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Advanced Patent Law Institute
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Antitrust and SSO Developments

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Antitrust Context

Technology increasingly important in world's economies

IPR increasingly important . . . and international

IPR increasingly matter of joint activity

- **standards setting**
- **patent pools**

IPR increasingly subject to competition/antitrust analysis

Analysis increasingly done in multiple jurisdictions

Difficult situation for business planning

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Antitrust Context

Standards Setting Organizations pose two kinds of anticompetitive risks

Frequent meetings and close working relationships among companies that can or do compete

Therefore, "traditional" risks of competitor cooperation

- **price fixing**
- **output restrictions**
- **customer/territory allocations**

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Antitrust Context

Avoiding "traditional" risks requires avoiding discussion of sensitive topics

- costs, cost structures, margins, or any other confidential business information
- "difficult market conditions"
- "unethical practices of some competitors"
- prices, past prices, future prices, pricing practices
- distribution practices, pricing, compensation
- particular customers, especially "difficult" ones
- credit worthiness, whether to do business

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Antitrust Context

Company risks from participating in standards process

Attendees not trained in antitrust
Significance of non-disclosures not understood

Compliance requires more than just training the sales/marketing teams

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Antitrust Context

Standards setting also poses risks related directly to its purpose

Joint technology decisions:

- **which technologies to develop/promote**
- **which technologies to abandon**

Risk excluding technology alternatives based on combined economic incentives of members

Risk exacerbated by potential "coercive" power either as/if standard gains market power or as/if standard adopted as government (-like) rule

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Antitrust Context

Applicable legal concerns:

Market power (monopolization) issues subject to Section 2 of the Sherman Act (and Article 82 of the Treaty in European Union)

"Unfair methods of competition" and/or "unfair or deceptive practices" Under Section 5 of the FTC Act

Illegal agreements among competitors subject to Section 1 of the Sherman Act (and Article 81 of the Treaty in the European Union)

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Antitrust Context

Antitrust and economic analysis has evolved

Has come to view that joint activity in IPR
can be pro-competitive,
increasing competition by increasing innovation

"Rule of reason" analysis
applied to IPR competition issues
requiring close analysis of specific facts

Examine arrangements for balance between
promotion of procompetitive effects
and avoidance/minimization of anticompetitive effects

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Competition Benefits

Can be benefit to public safety

Can permit/increase interoperability

Can increase downstream competition
with consumer benefits of wider choices, lower prices

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Competition Risks

Classic cartel to protect what's inside and exclude what's outside

Limit competition based on technology (innovation) and quality

Impede innovation by excluding alternative technology

Impede competition by foreclosing alternative technology

Exclude competitors

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Competition Risks

Classic case of competition risks where standard acquires or will acquire power of law: *Allied Tube*

Summary of facts in that case (should) say all that needs to be said

Impede competition by foreclosing alternative technology

Exclude competitors

Allied Tube v Indian Head, Inc. 486 US 492 (1988)

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Competition Risks

Courts will generally analyze under "rule of reason"

Will look at:

- **Purpose of standard (setting)**
- **Relation of standard to stated purpose**
- **How standards group organized and run, including membership rules and practices of group generally**
- **Whether (and extent of) exclusionary effect**
- **Justification for exclusionary effect**
- **Relation between justification (if valid) and scope of exclusionary effect**
- **Market structure: geographic and product**

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Competition Risks

A risk specific to standards setting is risk of "hold up"

Risk is that owners of proprietary technology incorporated into a standard acquire power to prevent practice of standard, and therefore market (price) power in licensing their technology

Risk exacerbated by inclusion in standards of technology that was not understood or known to be proprietary

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Competition Analysis

Does conduct by a patent owner that can or does lead to "hold up" violate the antitrust laws?

Some cases on point

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Competition Analysis

FTC v Dell Computer (1996)

- SSO on computer bus standard
- Dell certified no proprietary technology on technology it advocated for adoption
- After adoption of standard, Dell asserted its patent rights
- FTC found (a) Dell acted in bad faith in failure to disclose/misrepresentation and (b) SSO would have implemented a different standard had it known
- Violation of FTC Act Section 5, not antitrust laws

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Competition Analysis

FTC v Union Oil of California (Unocal) (2005)

- Gas formulation standard setting by California Air Resources Board
- Unocal represented (falsely) that research was non-proprietary, at same time pursuing a patent
- ALJ found CARB relied on misrepresentation, but found Unocal conduct protected by *Noerr-Pennington*
- FTC overruled, told ALJ to consider CARB expectations/reliance on Unocal, whether UNOCAL misrepresentation was deliberate
- Issue was again violation of FTC Act Section 5, not antitrust laws

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Competition Analysis

FTC v Rambus

- RAM standard setting by JEDEC
- Rambus participated on memory interface technology, while amending/pursuing patents
- After standard adopted, Rambus asserted patents

