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Articles

SINGLE-FIRM OPPORTUNISM AND THE FTC'S RAMBUS DEFEAT: IMPLICATIONS FOR SECTION 2 OF THE SHERMAN ACT

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I. Introduction

The D.C. Circuit delivered the Federal Trade Commission (FTC) a major defeat in *Rambus, Inc. v. FTC*.¹ The Supreme Court's rejection of the FTC's petition for certiorari, on February 23, 2009, brought to a close one of the most significant battles over standard-setting organizations in recent memory. Finally, on May 12, 2009, the FTC formally dismissed the case.²

*98 The D.C. Circuit vacated the FTC's decision that Rambus illegally monopolized several markets for semiconductor memory technology by failing to disclose its patents and patent applications to a standard-setting organization (SSO), which incorporated the technology into an industry-wide semiconductor standard.³ The court's decision throws into doubt the circumstances in which antitrust provides a remedy for opportunistic single-firm conduct in the standard-setting process. The defeat is important, because it raises significant questions about the viability of the FTC's long-standing effort to target such single-firm conduct, which "has been a priority for the Commission for over a decade."⁴ The decision also raises important questions about where to draw the line between the kind of "hold-up" conduct targeted by the FTC in its standard-setting cases and similar conduct--such as long-term contracting between major buyers and sellers--that the antitrust laws, for good reason, generally do not reach even if the bargaining is inefficient. This article explores the implications of the decision for SSO cases and attempts to outline a proper, limited role for antitrust enforcement against single-firm conduct involving breaches of contractual duties or vague ethical obligations.

II. Overview

Private standard setting is vastly important to the economy, particularly in technology markets. Indeed, “[i]ndustry standards are widely acknowledged to be one of the engines driving the modern economy.”⁵ Industry standard setting facilitates technological adoption by manufacturers of complementary products by specifying a common technological language that manufacturers can use to ensure that their products are interoperable. The greater the “network effects” of interoperability or mass adoption--such as ensuring that computers and peripheral devices are nearly all compatible, that all cable television signals can be received by all digital *99 TVs, that a device’s plug works with nearly all sockets, that you can use your phone to call nearly anyone else, and that your computer can connect with others over the Internet using a common set of codes--the greater the benefits of such standards.⁶

Before the Rambus decision, commentators had questioned whether antitrust law was the appropriate remedy for single-firm SSO manipulation.⁷ They based their skepticism on the strong incentives for aggrieved competitors and customers to challenge alleged fraud in SSOs through patent or contract remedies and the potential for antitrust treble damages to over-deter.⁸ FTC enforcement officials, however, have argued that single-firm deception of SSOs is a cheap way to acquire monopoly power and that antitrust enforcers should target such “cheap exclusion.”⁹ Leading economists have also argued that antitrust is an important remedy for such conduct, if the conduct leads SSOs to adopt proprietary technology unwittingly and without adequate *ex ante* licensing assurances, creating a patent “hold-up” problem.¹⁰ The hold-up problem arises after manufacturers and their customers commit themselves to a proprietary standardized technology by making sunk investments, and where it is not cost-justified to switch technologies after the fact to avoid paying *100 monopolistic patent royalties.¹¹ SSO disclosure and patent licensing rules like the ones at issue in Rambus aim to avoid that problem.

In Rambus, the Commission determined that Rambus purposefully failed to disclose its random access memory technology to an SSO, violating SSO disclosure rules and the obligation of good faith that the FTC believed Rambus owed to other participants in the cooperative standard-setting context.¹² According to the FTC, had Rambus disclosed its intellectual property, the SSO would have adopted a nonpatented technology or required Rambus to agree to license its technology at fair, reasonable and nondiscriminatory (FRAND) rates before standardizing it.¹³ Instead, after the SSO agreed to a semiconductor standard incorporating the technology, without knowledge of Rambus’s issued patents and its plan to seek additional ones--and after semiconductor manufacturers and computer industry customers incorporated the standardized technology into their products, effectively locking themselves in--Rambus demanded steep royalties.¹⁴ Rambus filed infringement suits against manufacturers who refused to pay.¹⁵

***101** The D.C. Circuit vacated the FTC’s ruling against Rambus because the FTC did not find that the SSO would have adopted a nonpatented technology but for Rambus’s nondisclosures.¹⁶ Importantly, the court did not endorse the theory that causing an SSO to adopt a proprietary technology can establish a violation of Section 2. Rather, it “assume[d] without deciding” that such proof would establish monopolization, and determined that the FTC did not find that the SSO would have adopted a different technology.¹⁷ According to the court, the ruling therefore turned on the FTC’s theory that, even if Rambus’s technology would have been adopted had Rambus disclosed, its conduct allowed it to charge higher prices by avoiding FRAND licensing commitments.¹⁸ The court rejected that theory, reasoning that “an otherwise lawful monopolist’s end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market.”¹⁹ The court relied heavily on the FTC’s remedial decision, in which, according to the court, “the Commission made it clear . . . that there was insufficient evidence that [the SSO] would have standardized other technologies had it known the full scope of Rambus’s intellectual property.”²⁰ To discourage further FTC proceedings on remand, the court questioned whether Rambus violated any obligation to the SSO.²¹ The court essentially blamed the SSO for a problem created by its own vague disclosure guidelines.

The ruling has been criticized for placing an excessively high burden on the FTC to show that Rambus’s deception was a “but for” cause of the SSO adopting its technology.²² Below, I address this criticism and point out that the decision in fact presents greater problems for FTC enforcement efforts than simply raising the causation burden. Though the decision’s so-called causation analysis was flawed, its analysis raises important questions about the role of antitrust in such cases and where to draw the line between the kind of deception at issue there and the kind of inefficiencies and transaction-cost problems encountered in negotiations in a wide range of industries--where negotiations between large firms can have significant effects on market prices. Next, I address the proper standard for showing that single-firm *102 conduct that allegedly violates some contractual or other legal norm is “predatory” in an antitrust sense. Assuming that the D.C. Circuit

was properly dismissive of the FTC's evidence in Rambus (a question that doesn't need to be addressed here), what kind of showing should establish the "willful" conduct necessary for monopolization in the SSO context (and, by implication, beyond)? If evidence fails to satisfy the core elements of common-law fraud, say, or fails to establish a violation of SSO-imposed duties, should Section 2 reach a greater range of arguably "bad" conduct? If so, how much greater?

III. The Implications of the Rambus "Causation" Analysis

The court's requirement that the FTC rule out the likelihood that the SSO would have adopted Rambus's technology at FRAND rates has been criticized as imposing an unrealistic causation burden--the burden to prove that the alleged conduct contributed in some way to the acquisition of monopoly power.²³ One FTC Commissioner has argued that the court departed from its prior decision in *United States v. Microsoft Corp.*,²⁴ one of the few significant decisions addressing causation, which imposed a de minimis causation burden.²⁵ The Microsoft court was willing to "infer causation" where exclusionary conduct "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power."²⁶ In Microsoft, the court reserved a more searching causation analysis for the remedy stage, where it held that the appropriateness of a remedy must be evaluated based on closer scrutiny of the likely consequences of the anticompetitive conduct.²⁷

Contrary to Microsoft □in Rambus the court required the FTC to establish strict "but for" causation at the liability stage. That standard imposes a nearly insurmountable causation burden in any case where SSO policies permit the SSO to adopt proprietary technology pursuant to FRAND commitments. The very fact that the SSO adopted the technology--after a non-disclosure of pricing terms--means that the SSO concluded that the technology was superior to other alternatives, pricing aside. It would be difficult to prove that a requirement to pay FRAND royalties would have changed the decision, unless, for example, the SSO rejected similar technologies that insisted on FRAND royalties. The heightened causation burden would not be as detrimental to cases involving SSOs that per se reject proprietary *103 technology, because in such cases the technology presumably would not have been adopted but for the nondisclosure.

