outcome. According to the FTC, "where there is evidence that the association would have implemented a different non-proprietary design had it been informed of the patent conflict during the certification process, and where Dell failed to act in good faith to identify and disclose patent conflicts — enforcement action is appropriate to prevent harm to competition and consumers."[27] Under the terms of the consent decree, the FTC required Dell to refrain from enforcing its patent against computer manufacturers practicing the bus standard.

B. *In the Matter of Rambus* [28]

In June 2002, the FTC staff issued an administrative complaint against Rambus, alleging that the memory chip design firm failed to disclose to a semiconductor standard-setting organization, the Joint Electron Devices Engineering Council (JEDEC), that it possessed relevant intellectual property.[29] According to the FTC staff, while Rambus participated for more than four years in JEDEC's standard-setting process for synchronous dynamic random access memory chips (SDRAM) and despite an alleged duty to inform JEDEC members about its intellectual property holdings, Rambus allegedly did not disclose that it owned a patent and was pursuing several patent applications for technologies that could or would eventually be adopted into the JEDEC standards. In its administrative complaint, the FTC staff

contended that Rambus — by failing to disclose its intellectual property — caused JEDEC members to believe that Rambus did not own any pertinent technologies, and thus, JEDEC unknowingly adopted standards that would then "read" on Rambus' patents. The FTC alleged that, in early 1996 (prior to the formal consideration of the JEDEC standards), Rambus voluntarily withdrew from JEDEC, but after doing so, Rambus tried to collect royalties from companies that manufactured and sold SDRAM products in accordance with the JEDEC standards. As a remedy, the FTC staff sought to enjoin Rambus from enforcing certain of its patents for SDRAM products made in accordance with the JEDEC standards.

In February 2004, the chief administrative law judge (ALJ) issued a 348-page decision dismissing the FTC complaint against Rambus.[30] The ALJ held that, as a matter of law, a violation of a standard-setting organization's patent disclosure rules could not give rise to antitrust liability. The ALJ further held that, even if a cause of action did exist based upon a company's exclusionary conduct before a standard-setting organization, Rambus owed no duty to disclose its intellectual property under JEDEC's rules. Citing to the Federal Circuit's decision in *Rambus Inc. v. Infineon Technologies AG*[31] in which the court found that Rambus did not breach a duty to disclose its intellectual property under the JEDEC rules, the ALJ concluded that JEDEC's disclosure rules were not sufficiently clear to find the existence of a specific type of disclosure duty. According to the ALJ, a duty to disclose intellectual property can only give rise to antitrust liability, at best, if the duty is "clear and unambiguous."[32] The ALJ also rejected the FTC staff's argument that Rambus "intended to mislead or deceive JEDEC,"[33] noting that the other JEDEC members knew or should have known from other sources that Rambus possessed relevant patents. Finally, the ALJ rejected the FTC staff's argument that Rambus' conduct proximately caused anticompetitive effects, finding that the FTC staff failed to demonstrate that there were no viable alternatives to Rambus' technologies and that Rambus' conduct "resulted in higher prices to the consumer."[34]

In April 2004, the FTC staff filed an appeal to the full Commission. After extensive briefing and oral argument, in August, 2006, the full Commission voted unanimously to reverse the ALJ's dismissal of the FTC complaint against Rambus.[35] The Commission held that Rambus had engaged in unlawful monopolization by actively withholding and concealing information regarding relevant patents and patent applications which were highly material to the standard-setting process.[36] Contrary to the decision of the ALJ, the Commission held that JEDEC's policies and practices, as well as the actions of JEDEC participants, amounted to an obligation that JEDEC members disclose both patents and patent applications relevant to the standard-setting process. The Commission stated that, Rambus, in violation of such disclosure obligations, intentionally engaged in deceptive conduct, designed to conceal the patent applications it filed, and the patents it obtained, until JEDEC had adopted its SDRAM standards.[37] Having found a *prima facie* case for exclusionary conduct aimed at willful acquisition of monopoly power, the Commission held that Rambus had failed its burden of establishing that its conduct served procompetitive purposes.[38] The Commission concluded that Rambus' exclusionary conduct, which significantly contributed to its acquisition of monopoly power, was a violation of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act.[39]

