Tumultuous times: the escalating US debate on the role of antitrust in standard setting

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'There is nothing more likely to start disagreement among people . . . than an agreement.'
E B White, essayist (1899–1985)

Introduction

On 8 September 2008, the US Department of Justice (DOJ) issued its long-awaited report on single firm conduct.[1] The report followed extensive hearings with the Federal Trade Commission (FTC) from June 2006 to May 2007 and was meant to assess what types of specific conduct by individual firms might violate section 2 of the Sherman Act. Notably, the FTC did not join the DOJ Report. In fact, a separate and dissenting statement by Commissioners Harbour, Leibowitz and Rosch was sharply critical. Claiming that the DOJ Report 'seriously overstates the level of legal, economic, and academic consensus regarding Section 2', the FTC majority said the DOJ's proposed standards 'would make it nearly impossible to prosecute a case under Section 2 of the Sherman Act.'[2] Further: 'At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.'[3] In a striking conclusion, the three Commissioners declared that the FTC 'stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report.'[4]

This disagreement between the two primary United States antitrust enforcement agencies is merely the most recent and dramatic in a pattern that has become increasingly apparent over the past two years. The agencies have taken opposing views, for example, on the antitrust implications of 'reverse payments' by pioneer pharmaceutical companies in patent settlements with their generic competitors;[5] whether the per se rule should be retained for resale price maintenance;[6] and the application of section 2 liability to 'price-squeeze' cases.[7]

The FTC Statement took note that the DOJ Report did not even consider 'all of the exclusionary practices that may be used to obtain or maintain monopoly power and cause harm to consumers', citing in particular the FTC's reverse payments cases and its *Unocal* standard-setting enforcement action.[8] The Commissioners had particular reason for chagrin at the DOJ Report's failure to mention standard setting as an active arena of antitrust enforcement against single firm conduct.[9] In a string of actions beginning with Dell Computer Corp. in 1996,[10] continuing with a 2002 complaint against Rambus and a 2003 action against Unocal,[11] the FTC has made alleged standard-setting abuses a major priority in its enforcement actions under both section 2 of the Sherman Act and section 5 of the Federal Trade Commission Act ('FTC Act').[12] The FTC's long-running (though currently unsuccessful) battle with Rambus,[13] discussed below, has been its flagship effort to combat IP licensing abuse in the context of standard-setting organisations ('SSOs').

Expanding its SSO campaign to non-participants in the SSO process, and sidestepping the substantive monopolisation hurdles of Sherman Act section 2, a split Commission recently brought (and simultaneously settled) a controversial enforcement action against Negotiated Data Solutions, LCC ('N-Data').[14] The action was based upon N-Data's pursuit of fair, reasonable and nondiscriminatory ('FRAND') licensing terms, in alleged repudiation of a substantially lower USD$1,000 per licence commitment made to the IEEE standard-setting body by a predecessor owner of the IP. [15]

N-Data has fomented a veritable stew of discourse in the months since January 2008, intensified by the DC Circuit's decision in *Rambus* barely three months later. The case brought into sharp relief a number of questions: (1) whether *N-Data* itself was an unwise antitrust intervention, leaving too-vague guidance for the future conduct of SSOs; (2) whether FTC enforcement of this sort will withstand scrutiny by the courts; and (3) whether the FTC will or should expand its enforcement under section 5 even further to encompass, for example, *ex-post* FRAND disputes. Whatever the outcome of this debate, there can be no doubt that the FTC intends to continue its aggressive efforts to protect the integrity of the standard-setting process. Their efforts carry two major risks: that agency intervention may, paradoxically, compromise the effective functioning of and broad participation in SSOs; and that the substantive policy and enforcement gap between the two US antitrust agencies concerning the proper application of antitrust law and policy to single-firm conduct may widen further.