The low Microsoft causation hurdle is based on the rationale that, "[t]o some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'"²⁸ Conversely, the reasoning goes, a "but for" causation burden would allow the defendant to benefit from the uncertainty involved in constructing a hypothetical market free of the defendant's bad conduct.²⁹ Certainly this is true as far as it goes, but there is a serious question whether such a standard is consistent with Section 2 and the basic burden of establishing anticompetitive effects by a preponderance of the evidence. Also, reserving a more searching causation analysis for the remedy stage, where remedies can be tailored if effects are limited or unclear, makes most sense for government enforcement actions seeking injunctive or structural relief, in which the relief can be tailored based on a more searching causation inquiry. However, that framework is not a good fit for private actions seeking treble damages, and the causation standard should not change from case to case based on who is suing or what relief is sought. Accordingly, the toothless causation burden adopted in Microsoft raises problems if applied across the board to Section 2 cases. Indeed, the standard is arguably lower than the burden to establish liability under Section 7 of the Clayton Act, which requires proof that a merger is "likely substantially to lessen competition."³⁰ And Section 7 reaches a broader range of incipient harm to competition, beyond the conduct reached by Section 2.³¹

Accordingly, if the D.C. Circuit in Rambus had just elevated the causation burden in Microsoft, arguments could be made that the Microsoft burden was too low and raising the burden was appropriate. Contrary to the criticisms of Rambus, however, the court's rejection of the FTC's FRAND theory was not really about causation. Instead, the decision was premised on a logical flaw that would rule out any challenge based on a false promise or concealment of pricing terms. The court's syllogism was as follows: (1) the SSO likely would have adopted Rambus's technology even if Rambus had disclosed its full patent portfolio; (2) as a result, Rambus would have successfully excluded other technologies and fully achieved its monopoly power; and (3) even though the SSO would have adopted the technology only at FRAND rates, it isn't a Section 2 violation for a monopolist (like Rambus, *104 at that point) to raise price to monopoly levels, even by fraud.³² The flaw is obvious. According to the FTC, Rambus achieved its monopoly position only by concealing its technology, thereby concealing its ultimate plan to charge monopoly prices.³³ The court's reasoning makes Rambus's deception irrelevant. Moreover, under the court's reasoning, consistent with Section 2, Rambus could have disclosed its technology but lied about its FRAND commitment. After its selection as the standardized technology, Rambus would be free to break its commitment and charge monopoly prices.

The court's reasoning violates the fundamental premise that antitrust is about effects, not form.³⁴ The reasoning is inconsistent with cases recognizing that, at least theoretically, such pricing commitments (predatory below-cost pricing) can

be used to acquire or maintain monopoly power.³⁵ Rambus's deception amounted, in effect, to a commitment to provide the technology for free. As others have pointed out, there is no practical difference between allegations of non-disclosure and false promises about pricing terms. Either can be used to achieve patent hold-up.³⁶

The implications are therefore far greater for the FTC's enforcement efforts than elevating its causation burden. The decision would render untenable the FTC's other recent prominent enforcement action in the SSO context, the N-Data case.³⁷ There, the Commission determined that a successor firm's breach of a licensing commitment to an SSO, which was made by a predecessor, amounted to a "deceptive practice" and an "unfair method of competition" under Section 5 of the *105 FTC Act.³⁸ Under the Rambus reasoning, such a deceptive-pricing theory is untenable under Section 2, and authority supports the argument that conduct permissible under Section 2 cannot violate Section 5. The FTC has used Section 5 primarily to reach conduct that would violate the Sherman Act but for some loophole, such as the predecessor-successor relationship in N-Data.³⁹ The FTC would be unlikely to succeed in court on an altogether different liability standard under Section 5 from what is recognized under Section 2--for example, by pursuing above-cost pricing as predatory under Section 5 even though such conduct is not predatory under Section 2. But that is the implication of Rambus for N-Data.

Recognizing the implications of the Rambus reasoning--and its flaws--points to troublesome cases, however. Antitrust should not be a remedy for every perceived violation of a long-term pricing commitment, whether arising out of the standardization process or competition for a long-term contract that excludes rivals. In the SSO context, there is concern that deception can create lock-in effects that affect entire industries and affect consumers downstream.⁴⁰ But the tendency of noncollusive negotiations to affect marketwide prices is not unique to the standard-setting context. Pricing commitments made by a large supplier to a large purchaser, such as a deal between a major steel producer and consumer, or between a dominant supplier and a big buyer like Wal-Mart, may have marketwide pricing implications. The purchasers may lock in to long-term contracts based on pricing commitments that are later renegotiated, contracts may be breached, and prices may increase over what the buyer likely would have agreed to with full knowledge of the future and a full ability to protect itself contractually. The process is messy and imperfect, and deals nearly always lock in the parties in a way that can be exploited later, just as winners of government contracts are often able to raise prices dramatically after locking in the business with a low bid.

That certain major negotiations can affect marketwide prices, however, does not transform them into antitrust issues absent some kind of horizontal restraint among competitors, even if the result is somehow objectively "inefficient." Antitrust should not be invoked after the fact by customers as a weapon in bilateral transactions. The question these SSO cases raise, therefore, is where to draw the line between the kind of conduct at issue in Rambus--assuming the best facts for *106 the FTC--and the kind of conduct that antitrust does not properly reach--perhaps the kind at issue in N-Data. That issue is addressed next.

IV. The Unresolved Issue: When and If Any Patent Hold-Up Theory Can Establish a Section 2 Offense

The potential inefficiencies of opportunistic patent lock-in are well known and undeniable,⁴¹ but the extent to which the FTC's single-firm hold-up theory will be accepted by the courts is an open question. The D.C. Circuit in Rambus explicitly refused to endorse the theory.⁴² Only one appellate decision has credited it.⁴³ This area of "law" is mainly defined by FTC settlements.⁴⁴ The Supreme Court cases recognizing antitrust theories in the standard-setting context involve competitors rigging SSO procedures, so while the Supreme Court has acknowledged the anticompetitive effects of distorting the standard-setting process and has held that such conduct can establish an antitrust offense, it has only done so in the context of classic horizontal behavior.⁴⁵ The Court has not confronted a case involving a single firm deceiving others or seeking to exploit loose disclosure provisions to gain an advantage. As discussed next, such cases are not a good fit for standard antitrust analysis because they turn overwhelmingly on the legality of the conduct in light of SSO rules, and not exclusively on competitive effects.

A. An Arbitrary Line that Must Be Drawn Somewhere

Whether antitrust has a proper role to play in limiting single-firm conduct in this area--and, by implication, in similar lock-in situations beyond the SSO context--starts with the basic elements of so-called "predatory" conduct under Section 2. For dominant-firm conduct to violate Section 2, the conduct must amount to "the willful acquisition or maintenance" of monopoly power, "as distinguished from growth or development as a consequence of a superior product, business acumen, *107 or historical accident."⁴⁶ Such so-called "exclusionary" or "predatory" conduct remains vaguely defined, however, even

in areas where the elements of monopolization are more clear--such as predatory pricing cases, where proof of below-cost pricing is necessary to establish that conduct is predatory.⁴⁷

The question, then, is how to determine whether conduct within an SSO crosses the line from merely opportunistic to “predatory.” That line must separate the type of conduct targeted in SSO cases (mainly, deception amounting to fraud) from conduct that may affect market-wide prices but does not raise Section 2 concerns. The problem is that, to avoid an ad hoc set of antitrust standards for such SSO abuse cases, the standards applicable to such conduct need to hew fairly closely to legal standards from other applicable areas of law, such as breach of contract, fraud, and equitable patent defenses. Doing so is also the only way to draw a meaningful line between conduct that is opportunistic but legal and conduct that is bad enough to amount to the sort of “willful” conduct Section 2 prohibits. Moreover, drawing such a line will often separate conduct that is unlikely to have marketwide effects from conduct that excludes rivals and forces buyers to pay prices higher than they thought they would have to pay.

