



Standard Setting and Other Hot IP/Antitrust Topics

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Recent FTC IP/Antitrust Activities

- Standard Setting Cases: Rambus and N-Data
- FTC/DOJ IP/Antitrust Report (2007)
- Evolving IP Marketplace
- Pharmaceutical Patent Settlement Cases



Standard Setting

- Can be *de facto* (MS Windows)
- Or set by SSOs
 - Provides compatibility
 - Increases consumer choice and competition
 - Avoids a format war
- SSOs worry about patent “hold up”
 - Generally require disclosure of relevant patents



Recent Antitrust Standard-Setting Cases

- Pre-adoption deception
 - FTC Cases
 - Dell (1996)
 - Unocal (2003)
 - Rambus (ongoing)
 - Broadcom v. Qualcomm (3rd Cir. 2007)
- Post-adoption opportunism
 - FTC Case: N-Data (2008)



FTC Rambus Decision (2006)

- JEDEC's policies required good faith disclosure of patents and patent applications
- Rambus had a program of amending patent applications to cover the standard, but did not disclose
- FTC found that Rambus' conduct was deceptive



Rambus Program

- Vincent notes 1992-93: “Richard Crisp wants to add claims to original application...to control latency”
- Vincent notes 1993: “What to include in divisional applications:...so cause problem w/ synch DRAM.”
- Ware email 1993: “[Additional claims covering] programmable CAS latency...This is directed against SDRAMs.”



Rambus Inc. - Company Confidential

Secondly, to gain awareness in 1992 that the 18Mbit RDRAM will have a die size equal to the 18Mbit Sync DRAM; and get Toshiba and NEC to quote pricing broadly in the 10% per bit range compared to commodity parts.

Our third strategy is to gain momentum rapidly in non-main-memory markets where Sync DRAMs are NOT an issue. So while main-memory customers remain confused and in a wait-and-see mode over the next year; we remove the price negative and risk negative associated with Rambus, show that we have the most actual volume sources shipping, and show that the volume is already ramping from other market segments.

Finally, we believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs. Our action plan is to determine the exact claims and file the

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Rambus has concentrated primarily on desktop computers to date. A large portion of our company comes from computer companies; including several experts on microprocessors and graphics.

2.3.5.1 Desktop Computer graphics/video subsystem

Development of graphical user interface operating systems has caused a rapid growth in the demand for high resolution, high color, high performance graphics subsystems. Developments like Quicktime are just starting the demand for high resolution, high performance digital video to be integrated into the graphics subsystem.

FTC Rambus Decision

- Had Rambus disclosed, either:
 - JEDEC would chosen different technology,
or
 - JEDEC would have required a RAND
commitment
- Either way, through deception, Rambus had
illegally obtained monopoly power



D.C. Circuit Rambus Opinion (Apr. 2008)

- Vacated FTC decision
- Accepted deception in legal analysis, but expressed skepticism
- Avoiding RAND is not monopolization
 - “An otherwise lawful monopolist’s use of deception simply to obtain higher prices” is not monopolization
 - Citing *NYNEX v. Discon*, 525 U.S. 128 (1998)



D.C. Circuit Rambus Opinion

- Court held that both outcomes must be anticompetitive to prove monopolization
- Requires proof that SSO would have chosen a different technology



FTC Cert. Petition in *Rambus*

- Argued for a Section 2 causation standard as in *Microsoft*
 - Conduct must “reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.”
- *Discon* analogy is incorrect: *Rambus* is not a “legal monopolist.”
 - Circuit split with *Broadcomm* (3rd Cir.), which holds that deception before an SSO can be exclusionary conduct.



Infineon v. Rambus (Fed. Cir. 2003)

- Did Rambus commit fraud on JEDEC members by failing to disclose?
- Conduct “impeach[es] Rambus’s business ethics”
- Rambus
 - “wanted to obtain claims covering the standard”
 - “thought it could cover the SDRAM standard”
 - “tried to do so”



Infineon v. Rambus (Fed. Cir. 2003)

- Court interpreted JEDEC policy to require disclosure only when a patent or application contained claims that a JEDEC member “reasonably would construe to cover the standardized technology.”
- The court found no claims pending while Rambus was a JEDEC member that covered the standard.



Infineon v. Rambus (Fed. Cir. 2003)

- J. Proust dissent: “The majority has gone so far as to make a *de novo* comparison of the pending claims to the JEDEC standard in order to conclude that no claims could possibly read on the standard. I do not believe that we, as an appellate court of review, are in a position to make this finding ...”



Courts' Reaction to JEDEC's Rules

- “A staggering lack of defining details ...”
 - Rambus v. Infineon, Federal Circuit, 2003
- “The toothless disclosure policy ...”
 - FTC v. Rambus, oral argument, D.C. Cir., 2008
- Courts express reluctance to make patents unenforceable based on violation of vague disclosure policies



Broadcomm v. Qualcomm (3rd Cir.)

