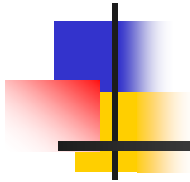


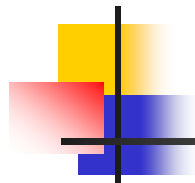


Standards, Intellectual Property, and Antitrust



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The views I express are my own and do not
necessarily reflect the views of the Federal
Trade Commission.



Standards and the United States

- Constitution – standard weights and measures
- 19th Century: Standards began being developed by public and private sectors
- Great Baltimore Fire of 1904 – hoses from neighboring towns did not fit into fire hydrants – Baltimore burns for two days!
- Thousands of standards throughout the years developed free of government intervention
- De facto standards (e.g., VHS, Windows)
- De jure or collaborative standards set through standards setting organizations (SSOs)



Procompetitive Benefits/Efficiencies of SSOs

- Competitors' collaboration leads to development of better and cheaper products for the benefit of consumers
- Bring together necessary technology and IP to produce best standard
- Reduces transaction costs; avoids standards war
- Standard may allow interoperability



Potential Anticompetitive Conduct of SSOs

- Exclusion – manipulate SSO to exclude rivals
- Hold up – after standard is widely adopted, and there is lock-in, patentee who participated in SSO begins demanding high royalties
 - Deception – failure to disclose IP when required to do so, or misleading disclosure
 - Breach of licensing commitment – renege on a prior commitment involving the adopted standard



Anticompetitive Harm

- Higher prices to consumers
- Decreased output
- Disincentives to participate in SSOs
- Decreased reliance on standards established by SSOs



Private Antitrust Cases Involving SSOs: Supreme Court Cases

- Allied Tube (1988) – group of steel interests packed SSO meeting to defeat proposal to include plastic conduit in industry standards.
- Am. Soc’y of Mech. Engineers, Inc. v. Hydrolevel Corp. (1982) – manufacturer manipulated the process to obtain an unjustified interpretation of a safety code, declaring a competitor’s product unsafe



FTC Interest in SSOs

- When there is reason to believe a violation has occurred and it is in the public interest to proceed
- Antitrust may have a role when conduct impairs development of standards and blocks benefits offered by standards
- SSO has no authority over patent holders after selection process
- Implementer or user of standard may not have participated in SSO process (e.g., new company)
 - Patent defenses may be insufficient



Hold up Problem

- Lock in: industry investment and consumer use make it too expensive to switch
- Patentee has power to extract greater royalties than it could if patents and costs had been known prior to selection of standard



FTC Deception Cases

- In re Dell Computer Corporation
121 F.T.C. 616 (F.T.C. 1996)
- In re Union Oil Company of California
138 F.T.C. 1 (F.T.C. 2004)
- In re Rambus Inc.
140 F.T.C. 1138 (F.T.C. 2005)



Deception – Dell

- Patentee “certified” that it had no IP on computer bus standard
- SSO adopted standard with patentee’s technology
- Commission concluded that patentee misled SSO and its failure to disclose was “not inadvertent”
- Patentee settled; remedy blocked ability to collect royalties when patent used in standard



Deception – Unocal

- Government process manipulated
- Patentee offered its technology to California Air Resources Board (“CARB”, a gov’t agency) for gasoline formulation standard
- Patentee claimed technology was “non-proprietary”
- CARB adopted the technology for standard
- Refineries spent millions retrofitting sites to make new gasoline
- Unocal obtained patent infringement award of \$0.05/gallon
- Patentee settled with FTC, agreeing to license its patented technology royalty free for use in standard



Deception – Rambus

- SSO had IP disclosure rules; patentee concealed essential IP for chip standard
- SSO adopted standard using patentee's technology
- Commission found that patentee misled SSO and thus illegally obtained monopoly power
- Commission decision reversed: *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008)
- Petition to Supreme Court filed November 24



Breach of Licensing Commitment – N-Data

- Pursuant to SSO request for a licensing letter, company committed its technology on Ethernet standard for a one-time \$1,000 royalty
- SSO adopted standard
- Patent later sold to N-Data, who knew of licensing commitment
- N-Data attempted to charge higher royalties
- N-Data settled; agreed to charge \$1,000 only
- FTC action favorably viewed by industry, including SSO at issue (IEEE)



Role of FTC Regarding SSOs

- Enforcer when there is reason to believe that there is anticompetitive conduct that causes consumer harm
- U.S. agencies do not support proposing operational guidelines for SSOs
 - There is wide variety of SSOs
 - “One size fits all” approach of guidelines could undermine competitive freedom and flexibility



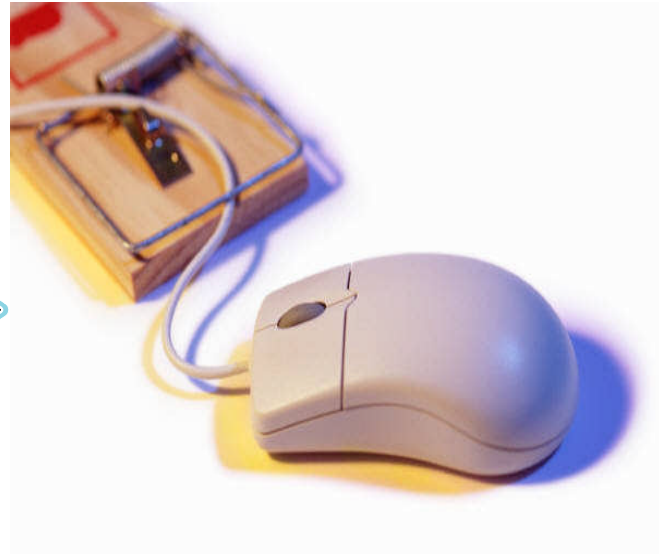
Ex ante Licensing Discussions

- SSOs prohibited licensing discussions prior to adopting standard; feared that would be a *per se* violation of antitrust law (price fixing)
- Agencies announced that any investigation of ex ante licensing discussions would be under rule of reason
- Agencies took no position on whether SSOs should require ex ante discussions
- DOJ business review letters to VITA and IEEE approved ex ante licensing disclosure approaches



Summary

- SSOs are important to business and economy for technical development of new products
- No need for government-imposed regulations or guidelines on private SSOs
- As with any other business activity, FTC may investigate allegations of anticompetitive conduct that harm consumers
- Hold ups caused by deceptive, misleading conduct regarding IP disclosures or breach of licensing commitment may cause consumer harm





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<http://www.ftc.gov/bc/tech/index.htm>