However, recognizing that such non-antitrust standards of conduct, of necessity, establish the line between predatory and acceptable conduct means also recognizing that any line here is somewhat arbitrary and problematic. Normally, antitrust cases (including Section 2 cases) turn on competitive effects, not noneconomic legal rules from other areas of the law that, based on other values, separate bad (fraudulent) conduct from acceptable (opportunistic) conduct. Imposing a “fraud” element as a part of the proof for a Section 2 violation in the SSO context (or, by extension, in other deception cases that lead to “lock in” effects) is contrary to antitrust doctrine.⁴⁸ The “screens” imposed in other Section 2 cases are based on assessments *108 of competitive effects, not such arbitrary line drawing.⁴⁹ The requirement of below-cost pricing for predation is based on an assessment that low pricing should be encouraged and that long-term anticompetitive effects of such conduct (driving rivals out of business, followed by monopoly pricing) are unlikely.⁵⁰ The requirement that a refusal to deal make no economic sense but for its anticompetitive effects is based on the assessment (some would say the guess) that long-term efficiency is enhanced by giving single firms freedom to vigorously compete, even if such competition involves short-term efficiency losses caused by denying rivals the ability to compete.⁵¹

Accordingly, the line-drawing that must occur in SSO cases is fundamentally different from the line-drawing that occurs in other single-firm Section 2 cases. Nonetheless, before the D.C. Circuit’s Rambus decision, there was general agreement among enforcers and commentators that antitrust liability for deceiving an SSO turns in large part on whether conduct intentionally violates an SSO’s disclosure rules or amounts to an intentional misrepresentation.⁵² Indeed, objective standards appropriate for other types of dominant-firm conduct--such as (under Section 2) whether conduct objectively makes no economic sense but for its tendency to exclude rivals⁵³ or whether (under Section 1) conduct causes an anticompetitive effect, irrespective of intent⁵⁴--are not helpful in cases involving deception. It is *109 not helpful to ask whether Rambus’s conduct had any purpose other than to exclude rival technologies, because that was undoubtedly its sole purpose. Rambus sought monopoly power. Whenever a competitor disparages a rival or advocates its own products, it intends to exclude its rivals in some sense. And it is not helpful to ask whether the conduct was on balance anticompetitive--as the FTC framed the question in Rambus⁵⁵--because even if the standardization of a patented technology creates monopoly power, the question of whether that monopoly power results from “bad” conduct that should be subject to antitrust liability remains.

Presumably, the FTC would not target all unethical conduct as exclusionary where it has an anticompetitive effect, no more than the FTC would target a firm’s exploitation of SSO rules to gain competitive advantage, absent any evidence that the firm violated the rules. The FTC’s approach to SSOs takes a broad view of disclosure obligations, but even the FTC believes that there must be some duty to disclose to support a monopolization offense.⁵⁶ Accordingly, had the FTC concluded in Rambus that there was no duty (because the SSO permitted members to withhold disclosure of patents or pending patent applications), there would have been no case. As the FTC has recognized, adopting an approach that imposes duties beyond SSO rules, or that attempts to regulate SSO disclosure obligations, would prevent SSOs from determining on their own the optimal balance between disclosure obligations and other values, such as encouraging participation in standard-setting activities.⁵⁷ Therefore, while other types of conduct can violate the antitrust law irrespective of whether the conduct is otherwise legal (such as entering into an exclusive contract or buying all of your rivals), that analysis fails to fit this situation.

B. The Value of Adhering to Non-Antitrust Legal Standards

Given the somewhat arbitrary non-effects-based line that must be drawn, a valid question is whether this is an area where antitrust should play a role. If SSO disclosure rules define antitrust obligations, and parties can alter those rules to police *110 their own organizations, what role does antitrust have to play? Antitrust has a proper role in these cases, but it should

only supplement legal duties defined by SSO rules and other legal remedies, not supplant them. As argued below, where such remedies are likely to obviate monopoly power, antitrust courts should take that into consideration in determining whether the conduct violates Section 2.

It is too much to say, as have some economists,⁵⁸ that antitrust should essentially ignore SSO rules and focus almost exclusively on effects. Not all inefficiencies in private contracting amount to antitrust offenses, even if they produce marketwide effects. One can imagine different approaches to the patent hold-up problem, but their rejection supports a common view that privately negotiated rules in this area must be given effect if they are not the product of anticompetitive collusion. For example, antitrust standards could define as exclusionary certain nondisclosures of patent rights, regardless of whether an SSO explicitly requires disclosure. However, no one has pursued that argument, and the Rambus court would certainly reject it.⁵⁹ Also, SSO rules could be subjected to closer scrutiny under Section 1—which prevents agreements in restraint of trade--to ensure that all SSO rules protect adequately against patent hold-up problems by mandating broad disclosures. Under current standards, private organizations' rules largely determine whether conduct is anticompetitive. The same conduct (non-disclosure), with the same intent and effect (to secure a monopoly), may violate the antitrust laws under one set of organization rules but not another. Here again, however, there is general agreement, even among the antitrust agencies, not to regulate SSO rulemaking through the antitrust laws.⁶⁰ Accordingly, there is little reason to depart from the *111 SSO rules themselves, or from bodies of law--such as contract, fraud, or estoppel-- that define a firm's legal obligations in the SSO context.

Despite the FTC's recognition that SSO rules in large part define whether conduct is "exclusionary," the court in Rambus strongly suggested that the FTC sought to impose additional duties on Rambus. The FTC justified its conclusion that Rambus had a duty to disclose patent applications--despite a "staggering lack of defining details" regarding disclosure obligations in the SSO's rules⁶¹--based largely on "the fact that the challenged conduct occurred in the context of a standard-setting process in which members expected each other to act cooperatively."⁶² The court noted that the FTC's vague "expectation of cooperation" was not based on any pre-existing legal standard, because Rambus owed no fiduciary duty to the SSO's members.⁶³ Indeed, as the Federal Circuit concluded in another case involving Rambus's conduct, imposing such a duty could itself raise competitive concerns because SSOs include competitors.⁶⁴ Putting aside whether the court was right about the FTC's case, imposing duties beyond the SSO's rules in such a way is hard to justify for the reasons previously discussed. The line-drawing is somewhat arbitrary--defined, as it is, by the SSO's choice of disclosure obligations--so departing from the SSO's rules risks ad hoc result-oriented analysis.