C. *In the Matter of Unocal* [40]

On March 4, 2003, the FTC staff issued an administrative complaint against Unocal, alleging that the oil refiner defrauded and subverted California's regulatory standard-setting proceedings for low-emissions reformulated gasoline (RFG).[41] In the late 1980s, the California Air Resources Board (CARB) — a state administrative agency established in 1967 by the California Legislature — initiated rulemaking proceedings to determine cost-effective standards governing the composition of RFG. According to the FTC staff, Unocal actively participated in the CARB rulemaking proceedings and worked with private

industry groups doing research on automobile emissions that reported their results to CARB. The FTC staff alleged that, between 1990 and 1994, Unocal intentionally created the impression that it had relinquished, or would not enforce, any proprietary interests in its emissions research results that might later be incorporated into CARB standards when, in fact, Unocal had pending patent claims on these research results. The FTC staff further alleged that Unocal did not publicly announce its intention to seek royalties on its intellectual property until January 1995 — after the refining industry had already spent billions of dollars to reconfigure refineries to produce Phase 2 "summer-time" gasoline (an RFG mandated for sale and use in California from about March through October). As a remedy, the FTC staff sought to enjoin Unocal from enforcing certain patents against companies making, selling and using RFG made in accordance with the Phase 2 standards.

In November 2003, the ALJ issued a decision dismissing the FTC's complaint against Unocal. The ALJ held that Unocal's alleged misrepresentations to CARB were immune from antitrust liability under the *Noerr-Pennington* doctrine — a judicially created doctrine that generally exempts political petitioning activities directed at a government entity.[42] The ALJ reasoned that the Phase 2 rulemaking process was akin to a legislative proceeding, and that Unocal was therefore engaged in immunized petitioning behavior. In addition, the ALJ held that Unocal's alleged misrepresentations to private industry groups were outside of the scope of the Commission's jurisdiction on the ground that they involved patent law questions that should be heard exclusively in federal court.

In July 2004, the full Commission voted unanimously to reverse the ALJ's decision and reinstate the complaint against Unocal. The Commission rejected the ALJ's holding that the *Noerr-Pennington* doctrine immunized Unocal's conduct from antitrust scrutiny. The Commission stated that Unocal's *Noerr-Pennington* position "rests on the proposition that a private business may lie to a government rulemaker, misrepresent its intentions regarding the enforcement of its patent rights, and then swing the trap shut after the government has enacted regulations that overlap with the patents."[43] The Commission stated that, under Unocal's reasoning, "a firm may thereby amass market power and enforce patent rights buttressed by a government mandate in ways never understood nor intended by the government agency, with absolute impunity from antitrust review." The opinion noted that "virtually all recent cases hold that in some circumstances false petitioning does not enjoy protection."[44]

Rejecting Unocal's argument that its communications with CARB and various industry groups were protected by the *Noerr-Pennington* doctrine, the Commission held that, as a matter of law, "misrepresentations that substantially affect the outcome of a proceeding or so infect its core to deprive the proceeding of legitimacy" can "warrant denial of *Noerr-Pennington* protection, pursuant either to a separate doctrinal exception or a variant of the sham exception."[45] The Commission explained that such "false petitioning loses *Noerr-Pennington* protection only in limited circumstances, such as when the petitioning occurs outside the political arena; the misrepresentation is deliberate, factually verifiable, and central to the outcome of the proceeding or case; and it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity."[46] According to the Commission, "the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing from deliberate misrepresentations that undermine the legitimacy of government proceedings."[47]

Although the Commission had remanded the Unocal matter for trial, the Commission unexpectedly announced in June 2005 that Unocal entered into a consent decree to settle the FTC's complaint.[48] The consent decree was executed in connection with the FTC's pre-merger review and approval of Chevron Corp.'s $18 billion proposed acquisition of Unocal. Under the terms of the consent decree, Unocal agreed to stop enforcing its RFG patents and to

dedicate them to the public — a result that is practically the same as the injunction remedy sought by FTC staff in the administrative complaint.

IV. LESSONS FROM RECENT STANDARD-SETTING CASES

A. Err On The Side Of Disclosure

At a time when industry standards are playing a growing role in commerce, antitrust regulators have decided to take a closer look at the boundaries between permissible and impermissible conduct in the standard-setting context. The cases of *Rambus* and *Unocal* reflect increasing attention to how a single firm's participation in a standard-setting organization can dramatically shape the outcomes of the standardization process. Antitrust law firmly holds that certain acts or practices that may be lawful for a firm which is not in a position to obtain monopoly power can violate the Sherman Act when the conduct threatens or entrenches a monopoly. Once a firm's patented technology is incorporated into an industry-wide standard and the standard confers market power on the patent owner, the owner of the patent may have achieved something in the marketplace that was not achievable but for the adoption of the standard. In adopting a standard, the standard-setting organization necessarily precludes alternative technologies from being commercialized or retards such commercialization, and thus, the patented technology becomes a type of "essential facility" to participation in the market.