FTC v N-Data

In a 3–2 decision dated 23 January 2008, the FTC settled an enforcement action against N-Data that limited the ability of that company to charge negotiated royalty rates for patents that had previously been integrated into a standard adopted by the Institute of Electrical and Electronics Engineers ('IEEE'). In its analysis accompanying the proposed settlement, the majority pointed out that the original IP owner, National Semiconductor Corporation ('National') was an active participant in the SSO's working group, which was considering various alternative technologies for the new 'fast ethernet' standard. In choosing National's 'NWay' technology, the IEEE relied upon the owner's letter committing to license its NWay technology to 'any requesting party', on a nondiscriminatory basis, for a one-time fee of USD$1,000. Thereafter, fast ethernet became the dominant standard for local area networks, 'and users are now locked into using NWay technology due to network effects and high switching costs.'[16]

In 1998, four years after National's commitment, it assigned the relevant patents to Vertical Networks, which had been given a copy of the 1994 commitment letter. N-Data bought the patents from Vertical in late 2003, allegedly aware of National's 1994 letter of assurance to the IEEE. In the meantime, however, Vertical had in 2002 sent a letter to IEEE proposing to deviate from National's 1994 commitment by making the patents available 'on a nondiscriminatory basis and on reasonable terms and conditions including its then current royalty rates.'[17] After some negotiation with IEEE about the text, Vertical's letter was posted on IEEE's website and Vertical proceeded to enforce its new licensing terms against certain target companies, including many large computer hardware manufacturers. Vertical, and later N-Data, both threatened and prosecuted legal actions against companies that had refused to pay its new royalty demands. While N-Data said that it sought only FRAND license terms, the FTC asserted that the royalties demanded were far in excess of the original National commitment to license for USD$1,000.

The FTC majority first charged that N-Data's actions constituted unfair competition under section 5 of the FTC Act, while acknowledging two 'limiting principles' of that statute. The first, requiring oppressive or coercive conduct, was arguably met by N-Data's 'patent hold-up' of firms that were locked into an existing standard.[18] The second principle requires an adverse effect upon competition, which was also satisfied by higher licensing fees than the USD$1,000 commitment by National and the threat posed by such conduct to the very process of standard setting.[19] Acknowledging that a 'mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under section 5,' the majority emphasised the 'potential' that N-Data's conduct would 'undermine the standard-setting process.'[20] The majority conceded that 'some may criticise the Commission for broadly (but appropriately) applying our unfairness authority' to this case.[21]

The majority also concluded that N-Data's conduct constituted an unfair act or practice under the consumer protection prong of Section 5.[22] An unfair act or practice is one 'likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'[23] The conduct here met those standards, argued the majority, because the increased royalties demanded by N-Data might result in millions of dollars in excess payments from those practising the standard,[24] who often 'have an incentive to pass along higher costs to the ultimate consumers who purchase the products.'[25] Further, there was no apparent 'countervailing benefit' to competition or consumers, and participants in the IEEE were 'locked into the standard' with 'no way to avoid the threatened injury posed by the demands that they faced.'[26] The Commission was careful to caveat that 'merely breaching a prior commitment is not enough to constitute an unfair act or practice under Section 5';[27] but the standard-setting context and lock-in effect, coupled with widespread use of the standard, 'are important factors in this case.'[28]

Commissioner (now Chairman) Kovacic dissented in *N-Data*, criticising the majority for not clearly explaining the delineation between the two prongs of Section 5.[29] He further suggested that the Commission had been less rigorous analytically because N-Data had made it clear that it could not and would not litigate the matter. In addition, he pointed out that since many states rely on the FTC Act in construing their comparable state laws, it was not at all certain that a rash of private litigation seeking trebled damages would be avoided – one of the majority's points in relying on section 5, as distinct from section 2 of the Sherman Act.[30]

Chairman Majoras wrote a more comprehensive dissent, primarily arguing that the proscriptions of section 5 should not reach conduct that does not violate either the Sherman or the Clayton Acts.[31] Her dissent is a template for most of the issues raised by this controversial decision. She asserts a 'scholarly consensus' that the Sherman and Clayton Acts are sufficient to address all conduct warranting competition enforcement, noting that the Commission has only rarely gone beyond those statutes – such as in invitations to collude that, if not consummated, do not violate section 1.[32] Among the points made by Chairman Majoras: (1) there are no allegations that National deceived IEEE members at the time of its 1994 licensing offer; (2) between 1994 and 2002 other IEEE members changed or clarified terms in their letters of assurance; (3) when IEEE passed a bylaw making patent letters irrevocable, it did not expressly apply retroactively to N-Data's conduct; (4) when Vertical submitted its new letter in 2002, IEEE's patent administrator did not object to the increased licensing fees, despite requesting changes to other parts of the letter before publishing it on the IEEE website; and (5) there is doubt that N-Data had market power, because until Vertical's letter in 2002, no company had in fact requested a licence to the NWay technology, and since then only one company had paid 'materially' more than the USD$1,000 committed to by National.