The FTC's temptation to go beyond SSO rules and existing legal duties is not new. The FTC arguably did the same thing in the Dell Computer matter, in which the Commission found that Dell violated Section 5 of the FTC Act by failing to disclose certain patents to an SSO and then seeking royalties after its technology was incorporated in a standard.⁶⁵ In Dell, the FTC forced Dell to license its patents royalty-free based on the finding that the company should have known that it owned patents covered by the standard, despite a lack of evidence that it purposefully *112 sought to mislead the SSO or that the SSO's rules imposed a duty to search patent portfolios before certifying compliance.⁶⁶

Using antitrust to fill gaps in more permissive legal standards or vague SSO rules is tempting in cases like Rambus, where the conduct appears unethical and may cause anticompetitive effects. However, unclear "course of conduct" theories of liability or disclosure duties that extend beyond the requirements imposed by SSO rules may create uncertainty and limit the discretion of SSOs to define the legal obligations of SSO members. The approach is questionable because the justification for imposing such vague duties is unclear. Imposing heightened duties is hard to justify by the desire to remedy anticompetitive effects because, as pointed out earlier, the question is whether the conduct crosses some line separating the "exclusionary" from the legal, even if the conduct creates monopoly power. An SSO with no disclosure obligations would impose no antitrust disclosure duties, even though patent hold-up problems could occasionally result.

Creating broader potential liability under the antitrust laws than is supportable under more definite patent, contract, or fraud standards could also undermine incentives for SSOs to define members' obligations clearly. The danger is that antitrust standards could form a vague set of default rules that shift depending on the potential for competitive harm, with treble damages available as a deterrent. Excessive reliance on such antitrust fallbacks and penalties could make SSOs more complacent about self-policing and monitoring disclosure obligations. Meanwhile, if standards are unclear, the potential leverage gained by a patent holder seeking to withhold disclosure may make opportunistic conduct more likely even if antitrust liability is a threat. The alternative for the patent holder--full disclosure--may result in no royalties or significantly reduced royalties, making it worthwhile to roll the dice in the face of unclear rules. The end result could be increased uncertainty, disincentives to participate in SSOs due to that uncertainty, and a greater likelihood of litigation. Where antitrust

theories need not satisfy specific well-defined elements--like those that must be satisfied under contract or tort theories--prolonged litigation is more likely. A California district court decision involving Rambus illustrates this risk. The court ruled that Rambus's course of conduct and intent could establish an antitrust offense, despite the "vagueness" of the patent policy.⁶⁷

***113** Vague antitrust obligations may also complicate SSO efforts to balance disclosure obligations with incentives to participate in standards development. Such efforts should be encouraged.⁶⁸ Overly broad disclosure obligations may deter participation by imposing excessive costs on the SSO or its members or by creating excessive risks of forfeiture of intellectual property rights. SSO rules are explicit about the need to balance these competing priorities.⁶⁹ Indeed, businesses that participate in SSOs criticized the FTC's Dell decision because it could be read to impose liability for negligent nondisclosures or failures to search company patent portfolios, absent any requirement in the SSO rules to do so. They worried about the effect on incentives to participate in standard-setting activities.⁷⁰ To a certain extent, SSOs can respond to decisions like Dell or Rambus, as they have, by making their rules more explicit about the scope of disclosure duties. However, decisions that rely on vague duties and inferences of intent create uncertainty about the extent to which SSO rules will confine legal obligations. Indeed, post-Dell SSO rules illustrate the potential confusion.⁷¹ Some SSOs have rejected a "one-size-fits-all" approach, but others have noted vaguely that patent holders' obligations may not be defined strictly by SSO rules.⁷² Uncertainty about the scope of antitrust as a ***114** default rule will complicate efforts to define the scope of SSO members' obligations.

SSOs are well-positioned to correct rules that allow for abuse. Members of SSOs are typically repeat players with interests aligned with other manufacturers to avoid hold-up problems (although Rambus may be an exception), and SSOs appear well-suited to work out such problems, protect their members, and thereby protect consumers.⁷³ SSOs have an incentive to craft rules that minimize the dangers of patent hold-up problems.⁷⁴ As one leading treatise predicted, after the Federal Circuit's reversal of a judgment against Rambus in private litigation, "[o]ne likely effect of the decision will be for organizations to review their rules and rewrite them, at the least to clarify their scope and perhaps to broaden those rules to include patent applications."⁷⁵ Indeed, the SSO involved in the Rambus case revised its rules to make its patent disclosure obligations and policies clear.⁷⁶ Accordingly, adherence to SSO rules provides incentives for SSOs to correct them.

C. The Walker Process/Unocal Analog: Where to Draw the Line

Although it is tempting to reach out to target arguably unethical, opportunistic conduct that may cause anticompetitive effects, antitrust enforcement must consider other legal policies. Certainly, as the Supreme Court stated in the Walker Process case, "[t]he far-reaching social and economic consequences of a patent . . . give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."⁷⁷ But as Justice Harlan reasoned in his concurrence, the decision requires intentional and knowing fraud before procuring a patent can amount to a monopolization offense, as "a suitable accommodation in this area ***115** between the differing policies of the patent and antitrust laws."⁷⁸ Requiring a lesser showing for an antitrust offense "might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits."⁷⁹ Accordingly, after Walker Process □ the Federal Circuit has required a strict showing of common law fraud to support an antitrust claim based on the wrongf ul procurement of a patent.⁸⁰

The same considerations that support strict standards for Walker Process claims support strict standards for antitrust liability in the SSO context. Indeed, given the availability of non-antitrust remedies to protect SSOs and their members, antitrust policies are arguably less important. SSOs and their members may be able to invoke estoppel or fraud remedies. Those remedies do not involve treble damages and therefore pose a less serious threat of discouraging participation in standard-setting activities. They are also less likely to create incentives for challenging conduct that, while perhaps mistaken or opportunistic, is not egregious enough to warrant antitrust liability. Indeed, the FTC has justified its enforcement efforts in the SSO context in part based on its ability to tailor remedies to the nature of the violation.⁸¹ The problem is that antitrust liability standards should be clear and should apply equally to the FTC's enforcement actions and to private actions. Private plaintiffs with access to antitrust remedies are unlikely to settle for court orders that limit royalty payments.

The FTC's analysis of whether fraudulently petitioning a government standard-setting agency states an antitrust claim sets forth a framework that, if applied by analogy to purely private standard setting, would appropriately limit the scope of antitrust liability for statements made to SSOs. In the Unocal case, the FTC considered conduct similar to that in Rambus, but the allegedly misleading statements about patent rights were made to a California regulatory body that was considering ***116**

standards for emissions-reducing gasoline.⁸² The FTC alleged that Unocal advocated certain gasoline formulations to the regulator, that Unocal's statements led the regulator to believe that the technology was nonproprietary, and that the regulator adopted the technology standards in reliance on Unocal's intentionally misleading information.⁸³ After the regulator adopted the technology as part of a statewide emissions standard, and after refiners allegedly spent billions of dollars configuring their plants to produce gasoline in compliance with state regulations, Unocal sought royalties. A federal jury determined that Unocal's patents were valid and awarded Unocal 5.75 cents on every gallon of gasoline incorporating Unocal's technology.⁸⁴ The added cost to motorists amounted potentially to billions of dollars a year.⁸⁵

Accordingly, the potential harm caused by Unocal's conduct was severe, and the effect on competition was clear. Because a state agency imposed the regulations, non-antitrust legal remedies were likely unavailable. For the same reason, switching to other technologies was likely foreclosed. Given those circumstances, if potential distortion of the standard-setting process and potential anticompetitive effects are the concerns, it makes little sense to impose a higher standard for bad conduct in Unocal than in Rambus. While the test in Unocal is based on First Amendment concerns, the test depends on essentially the same considerations that must be balanced when determining the scope of liability in private standard-setting contexts. Unocal's pragmatic factors should guide enforcement in all such standard-setting cases.