Given the risks associated with the "winner" in the standard-setting process obtaining increased market power as a result of the standard, the antitrust law has already been deployed to attack alleged abuses of the standard-setting process, as described above in such cases as *Dell*, *Rambus* and *Unocal*. In *Rambus* and *Unocal*, the FTC deployed the antitrust laws to attack single-firm opportunistic behavior used to undermine disclosure obligations created by the rules of the standard-setting bodies. At its most basic core, the FTC's approach in *Dell*, *Rambus* and *Unocal* is to treat a breach of the duty to disclose pertinent intellectual property rights as potentially unlawful conduct under the antitrust laws.

The FTC's reasoning follows a fairly simple, if not controversial logic: the Sherman Act condemns anticompetitive single-firm conduct that is directed at acquiring or maintaining a monopoly. This rule prohibits conduct that violates express disclosure rules of the standard-setting organization or subverts the legitimacy of the standardization process by inducing the organization to erroneously believe that no intellectual property rights are implicated, thereby granting to the non-disclosing member a monopoly in the market covered by the standard. As the Supreme Court stated in *Allied Tube*, a trade association avoids antitrust liability when it adopts a standard "based on the merits of objective expert judgments and thorough procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition."[49] It is one thing for a firm to "vigorously" argue the scientific evidence to the standard-setting organization.[50] It is quite another thing for a firm to hijack the standard by inducing members to reasonably and justifiably (albeit falsely) believe that it has no relevant intellectual property concerning a proposed standard. Unless all participants in the standard-setting process are aware of the relevant intellectual property, the standard-setting organization cannot adequately assess the comparative costs and benefits of competing technologies nor can it make an informed "objective" decision about a proposed standard, as required by *Allied Tube*. The question remains a difficult one — is the antitrust violation solely a function of violating a known disclosure rule or is it a function of using the standard-setting mechanism to enhance one's IP rights whether disclosure is mandatory or not?

B. Where Are We Going?

While some criticism has been leveled against the FTC for allegedly complicating, rather than clarifying, the scope of a firm's obligations to disclose intellectual property when it participates in standard-setting, much of the criticism may be the result of the intensely factual nature of both

the *Rambus* and *Unocal* cases and the inability to determine at present which fact or combination of facts was most important to the antitrust analysis. However, the reality is that the *Rambus* and *Unocal* cases have reopened a dialogue on single-firm behavior in standard-setting organizations regarding how that behavior can potentially subject the goals and benefits of standard-setting. Many questions remain; for example:

- If the internal rules of a standard-setting organization are completely silent about whether participants are required to disclose their intellectual property but, as a matter of industry custom, all participants routinely disclose their intellectual property, would a firm's failure to disclose its intellectual property give rise to antitrust liability?

- If the internal rules of a standard-setting organization impose an affirmative duty to disclose intellectual property, do there remain any legitimate business reasons (such as trade secrets) that could justify a firm's refusal to disclose its intellectual property to the organization?

- If the rules of a standard-setting organization impose an affirmative duty to disclose intellectual property, will antitrust liability still be imposed for a good faith, but inadequate or income-plete, disclosure?

- Can a mere violation of the internal rules of a standard-setting organization, by itself, give rise to antitrust liability?

- Can a standard-setting organization shield its members from antitrust liability by adopting internal rules that intentionally avoid imposing any intellectual property disclosure obligations?

[1] P. K. Ashton, *Some Economic Effects of Standards—Comment*, 19 APPLIED ECON. 1515, 1515 (1987).

[2] G. Tassey, *Standardization in Technology-Based Markets*, 29 RESEARCH POLICY 587, 587 (2000); P. Grindley et al., *Standards Wars: The Use of Standard-setting as a Means of Facilitating Cartels*, 3 INT'L J. COMM. LAW & POLICY 1, 32 (1999).

[3] *In the Matter of Dell Computer Corp.*, 121 F.T.C. 616 (1996).

[4] *In the Matter of Rambus, Inc.*, F.T.C. Docket No. 9302; *In the Matter of Union Oil Co. of Cal.*, F.T.C. Docket No. 9305.

[5] *IP Guidelines*, § 2.1.

[6] FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, at ch. 1, pp. 8-9 (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[7] *See IP Guidelines*, § 2.2 ("Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power."); *see also Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006) (concluding that the mere fact that a tying product is patented does not support a presumption of market power in a patented product).

[8] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 37 n.7 (1984) (O'Connor, J. concurring) ("[A] patent holder has no market power in any relevant sense if there are close substitutes for the patented product."); 10 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 1737a (2d ed. 2004) ("there is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid, patent, copyright, trademark or other intellectual property right") (footnote omitted).

[9] *See, e.g.*, *Dell*, 121 F.T.C. at 642 n.2 (explaining that wide acceptance of an industry standard "effectively confer[s] market power upon [the patentee]" where the standard-setting body could have adopted an alternate standard based upon equally effective, non-proprietary technologies).