Finally, Chairman Majoras concluded that the facts did not even satisfy section 5's requirements for unfair methods of competition or unfair acts or practices. She pointed out that N-Data had offered a new bundle of IP rights, somewhat broader than the patents on which National's 1994 letter was based, and it offered those licences on FRAND terms. Further, because IEEE knew that its members were making changes to their patent letters and could have acted earlier to stop that conduct, the SSO was in fact able to protect its interests and had simply failed to do so. Finally, the 'consumers' in this case were large, sophisticated computer manufacturers, not the small and defenceless entities that the FTC had traditionally sought to protect under its unfair act or practices jurisdiction.[33]

Rambus decision by the DC Circuit

The FTC majority's robust wielding of section 5 in *N-Data* was quickly thrown into question by the District of Columbia Circuit's decision on 22 April 2008, rejecting the FTC's findings of liability in its six-year old *Rambus* case.[34] The tortuous history of this FTC action has been well-documented and need not be repeated here.[35] In brief: In 2006, after an Administrative Law Judge had ruled against the FTC, the Commission in its own *de novo* adjudication found Rambus liable under both Sherman Act section 2 and FTC Act section 5 for failing to disclose certain IP in breach of its duty of good faith to the JEDEC standard-setting body. Rambus had participated in the SSO from 1992 to June 1996, while certain DRAM standards were being developed, without disclosing IP that was incorporated in standards eventually adopted by JEDEC. In 2002, after Rambus sought to enforce its patents, the FTC accused it of monopolising several distinct DRAM design markets.[36] A raft of private litigation followed, much of which is ongoing.[37]

On Rambus's appeal of the FTC's decision, the issues were neither market definition nor market power, both of which Rambus conceded. Rather, the question was whether Rambus's failure to disclose its IP while participating in JEDEC was in fact deceptive and so constituted an unlawful acquisition of that monopoly power. The DC Circuit found not.[38] Interestingly, the FTC had stated its theory of liability in the alternative: But for Rambus's deceptive nondisclosure of its IP, JEDEC either (1) would have chosen an alternate technology for the standards, or (2) would have required Rambus to commit to FRAND licensing terms before adopting a standard incorporating the Rambus technology. The appellate court found the evidence insufficient to show that JEDEC had or would have chosen an alternative technology for its DRAM standards. On that theory, the court remanded the case to the Commission for further evidentiary proceedings.

The lost opportunity to secure a FRAND commitment, however, was found by the DC Circuit to be legally insufficient as an antitrust claim. The FTC failed to show anti-competitive harm, because an 'otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.'[39] There is no violation of the Sherman Act where the competitive process was not affected, notwithstanding higher prices to consumers.[40] The SSO's mere 'loss of an opportunity to seek favorable licensing terms is not as such an antitrust harm.'[41]

The FTC may well seek review of this ruling by the Supreme Court.[42] It may also, on remand, continue to pursue Rambus solely under section 5 of the FTC Act. The DC Circuit, however, offered no comfort for that course of action. Agreeing with the Administrative Law Judge's 2006 ruling, the court observed that JEDEC's disclosure requirements and duties 'suffered from a staggering lack of defining details,' leading to 'serious concerns about strength of the evidence' that Rambus actually deceived JEDEC.[43]

The DC Circuit's decision in *Rambus* undercuts the FTC majority's position in *N-Data* and cautions against expansive Commission enforcement against standard-setting abuses. First, the market power acquired by National when its technology was incorporated into the IEEE standards involved no deception, failure to disclose, or other misconduct. National's monopoly position, which was later assigned to N-Data, was lawfully acquired – just as Rambus acquired its monopoly lawfully, even assuming deception by it, in the absence of competing alternative technologies that the SSO might have chosen. An argument remains that N-Data, by reneging on the original USD$1,000 licensing commitment, acted unlawfully to *maintain* its lawfully acquired monopoly; but the chain of causation back to alleged harm to the competitive process in the original standard-setting process is tenuous – as suggested by the Commission's reliance on section 5 and the two dissenting voices in *N-Data*.