The FTC's decision in Unocal thoroughly developed the appropriate Noerr-Pennington standard in a quasi-judicial standard-setting context.⁸⁶ The FTC determined that there must be proof of "deliberate misrepresentations that substantially affect the outcome of a proceeding or so infect its core to deprive the proceeding of *117 legitimacy."⁸⁷ The FTC explained that the standard for falsity is strict.⁸⁸ The falsity of any representation must also be "clear and apparent with respect to particular and sharply defined facts."⁸⁹ Finally, they "must be of central significance, such that it undermines the very legitimacy" of the proceeding.⁹⁰

As the FTC noted, the Supreme Court has made clear that, for a misrepresentation to constitute an antitrust offense in the administrative context, it must amount to "unethical conduct" or "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes."⁹¹ The FTC also invoked the Walker Process standard, under which the conduct must amount to "knowingly and willfully misrepresenting facts."⁹²

The FTC in Unocal considered multiple characteristics of the California regulatory agency in determining that an exception to Noerr-Pennington immunity applied to Unocal's misleading statements. Based on those characteristics, the FTC distinguished making misleading statements to the regulator from making misleading statements while lobbying a legislative or executive entity that retains broad discretion.⁹³ Lobbying is essentially a free-for-all where the petitioning right supports blanket antitrust immunity. As with private standard-setting organizations, which serve an almost quasi-governmental/private regulatory function and in some instances adopt standards that are incorporated into state regulations, the issue in Unocal was how to balance the right to advocate in front of the agency with antitrust-based standards of fair play. Each of the factors the FTC analyzed show that a strict misrepresentation standard should apply in the private, as well as the public, standard-setting context.

First, the FTC reasoned that an exception to Noerr-Pennington immunity applied for misrepresentations because the regulator would have expected truthful representations.⁹⁴ In the private standard-setting sphere, the basis for such an expectation *118 is less clear because SSOs include competitors and generally impose no fiduciary duty on members.⁹⁵ Accordingly, based on this factor alone, duties imposed on private SSO participants should be less exacting than in the regulatory context.

Second, the FTC reasoned that quasi-legislative bodies like the California regulator exercise more limited discretion in their decision-making than legislative bodies. When "discretion is substantially limited, there is a meaningful basis to define legitimacy and assess whether a misrepresentation has undermined it."⁹⁶ This factor also supports greater leeway for private SSO conduct than for the conduct at issue in Unocal. Private SSOs retain substantial discretion. As the Rambus decisions of the FTC and D.C. Circuit illustrate, it will often be difficult to determine what the "but for" decision of the SSO would have been. In Rambus, the FTC could not determine whether the SSO would have adopted a nonproprietary technology but for Rambus's nondisclosures.⁹⁷

Third, the FTC noted the reliance of the administrative agency on the petitioner's factual assertions.⁹⁸ As with the first factor, there is a stronger basis for such an expectation in Unocal than in the private SSO context. The absence of a general fiduciary duty in the private context makes the issue of reliance in cases of nondisclosures critically dependent on the duties explicitly set out in an SSO's rules. As explained above, the scope of that duty should remain defined by the SSO, not vague antitrust duties that depart from the duties that would otherwise apply under other legal standards, such as fraud or contract.

Fourth, the FTC noted that as activity moves from the political to the administrative arena, it becomes more feasible to trace the result of a false representation to the governmental action.⁹⁹ In the private context, tracing anticompetitive harm to the SSO's policy can be more difficult. A state mandate is far more likely to cause anticompetitive effects because it is a mandate. Companies forced to comply with the mandate and pay royalties to the patent holder may be unable to avoid the hold-up problem because the harm action is directly attributable to the state's decision. A private standard, however, may not cause the same harm if the private patent holder is unable to enforce its patent rights, as in Rambus.

***119** Accordingly, First Amendment aside, each of the factors analyzed in Unocal as support for recognizing a sham-based exception to petitioning immunity applies with even greater force in the private SSO context. Adhering to them in all cases would unify the analysis of single-firm efforts to deceive private, quasi-public, and public regulators into standardizing patented technology. The standards would also ensure that only truly "willful" conduct is subjected to antitrust liability.

D. Line-Drawing and the Monopoly Power Element

The FTC has justified its enforcement efforts in the SSO context based on the need to protect consumers, but often SSOs can police themselves and remedy violations of their rules.¹⁰⁰ Antitrust remedies are appropriate only if a would-be monopolist can enforce the legal rights giving its conduct an exclusionary effect. Monopolization requires the ability to exclude competition, not just harm to a few members of an SSO. If an SSO incorporates patented technology into an industry standard because of a nondisclosure by the patent holder, but purchasers can invoke patent, contract, or other remedies to avoid paying royalties, recover them, or significantly limit royalty payments, those remedies may prevent the exercise of monopoly power.¹⁰¹ Without the right to exclude, the conduct cannot "harm the competitive process and thereby harm consumers," as required for monopolization.¹⁰² Accordingly, adhering closely to non-antitrust-based standards makes sense because alternative remedies may limit or eliminate monopoly power.

If even a few significant purchasers can successfully resist claims of infringement, that may be enough to undermine whatever monopoly power the patent holder might otherwise have acquired. For example, in the Rambus litigation, the alleged infringers were large semiconductor manufacturers belonging to the SSO that adopted Rambus's patented technology as a semiconductor standard.¹⁰³ The first infringement suits were filed in 2000, but most semiconductor manufacturers resisted paying royalties. Seven years later, according to Rambus, firms paying licensing *120 fees accounted for less than 30% of worldwide semiconductor sales.¹⁰⁴ The two largest firms, Infineon and Samsung, which in 2006 represented nearly half of the semiconductor market by revenue, succeeded in forcing Rambus to dismiss infringement cases against them based on Rambus's alleged destruction of evidence in infringement litigation.¹⁰⁵ Where less than 30% of customers are even paying royalties, it is difficult to conclude that the patent holder is exercising monopoly power.¹⁰⁶ The firms paying royalties compete against major firms who aren't, limiting the royalties Rambus can demand.

As the Rambus case illustrates, competition between downstream manufacturers, many of whom resisted paying royalties, provides strong incentives for all manufacturers to invoke available legal remedies to limit licensing fees. Pressure on a patent holder can significantly limit the royalties it demands, because even one adverse judgment in an infringement suit can create precedent threatening the patent holder's rights with respect to other alleged infringers. And if firms with significant market share avoid paying royalties, the amount a patent holder can charge other firms will be limited by downstream competitive constraints. Indeed, some SSOs have adopted arbitration procedures for disputes over licensing commitments, which would provide a potential remedy for efforts to game the standards process to extract excessive royalties.¹⁰⁷ In such cases, arbitration may obviate monopoly power, and even if it does not, antitrust should not form a basis for collaterally attacking the arbitration process.

Accordingly, absent evidence that an alleged fraud will have an effect on competition marketwide, antitrust is an inappropriate remedy. Absent such proof, some firms may suffer, but consumers overall will not. To the extent that other remedies are unavailable because their liability standards are more exacting and more strictly enforce the terms of SSO rules, antitrust should not adopt vague duties that prohibit what other legal standards permit. When SSOs decide to risk hold-up problems, due to other priorities, courts should not impose disclosure obligations *ex post*.

***121 V. Conclusion**

Traditional monopolization principles--focusing on whether conduct is nakedly exclusionary or has an anticompetitive effect--do not provide a good fit for analyzing exclusionary deception in the SSO context. Because determining whether there has been an antitrust violation turns, even under the most aggressive enforcement approach, largely on the underlying duties imposed on participants in SSO's rules, going beyond those clearly defined duties risks an ad hoc, vague definition of antitrust obligations. Individual cases, such as Rambus, provide strong temptations to loosely analyze those duties and construe them in a way that provides a remedy for hold-up problems. Those temptations, however, should be avoided.