[10] *See supra* note 6.

[11] 6 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 1402a3 at 11 (1986).

[12] ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING 31

(2004); *see*, *e.g., Silver v. N.Y. Stock Exch.,* 373 U.S. 341 (1963) (finding *per se* violation of Section 1 of the Sherman Act where the New York Stock Exchange directed its members to discontinue providing telephone wire connections to nonmembers without notice or opportunity for hearing); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (holding that agreement to sell gas only for use in association-approved products constituted *per se* violation); *Associated Press v. United States,* 326 U.S. 1 (1945) (condemning certain AP by-laws as a group boycott).

[13] *See* ABA SECTION OF ANTITRUST LAW, *supra* note 12, at 31; *see*, *e.g., Consolidated Metal Prod., Inc. v. American Petroleum Inst.,* 846 F.2d 284 (5th Cir. 1988) ("Because product information reduces uncertainty, it both increases consumer demand for the product and encourages producers to prove their products"); *Eliason Corp. v. Nat'l Sanitation Found.,* 614 F.2d 126 (6th Cir. 1980) (applying rule of reason and upholding standards applied by testing organization to commercial refrigerators).

[14] 486 U.S. 492 (1988).

[15] *Id.* at 500-01 (citations and footnote omitted). *But see Golden Bridge Tech., Inc. v. Nokia, Inc.,* 416 F. Supp. 2d 525 (E.D. Tex. 2006) (district court held that the *per se* rule can apply to a standard setting organization and plaintiff had appropriately alleged such a *per se* violation to defeat defendants' Rule 12(b)(6) motion).

[16] 468 U.S. 85 (1984).

[17] *Id.* at 117.

[18] 456 U.S. 556 (1982).

[19] *Id.* at 571.

[20] *Id.* at 572-73.

[21] *Allied Tube,* 486 U.S. at 506-07.

[22] *Id.* at 510.

[23] *Id.* at 511.

[24] *In the Matter of Dell Computer Corp.,* F.T.C. Docket No. C-3888.

[25] Section 5 of the FTC Act declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Pursuant to its authority over unfair methods of competition, the Commission may take administrative action against conduct that violates the Sherman Act as well as anticompetitive practices that do not fall within the scope of the Sherman Act.

[26] *Dell*, 121 F.T.C. at 623-24.

[27] *Id.* at 624.

[28] *In the Matter of Rambus, Inc.*, F.T.C. Docket No. 9302.

[29] *In the Matter of Rambus, Inc.*, 2002 FTC LEXIS 31, at *1-2 (July 18, 2002) (Complaint). The F.T.C.'s complaint also alleged that Rambus engaged in conduct constituting actual or attempted monopolization. *See id.* at *70-72.

[30] *See In the Matter of Rambus, Inc.,* 2004 FTC LEXIS 17, at *554 (Feb. 23, 2004) ("Initial Decision").

[31] 318 F.3d 1081 (Fed. Cir. 2003).

[32] Initial Decision, 2004 FTC LEXIS 17, at *554.

[33] *See id.* at *625-26.

[34] *See id.* at *690-91.

[35] *In the Matter of Rambus, Inc.,* F.T.C. Docket No. 9302 (Opinion of the Commission) (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/index.htm.

[36] *See id.* at 118.

[37] *See id.* at 36-37.

[38] *See id.* at 68, 71.

[39] *See id.* at 119.

[40] *In the Matter of Union Oil Co. of Cal.*, F.T.C. Docket No. 9305.

[41] The FTC's complaint also alleged that Unocal engaged in conduct constituting actual or attempted monopolization. *In the Matter of Union Oil Co. of Cal.,* F.T.C. Docket No. 9305 (Complaint) (Mar. 4, 2003), *available at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[42] The rationale for the *Noerr-Pennington* doctrine is that parties have a constitutional right to petition the government for redress of grievances, and the ability of the government to seek input from the public would be impaired unless actions taken to influence the passage or enforcement of laws are shielded from the Sherman Act. *See, e.g., Eastern Railroad Presidents Conf. v. Noerr Motor Freight,* 365 U.S. 127 (1960); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657 (1965).

[43] *In the Matter of Unocal Corp.,* F.T.C. Docket No. 9305 (Opinion of the Commission) at 48 (July 7,

2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* FTC Appeal Brief of Counsel Supporting the Complaint, *In the Matter of Rambus Inc.*, F.T.C. Docket No. 9302 (filed Apr. 16, 2004), *available at* http://www.ftc.gov/os/adjpro/d9302/040422appealbrief.pdf.

[49] *Allied Tube,* 486 U.S. at 501.

[50] *Id*. at 510.