- Allows Section 2 monopolization count to go forward
 - Complaint alleges that Qualcomm acquired monopoly power by intentionally deceiving SSO
 - Alleges that Qualcomm falsely agreed to license on RAND terms
 - Alleged conduct harmed the competitive process of choosing the standard



Qualcomm v. Broadcomm (Fed. Cir.)

- Patent infringement case
- Broadcomm argued that patents were unenforceable
- Court (J. Prost) held
 - Qualcomm had a duty to disclose patents to an SSO
 - It breached that duty
 - Patents were unenforceable against the standard only



FTC N-Data Consent (Jan. 2008)

- IEEE Ethernet standard
- During standard setting in 1994, National Semiconductor offered a \$1000 license
- Market locked in N-way technology
- N-Data acquired the patent in 2001 and sought to impose new terms

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FTC N-Data Consent

- FTC alleged an “unfair method of competition” in violation of FTC Act § 5 with no reference to monopolization.
 - 3-2 Vote
- Questions raised
 - Does the FTC Act § 5 reach conduct that falls outside Sherman Act § 2?
 - Should § 5 be used this way?
 - Why was there no monopolization allegation?



FTC N-Data Consent

- Majority implies that § 5 need not be coterminous with § 2
 - See FTC Workshop on § 5, October 17, 2008
 - Absence of private action and treble damages supports broader reach for § 5
- Limiting principles: Commission Statement requires that an “unfair method of competition” be
 - Coercive
 - Oppressive
 - Have an adverse effect on competition



Comm'r Rosch's views on § 2 Question

“Speaking only for myself, I did not believe the facts supported a viable Section 2 claim. The facts in N-Data were different from those of the Commission’s earlier standard setting cases. For example, unlike in *Rambus*, there were no allegations of misconduct or anti-competitive behavior at the time the standard was adopted by the IEEE. Nor were there any allegations of anticompetitive behavior that led the market to subsequently implement IEEE’s standard. The conduct in the case – the breach of the licensing commitment – did not cause N-Data to either acquire or maintain its monopoly power. The monopoly power exploited by N-Data was conferred by the standard setting organization and the subsequent marketplace adoption of the standard.”



Did N-Data already have monopoly power?

- **Yes: structural view**
 - Patent + \$1000 promise made N-Data a constrained monopolist
 - Conduct was exploitation of monopoly power that does not violate § 2
- **No: pricing view**
 - N-Data had no ability to control price or limit output
 - Removal of constraint = exclusionary conduct



Themes of IP Reports

- **Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition**

April 2007 (joint report with DOJ)

- Antitrust law must take into account the procompetitive nature of the patent system's incentives to innovate.



IP/Antitrust Report

- Ch. 1: Unilateral Refusals to License Patents
- Ch. 2: Collaboratively Set Standards
- Ch. 3: Cross-Licensing and Patent Pools
- Ch. 4: Variations in IP Licensing Practices
- Ch. 5: Tying and Bundling
- Ch. 6: Terms Extending Beyond Patent Expiration



Ex Ante Licensing Discussions

- Discussing patent licensing terms before the standard is adopted
- FTC/DOJ recognize that ex ante licensing discussions can be procompetitive
 - Rule of reason applies
- The Agencies recognize practical concerns and take no position on whether SSOs should require ex ante discussions
 - IP/Antitrust Report
 - DOJ Business Review Letters to Vita and IEEE



The Evolving IP Marketplace



- First hearing held
December 5, 2008
 - More to come!
- Exploring
 - New business models
 - Patent remedies
 - Notice and legal doctrines affecting licensing
- Comments accepted through
February 5, 2009

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Pharmaceutical Patent Settlements

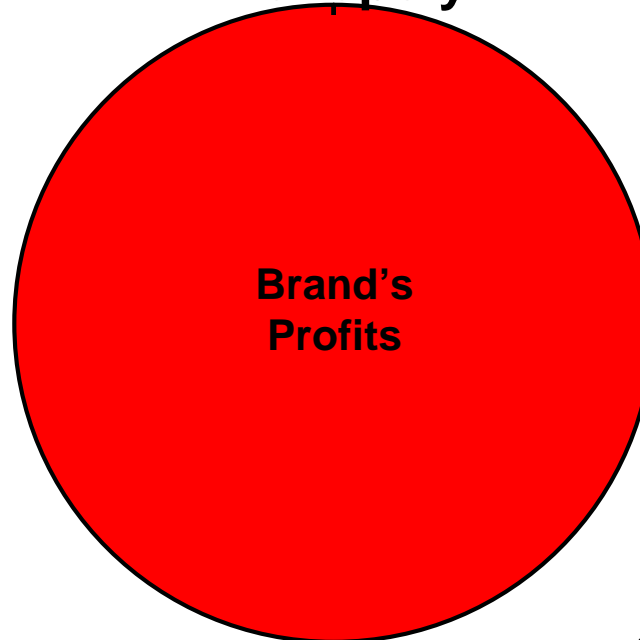
All have an “exclusion payment” from patentee brand drug company to accused generic infringer, who stays off the market for agreed time