Footnotes

¹ Christopher Hardee is an Attorney in the Antitrust Division of the United States Department of Justice. J.D., 1994, Yale Law School. The views expressed here are solely those of the author and do not purport to reflect the views of the United States Department of Justice.

² Rambus, Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 469 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

³ Order Returning Matter to Adjudication and Dismissing Complaint, *In re Rambus Inc.*, No. 9302 (F.T.C. May 12, 2009), available at <http://www.ftc.gov/os/adjpro/d9302/090512orderdismisscomplaint.pdf>. After the dismissal, Richard A. Feinstein, director of the Bureau of Competition, reiterated the importance of the issues raised in the case:
While we remain disappointed by the decision of the Court of Appeals, we of course respect the Court's opinion and will move forward.... The standard-setting issues that were at the heart of this case remain important, both as a matter of antitrust policy, and in order to protect consumers, and we will remain vigilant in this area.
Press Release, Fed. Trade Comm'n, Statement in the Matter of Rambus (May 14, 2009), available at <http://www2.ftc.gov/opa/2009/05/rambus.shtm>.

⁴ Rambus, 522 F.3d at 459, 469.

⁵ J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Speech at the LSI 4th Antitrust Conference on Standard Setting & Patent Pools: Section 2 and Standard Setting: Rambus, N-Data, and the Role of Causation, at 2 (Oct. 2, 2008), available at <http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf>.

⁶ U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33 (2007).

⁷ See Mark A. Lemley, Intellectual Property Rights and Standard-Setting Organizations, 90 Cal. L. Rev. 1889, 1896 (2002) ("Some standards are extremely complex and technical in nature. For example, the set of application-programming interfaces that defines compatibility with the Microsoft Windows operating system is an industry standard; those who know and use the proper interfaces are compliant with the standard, and their products will "interoperate" with the Microsoft operating system. But standards need not be so sophisticated. Ordinary consumers use a wide variety of standardized products in everyday life. In the United States, electrical plugs and outlets are built to a particular standard for voltage, impedance, and plug shape. Without this standardization, no one could stay in a hotel room and have any confidence that his hair dryer would work in the hotel's outlet.").

⁸ See, e.g., Dennis W. Carlton & Ken Heyer, Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct, 4 Competition Policy International 285, 297 (2008). The authors are, respectively, the former Deputy Assistant Attorney General and the Economics Director at the Antitrust Division.

⁹ See, e.g., id. The concern is consistent with Professor Hovenkamp's skepticism about converting torts into antitrust violations. See Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice §7.13 (3d ed. 2005) (expressing the view that "[a]ntitrust claims based on business torts require extreme caution....").

¹⁰ See Susan A. Creighton et al., Cheap Exclusion, 72 Antitrust L.J. 975, 987-88 (2005). When the article was published, the authors held positions at the FTC's Bureau of Competition or had recently left the FTC.

¹⁰ See, e.g., Joseph Farrell et al., Standard Setting, Patents, and Hold-Up, 74 Antitrust L.J. 603, 661 (2007) (“[E]conomics suggests that the incentives even of ‘technology buyer’ members of SSOs to prevent hold-up may be inefficiently weak, and efficiency, including efficient rewards for innovation, may be well served by antitrust enforcement that goes beyond an enforcement mechanism for SSO rules.”).

¹¹ Id. at 603-04 (“In very broad terms, opportunism or hold-up arises when a gap between economic commitments and subsequent commercial negotiations enables one party to capture part of the fruits of another’s investment, broadly construed. Hold-up can arise, in particular, when one party makes investments specific to a relationship before all the terms and conditions of the relationship are agreed.”); M. Howard Morse, Standard Setting and Antitrust: The Intersection Between IP Rights and the Antitrust Laws, IP Litigator, May-June 2003, at 17, 22 (“[A] standard may invest market power in IP that would have little power absent adoption of the standard. That can be illustrated by the household plug example. If at the time the standard was adopted, one firm had a patent on a particular plug configuration when alternative configurations could have been adopted, then the choice of the standard may give that firm market power.”).

¹² In re Rambus, Inc., No. 9302, slip op. at 4 (F.T.C. Aug. 2, 2006), <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>, rev’d sub nom, Rambus, Inc. v. Fed. Trade Comm’n, 522 F.3d 456, 469 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

¹³ See *id.* at 4-5.

¹⁴ See *id.*

¹⁵ Id. at 17-18. The standardization of a patented technology does not alone create monopoly power. Cf. Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006) (holding that a patent does not give rise to a presumption of market power). Rather, the evidence would have to show that firms practicing a standard would not likely switch to an alternative technology, and that downstream competition between products incorporating a standard and products using an alternative technology would not likely prevent the owner of the standardized technology from charging monopoly prices. Patented technology that is incorporated into a standard will likely confer monopoly power, however, because the purpose and effect of industry-wide standard setting is the uniform adoption by firms in an industry of uniform technology standards. Uniform standards foster compatibility between different manufacturers’ products at different levels of the supply chain (e.g., between various chip makers’ and computer manufacturers’ devices). Such positive network externalities of common adherence to a standard may render technological alternatives non-viable, at least in the short term. Also, large investments associated with incorporating standardized technology into a firm’s manufacturing process may make switching expensive. See, e.g., Farrell et al., *supra* note 10, at 608.

¹⁶ Rambus Inc. v. Fed Trade Comm’n, 522 F.3d 456, 467 (D.C. Cir. 2008), cert denied, 129 S. Ct. 1318 (2009).

¹⁷ *Id.* at 463-64.

¹⁸ *Id.*

¹⁹ *Id.* at 466.

²⁰ *Id.* at 464.

²¹ *Id.* at 468-69 (noting a “staggering lack of defining details” in the SSO disclosure rules and suggesting that the FTC erroneously concluded that Rambus engaged in misrepresentation).

²² Rosch, *supra* note 4, at 6-10.

²³ Rosch, *supra* note 4, at 10.

²⁴ United States v. Microsoft Corp., 253 F.3d 34, 118-19 (D.C. Cir. 2001).

²⁵ Rosch, *supra* note 4, at 9.

²⁶ See Microsoft, 253 F.3d at 79.

²⁷ *Id.* at 80, 107.

²⁸ *Id.* at 79 (internal citation omitted).

²⁹ Rosch, *supra* note 4, at 8.

³⁰ 15 U.S.C. §18 (2006).

³¹ See *id.*

³² See *Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456, 466-67 (D.C. Cir. 2008), cert denied, 129 S. Ct. 1318 (2009).

³³ *Id.* at 461.

³⁴ See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) (reasoning that “there is a presumption in favor of a rule-of-reason standard” and that “departure from that standard must be justified by demonstrable economic effect ... rather than formalistic distinctions ...”); *LeeginCreative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2720-24 (2007) (overruling *Dr. MilesMed. Co. v. JohnD. Parke & Sons Co.*, 220 U.S. 373 (1911), based on lack of economic support for *per se* illegality of resale price maintenance).

³⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (outlining elements of predatory pricing, involving a firm pricing “below an appropriate measure of its rival’s costs” and the likelihood that such predatory conduct will be followed by “recouping its investment in below-cost pricing”).

³⁶ See, e.g., *Farrell et al., supra* note 10, at 605 (“While we focus primarily on ... deception or failure to disclose patents, a similar economic logic underlies some cases where patents were disclosed but users assert that the patent holder is not meeting its duty to license in a reasonable fashion.”).