- FTC alleged antitrust violation
- FTC said Rambus
  - Failed to disclose while JEDEC adopted technologies on which Rambus was seeking patents
  - Misled others on whether its patents would cover adopted technology

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Competition Analysis

FTC v Rambus (continued)

- ALJ found for Rambus: JEDEC rules too vague
- FTC reversed, found Rambus "unlawfully monopolized market" for four JEDEC technologies
- FTC focused on
  - "hold up" effect
  - "duty of good faith" in JEDEC process
  - Rambus conduct more "willful" than Dell's
  - Rambus acquired market power by predatory (exclusionary) conduct
- FTC allowed Rambus enforcement
  - but set rates at what believed Rambus would have been able to negotiate *ex ante*

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Competition Analysis

FTC v Rambus (continued)

- DC Circuit reversed FTC:
- no proof Rambus technology would not have been chosen "but for" Rambus conduct at issue
- therefore no proof Rambus conduct caused adoption, and resulted in Rambus monopoly power
- "use of deception simply to obtain higher prices normally has no tendency to exclude rivals" (*i.e.*, no anticompetitive effect)

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Competition Analysis

FTC v Rambus (continued)

Deception in standards setting - even resulting in significant market power - is not predatory/exclusionary conduct making the market power an unlawful monopolization in violation of Section 2, absent proof that deception *caused* adoption of technology into standard

Market power arising from adoption of proprietary technology into a standard can be an unlawful monopolization violating Section 2 if the proprietary technology would not have been adopted into the standard but for the patent owner's deceptive conduct

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Competition Analysis

Broadcom v Qualcomm (Third Circuit)

- ETSI standard setting
- Qualcomm committed to license on FRAND terms
- Broadcom alleged Qualcomm violated commitment, charging higher-than-competitive prices to licensees purchasing non-Qualcomm chipsets
- District Court dismissed: not an antitrust violation

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Competition Analysis

Broadcom v Qualcomm (Third Circuit)

- Third Circuit reversed
- "[I]n a consensus-oriented private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, coupled with an SDO's reliance on that promise when including the technology in a standard, and the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."

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Competition Analysis

FTC v Negotiated Data Solutions (N-Data) (2008)

- IEEE Ethernet standards setting
- National Semiconductor committed to licensing for "nominal fee" if technology included in standard
- N-Data purchased patent after adoption; did not practice
- refused to honor National Semiconductor commitment
- FTC alleged
  - IEEE relied on commitment in adopting standard
  - N-Data aware of commitment when bought patent
  - violation of FTC Act Section 5 (*not* antitrust)

- N-Data settled, agreed to honor commitment

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Competition Analysis

FTC Split on N-Data Enforcement:

- Former Chair Majoras, current Chair Kovacic, Opposed
  - Possible private litigation spillover effects
  - Why unfair method of competition and unfair acts or practice
  - How to "limit" section 5 beyond what Section 1 & 2 cover
  - Large sophisticated businesses not in need of "consumer protection"

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Managing Risk

- Balance interests of patentees and licensees
- Encourage innovation and preserve competition

- Rules should give all participants notice
  - Need to be clear and explicit

- Rules should be even-handed
  - Not favor either patentees or licensees

- Rules should apply to process, not outcome
  - Disclosure
  - Licensing

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Managing Risk

Potential Disclosure Rules

- Whether to require disclosure of proprietary technology
  - If “yes”, when in process
- Challenges:
  - Burden of portfolio search
  - Timing of disclosure
    - Has implications for timing of search
  - Patents? Applications? At what stage?
  - Burdens should not discourage participation

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Managing Risk

Potential Licensing Rules

- Whether to require patentee commitments on licensing terms and conditions
  - FRAND?
  - Maximums?
  - Royalty-free or non-assert?
  - *Ex-ante* negotiation?
- Challenges
  - Potential antitrust concerns
    - "buyer cartel"
    - monopsony power
  - Risk of discouraging participation

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Reading tea leaves

Where do we go from here?

- DC Circuit got it right for antitrust analysis
  - "but for" test (antitrust violation) hard to meet
- Third Circuit perhaps also got it right
- FTC will continue to pursue under Section 5
  - and will be looking for "but for" test case

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Reading Tea Leaves

SSOs should and will get much more explicit

- clear up-front disclosure rules
- clear up-front FRAND obligations
  - binding on successors
- strong temptation for *ex ante* commitments
- strong temptation for *ex ante* negotiations

Challenges

- tricky antitrust territory
- unknown effects on incentives to participate, and therefore on
  - innovation
  - quality of standardized technology
  - competition (in technology and downstream)

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The New Administration

- Solid Predictions:
  - More use of FTC Section 5
  - More enforcement of Sherman Act Section 2
- Less Solid:
  - Less certainty on support for strong IP rights, and broad rights to exploit IP

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