- Consents in Abbott/Geneva, Hoechst/Andrx, BMS/Shein (2000-2002)
- Schering-Plough (11th Circuit, Mar. 5, 2005)
- Cephalon (D.C. District Court)

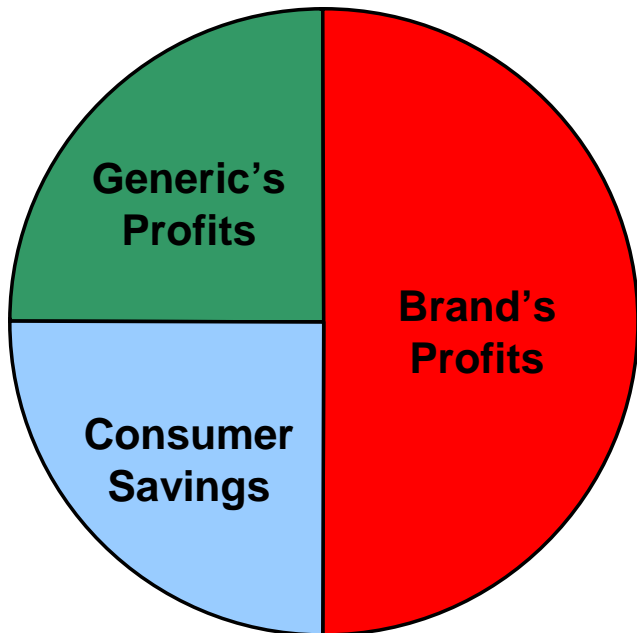


Incentives to Pay for Delay

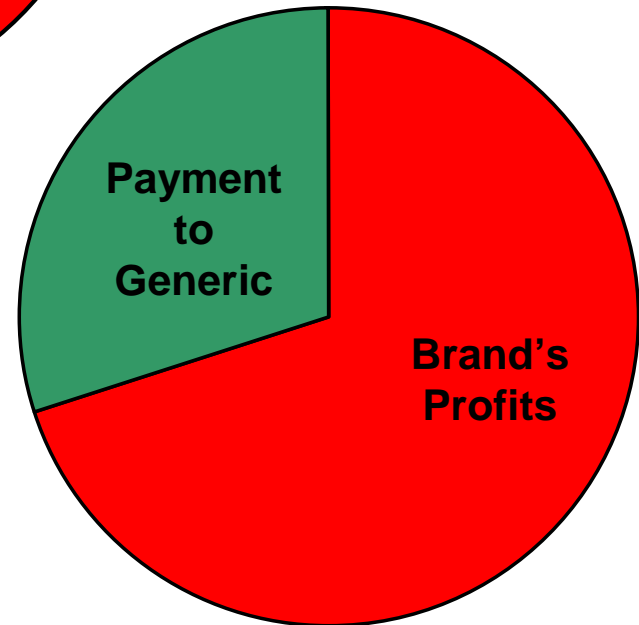
Monopoly



Competition



Retained Monopoly



Pharmaceutical Patent Settlements

- Buying “insurance” against competition - i.e. paying to eliminate uncertain competition - violates antitrust laws
- *U.S. v. Microsoft* (D.C. Cir. 2001) “It would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will.”



Pharmaceutical Patent Settlements

- Does the legitimate use of a patentee's "right to exclude" include paying an accused but unproven infringer to stay off the market?
- Courts are not reaching the antitrust analysis.



Pharmaceutical Patent Settlements

Schering-Plough v. FTC, (11th Cir. Mar. 5, 2005)

“By virtue of its ‘743 patent, Schering obtained the legal right to exclude Upsher and ESI from the market until they proved either that the ‘743 patent was invalid or that their products ... did not infringe Schering’s patent.”

The ESI settlement was “within the patent’s exclusionary power, and reflect[s] a reasonable implementation of the protections afforded by patent law.”



Pharmaceutical Patent Settlements

In re Tamoxifen Citrate Antitrust Litig. (2nd Cir. Nov. 2, 2005)

“[S]o long as the patent litigation is neither a sham nor otherwise baseless, the patent holder is seeking arrive at a settlement in order to protect that to which it is presumably entitled: a lawful monopoly over the manufacture and distribution of the patented product.”

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Pharmaceutical Patent Settlements

In re Ciprofloxacin Hydrochloride Antitrust Litig. (Fed. Cir. 2008)

“The district court correctly concluded that there is no legal basis for restricting the right of a patentee to choose its preferred means of enforcement ...”

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Pharmaceutical Patent Settlements

- When a patentee pays an accused infringer to stay off the market, what is the source of the exclusion?
 - The patent, or the money?



Pharmaceutical Patent Settlements

In re Cardizem CD Antitrust Litigation, (6th Cir. 2003)

“It is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent’s effectiveness in inhibiting competitors by paying the only potential competitor \$40 million per year to stay out of the market.”

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