³⁷ *In re Negotiated Data Solutions, LLC*, No. 051-0094, slip op. at 1-2, <http://www.ftc.gov/os/caselist/0510094/080122do.pdf> (Decision and Order) (F.T.C. Jan. 22, 2008).

³⁸ *In re Negotiated Data Solutions, LLC*, No. 051-0094, slip op. at 8, <http://www.ftc.gov/os/caselist/0510094/080122complaint.pdf> (Complaint) (F.T.C. Jan. 22, 2008).

³⁹ See In re Negotiated Data Solutions, LLC, No. 051-0094, slip op. at 1-2, <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf> (Dissenting Statement of Chairman Majoras) (F.T.C. Jan. 22, 2008).

⁴⁰ See supra notes 10-12 and accompanying text.

⁴¹ See, e.g., Creighton et al., supra note 9, at 987-88; Farrell et al., supra note 10, at 661.

⁴² Rambus, Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 466 (D.C. Cir. 2008), cert denied, 129 S. Ct. 1318.

⁴³ Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314-16 (3d Cir. 2007).

⁴⁴ See, e.g., In re Dell Computer Corp., No. C-3658, 121 F.T.C. 616, 618-19 (May 20, 1996); In re Negotiated Data Solutions LLC, No. C-4234, slip op. at 1, <http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf> (Decision and Order) (F.T.C. Sept. 22, 2008).

⁴⁵ See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (“Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.”); Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp., 456 U.S. 556, 571 (1982).

⁴⁶ Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

⁴⁷ See, e.g., Einer Elhauge, Defining Better Monopolization Standards, 56 Stan. L. Rev. 253, 253 (2003) (“Monopolization doctrine currently uses vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary.”).

⁴⁸ See Trinko, 540 U.S. at 408-09 (rejecting general duty to deal with rivals absent evidence of a pattern of past dealing suggesting that the refusal involved sacrificing short-term profits for longer-term monopoly power; Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (imposing a below-cost pricing screen as part of the test for predatory pricing). See generally Mark S. Popofsky, Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules, 73 Antitrust L.J. 435 (2006) (arguing that a unitary test for defining exclusionary conduct under Section 2 would be unworkable and that courts should select from the spectrum of Section 2 tests based on the particular conduct at issue in the case, consistent with decision theory principles). Cf. Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 464 (D.C. Cir. 2008), cert denied, 129 S. Ct. 1318 (“Even if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws’ reach.”).

⁴⁹ See Brooke Group Ltd., 509 U.S. at 221-23.

⁵⁰ Id.

⁵¹ See, e.g., Trinko, 540 U.S. at 407-08 (“Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”).

⁵² See, e.g., In re Dell Computer Corp., No. C-3658, 121 F.T.C. 616, 625-26 (May 20, 1996) (“[T]he Commission’s enforcement action is limited to the facts of this case, in which there is reason to believe that Dell’s failure to disclose the patent was not inadvertent. The 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.”); 2 Herbert Hovenkamp et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law §35.5b2, at 35-47 (2009) (“For those standard-setting organizations with no intellectual property policy or no disclosure requirement, failure to disclose a patent should not raise competitive concerns.”).

⁵³ Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004); Gregory J. Werden, Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense Test,” 73 Antitrust L.J. 413, 413 (2006).

⁵⁴ See Jonathan M. Jacobson & Scott A. Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, 73 Antitrust L.J. 779, 779-80 (2006).

⁵⁵ See In re Rambus, Inc., No. 9302, slip op. at 31 (F.T.C. Aug. 2, 2006), <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>, rev’d sub nom, Rambus, Inc. v. Fed. Trade Comm’n, 522 F.3d 456, 469 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

⁵⁶ Dell, 121 F.T.C. at 625-26.

⁵⁷ See Dell, 121 F.T.C. at 625 (“Other commenters asked whether the Commission intended to signal that there is a general duty to search for patents when a firm engages in a standard-setting process. The relief in this matter is carefully limited to the facts of the case. Specifically, VESA’s affirmative disclosure requirement creates an expectation by its members that each will act in good faith to identify and disclose conflicting intellectual property rights. Other standard-setting organizations may have different procedures that do not create such an expectation on the part of their members. Consequently, the relief in this case should not be read to impose a general duty to search.” (footnote omitted)).

⁵⁸ See, e.g., Farrell et al., *supra* note 10, at 658 (“SSO rules should not be the last word on whether conduct violates the antitrust laws--in particular, compliance with SSO rules should not prevent the imposition of liability.”).

⁵⁹ Indeed, the focus on whether conduct intentionally violates a private organization’s rules is a questionable standard for antitrust liability, because outside the context of attempted monopolization, Section 2 has moved away from an intent standard. See, e.g., Werden, *supra* note 53, at 426 (“Consistent with modern Section 2 jurisprudence generally rejecting an intent-based approach, the no economic sense test is not concerned with subjective motivation, but rather merely asks whether the conduct would have been rational but for any payoff from eliminating competition.” (footnote omitted)).

⁶⁰ Dell, 121 F.T.C. at 625 (Statement of the Federal Trade Commission) (“Some of those who commented on the Agreement Containing Consent Order suggested that this matter expresses an endorsement of certain types of standards (i.e., those including only non-proprietary technology versus those including proprietary technology) or of a certain form of standard-setting process. On the contrary, the Commission’s enforcement action does not address, and is not intended to address, any of these broader issues.”); Letter from Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, to Robert A. Skitol, Esq. (Oct. 30, 2006) (on file with author), available at <http://www.usdoj.gov/atr/public/busreview/219380.pdf> (evaluating proposed SSO rules under the rule of reason and indicating no intent to challenge rules that represented a “sensible effort by [the SSO] to address a problem that is created by the standard-setting process itself.”).

⁶¹ Rambus, Inc. v. Fed. Trade Comm’n, 522 F.3d 456, 468 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009) (internal citation omitted).

⁶² See In re Rambus, Inc., No. 9302, slip op. at 17 (F.T.C. Aug. 2, 2006), <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>, rev’d sub nom, Rambus, Inc. v. Fed. Trade Comm’n, 522 F.3d 456, 469 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

⁶³ See Rambus, 522 F.3d at 466-68.

⁶⁴ See Rambus, Inc. v. Infineon Techs., AG, 318 F.3d 1081, 1096 n.7 (Fed. Cir. 2003) (“[A] disclosure duty based on a fiduciary relationship seems unlikely. Rambus and Infineon are competitors. There is no basis for finding that Rambus and Infineon shared a fiduciary relationship solely by virtue of their JEDEC membership. Indeed, the implications of holding that mere membership forms a fiduciary duty among all JEDEC members could be substantial and raise serious antitrust concerns.”).

⁶⁵ See Dell, 121 F.T.C. at 624.

⁶⁶ See *id.* at 633 (Azcuena, Comm'r, dissenting).

⁶⁷ Hynix Semiconductor, Inc. v. Rambus, Inc., 441 F. Supp. 2d 1066, 1081 (N.D. Cal. 2006) (“In light of the patent law policies implicated, breach of the JEDEC disclosure policies, without more, cannot give rise to antitrust liability. To do so, particularly in light of the vagueness of the JEDEC disclosure policy at issue, would directly conflict with the protection afforded patentees and patent applicants to encourage innovation. The court finds that breach of JEDEC’s disclosure policy, by itself, is not sufficient to constitute antitrust liability. The court notes, however, that Hynix is not barred from asserting that Rambus’s overall course of conduct, which may include the circumstances and intent behind its decision to not disclose its patents and patent applications, violated antitrust laws.”).

⁶⁸ See Michael J. Schallop, The IPR Paradox: Leveraging Intellectual Property Rights to Encourage Interoperability in the Network Computing Age, 28 AIPLA Q.J. 234 (Summer 2000) (“[T]he variety of different standard-setting organizations with their different [intellectual property rights] policies serve as interesting labs of experimentation for purposes of the importance of [intellectual property rights] in generating innovation and participation from an economic incentive perspective,” and such “competition among these different standard-setting organizations suggests that the winners may partly owe their winning, assuming that there are clear winners and losers, to their selected [intellectual property rights] policy approach.”).

⁶⁹ See, e.g., Amy A. Marasco, Vice President and Gen. Counsel, Am. Nat'l Standards Inst., Presentation before the AIPLA: IPR and Standards 15 (Oct. 30, 2003), <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Speeches/PatentsAIPLA10-03.pdf> (“ANSI’s position is that a one-size-fits-all approach will eliminate necessary flexibility to devise individual patent policies that best accommodate the objectives of the standard-setting project and the consensus of its participants.”).

⁷⁰ See Dell, 121 F.T.C. at 634-35 (Azcuena, Comm'r, dissenting) (discussing comments and noting that they “reflect an unusual degree of concern and apprehension about the implications of the order. Several of the nation’s most significant standards-setting organizations have written to state their opposition to the broad implications of the order and its possible chilling effect on the participation of firms with broad patent portfolios in the standards-setting process.”).

⁷¹ See Marasco, *supra* note 69, at 5-7.

⁷² See Marasco, *supra* note 69, at 15 (rejecting suggestions for more definite disclosure duties under SSO disclosure rules in favor of flexibility, but noting that “recent enforcement actions have highlighted that patent policies and compliance with their terms do not define improper conduct from an antitrust perspective”).

⁷³ See, e.g., J. Gregory Sidak, Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations, 5 J. Competition L. & Econ. 123, 130-41 (Mar. 2009) (questioning the “patent holdup conjecture” in the context of SSOs, and arguing that allowing *ex ante* licensing discussions poses a risk of fostering oligopsony).

⁷⁴ See Schallop, *supra* note 68, at 288 (“Standard-setting organizations can build in procedural safeguards to attempt to minimize the ability of a dominant market player from manipulating a standards setting process. Companies can elect not to participate in standard-setting organizations that lack such procedural controls or fail to enforce the procedural controls. Accordingly, the competition in the *de jure* standard-setting process can self-remedy to a large extent the dangers associated with anti-competitive behavior by certain participants during the standards setting process.”).

75 Hovenkamp et al., *supra* note 52, §35.5.

76 See JEDEC Patent Policy, available at http://www.jedec.org/Home/patent_related/JEDEC_Patent_Policy Stmt.pdf; JEDEC Manual of Organization and Procedure §§8.3-4, Annexes A, B (2006), available at <http://www.jedec.org/Home/manuals/JM21N.pdf>.

77 *Walker Process Equip. Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)).

78 *Id.* at 179.

79 *Id.* at 180.

80 See, e.g., *Nobelpharma AB v. Implant Innovations Inc.*, 141 F.3d 1059, 1069 (Fed. Cir. 1998) (“Consistent with the Supreme Court’s analysis in *Walker Process*, as well as Justice Harlan’s concurring opinion, we have distinguished ‘inequitable conduct’ from *Walker Process* fraud, noting that inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim.”).

81 See, e.g., *In re Dell Computer Corp.*, No. C-3658, 121 F.T.C. 616, 626 (May 20, 1996) (“Finally, some commenters suggested that private litigation is sufficient to address this type of controversy. Although there has been private litigation for failure to disclose patent rights under equitable estoppel theories, enforcement of Section 5 of the Federal Trade Commission Act also serves an important role in this type of case, where there is a likelihood of consumer harm. Moreover, unlike other antitrust statutes, Section 5 provides only for prospective relief. In fact, the judicious use of Section 5--culminating in carefully tailored relief--is particularly appropriate in this type of case, in which the legal and economic theories are somewhat novel.”).

82 See *In re Union Oil Co. of Cal.*, No. 9305, slip op. at 3-5, <http://www2.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf> (F.T.C. July 6, 2004). Unocal also allegedly made misleading statements to other refiners, but the focus was on statements Unocal made to the state regulator. See *id.* at 5-6.

83 *Id.* at 3-5.

84 *Id.* at 7.

85 See Analysis of Proposed Consent Order to Aid Public Comment at 3, *In re Union Oil Co. of Cal.*, No. 9305 (F.T.C. June 10, 2005), available at <http://www.ftc.gov/os/adjpro/d9305/050610analysis9305.pdf> (noting a cost to the refining industry of more than \$500 million a year, 90% of which would be passed on to consumers through higher gas prices); Eric Peters, The Cost of “Clean Gas,” *National Review Online*, April 23, 2003, <http://article.nationalreview.com/print/?q=YWVmZTU0YTRiNTVIMWFjZjIwOGU5MTRlMTBmNjM3=> (quoting an FTC source as estimating that the total windfall to Unocal would amount to \$1.5 billion a year).

86 See Unocal, slip op. at 8-56.

87 *Id.* at 29.

88 *Id.* at 36 (“If false information is to be actionable in an antitrust suit, the falsity must be clear and apparent with respect to particular and sharply defined facts.”) (quoting 1 Areeda & Hovenkamp, *Antitrust Law* P 203f2, at 175 (2d ed. 2000)).

89 Id. (quoting 1 Areeda & Hovenkamp, Antitrust Law P 203f2, at 175).

90 Id.

91 Id. (quoting Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972)).

92 In re Union Oil Co. of Cal., No. 9305, slip op. at 36, <http://www2.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf> (F.T.C. July 6, 2004) (quoting Walker Process Equip. Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172, 177 (1965)).

93 Id.

94 Id. at 32.

95 Rambus, Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1102 (Fed. Cir. 2003); Rambus, Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 468-69 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

96 Unocal, slip op. at 33.

97 Rambus, Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 468-69 (D.C. Cir. 2008), cert. denied, 129 S.Ct. 1318 (2009).

98 Unocal, slip op. at 34.

99 Id.

100 See supra note 81 and accompanying text.

101 Analogously, in declining to decide whether Noerr-Pennington immunity “permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations,” the Supreme Court has cited to the availability of other relief. See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 61 n.6 (1993) (citing Fed. R. Civ. P. 60(b)(3), which allows a federal court to “relieve a party ... from a final judgment” for “fraud ..., misrepresentation, or other misconduct of an adverse party”).

102 See Rambus, 522 F.3d at 463 (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis removed)).

103 Rambus, 522 F.3d at 459-60.

104 See Memorandum of Points and Authorities in Support of Rambus’s Motion for Summary Judgment or Summary Adjudication on Manufacturers’ Monopolization Claims at 2, Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW (N.D. Cal. Oct. 17, 2007), available at <http://files.shareholder.com/downloads/RMBS/703311231x0x138486/693701FC-313E-4C8B-88EB-96085B0DC2E9/HynixVsRambus187.pdf>.

105 See Samsung Electronics Co., Ltd. v. Rambus, Inc., 523 F.3d 1374, 1377 (Fed. Cir. 2008).

¹⁰⁶ See, e.g., Hovenkamp, *supra* note 8 §6.2a, at 273 n.5 (citing cases rejecting allegations of monopoly power where market shares were 50% or less).

¹⁰⁷ See, e.g., VITA Patent Policy §10.5 (Oct. 30, 2006), <http://www.vita.com/disclosure/VITA%20Patent%C20Policy%C20section%C2010%20draft.pdf>.