Secondly, the factual record in *N-Data*, as in *Rambus*, suffers from ambiguities in the rules and conflicting practices within IEEE. Since other IEEE members had revised initial commitment letters without objection, the organisation had no problem posting Vertical's new licensing terms, and new rules forbidding changes to licensing commitments were not retroactive, arguably neither Vertical nor its successor N-Data breached clear or established rules of the IEEE – or at least that any breach was not so egregious as to threaten the integrity of the SSO process. Absent both deception within the SSO and a clear and serious breach of the SSO's rules, even a section 5 claim for unfair acts of competition might not survive judicial review in a similar case. Finally, if the only harm is higher licensing royalties, which under *Rambus* and *Discon* does not support a section 2 claim, should a section 5 claim stand – particularly where the defendant, like N-Data, was proposing to license on a FRAND basis?

Concerns with *N-Data* raised by public comments

Literally as the DC Circuit published its opinion in *Rambus*, sixteen entities were in the process of filing public comments with the FTC on its proposed action and remedial order in *N-Data*.[44] Six, including filings by the American Antitrust Institute, state attorneys general, and Dell, Inc, were fully supportive of the FTC's decision, expressing deep concern over the danger of patent holdups by IP successors in interest.[45] The majority of comments, however, sought 'clarification' of the Commission's decision or sounded warnings about harm to the SSO process arising from an overly broad reading (or application) of *N-Data*. In fact, three of four commenting SSOs fell into this camp – including IEEE, the putative victim of N-Data's conduct.

IEEE's comments described in some length both its process for setting standards and its IP disclosure and licensing policies, acknowledging that at the time National gave its original assurance of USD$1,000 per licence, the irrevocability of such letters was only an 'implicit obligation', which has since been made express.[46] The SSO opined that 'alternative' letters of assurance should remain permissible, since some might find them advantageous to original commitments.[47] Other of IEEE's comments reflected a concern with possible application of the decision to FRAND policies and issues. For example: 'As a matter of policy, the IEEE-SA makes no determination of, and takes no position on, the reasonableness of royalties or other license terms.'[48] In commenting on the FTC's 'compromise' permitting N-Data to charge USD$35,000 to implementers who fail to accept the original offer, IEEE does 'not understand the Commission to be adopting a rule or stating a principle' that such an amount would always be 'reasonable.' Further, IEEE made a point of noting that the Commission 'has made no finding as to the reasonableness' of the original USD$1,000 licence fee; and that 'this case does not present' the issues of licences claimed not to comply with RAND.[49]

Other SSOs were more direct in seeking to limit the interpretation or application of *N-Data*. The Telecommunications Industry Association ('TIA') insisted that the IP policies of SSOs 'must be both flexible and predictable. A flexible SDO policy is necessary to accommodate the various participants' objectives and business models.'[50] In this matter, the TIA was concerned that:

> '[U]nless clarified, the Commission's decision in *N-Data* will cause uncertainty concerning the legal ramifications of standards development activities that may chill the willingness of parties to participate in the process. Further, because SDO rules and policies reflect a balancing of competing, if not conflicting interests and trade-offs among the members, such policies should not be upset after they are developed merely because one party subsequently asserts they are unfair.'[51]

The TIA warned that the FTC's decision might be used to limit the FRAND licensing policies of TIA and many other SSOs, or to suggest that SSOs should start determining what constitutes 'reasonable' royalties or terms.[52] Citing its own policies to the contrary, TIA sought clarification that licensing commitments in SSOs did not have to 'automatically apply to all evolutions of the standard in question or to any and all of the SDO's standards'; that TIA's RAND policy permitting a licence to be made available only on a reciprocal basis was allowable; and that licencees were not free, having failed to seek a RAND licence, to avoid an infringement claim merely because of the patent-holder's commitment that it would make such licences available.[53]

Others echoed a concern with overly broad application of *N-Data* and a fear that participation in SSOs might be discouraged. The Alliance for Telecommunications Industry Solutions ('ATIS') urged that the FTC 'employ its Section 5 powers judiciously' and that *N-Data* be 'limited to the specific facts involved.' An 'elusive' unfairness standard could be misused by firms, or even if used in good faith could increase the disputes among standards participants' which would 'hurt the standards process' and 'slow the development of standards'.[54] ATIS strenuously opposed a per se liability for changing an initial licensing assurance: 'A number of legitimate reasons exist that would justify and support such a change, and a per se rule would cause an imbalance among the varied interests' of SSO participants. Where SSO policies – like those of ATIS now and IEEE at the time of National's 1994 commitment – do not make assurances irrevocable, 'exposing standards participants to potential legal claims based upon broad concepts of fairness. . . would create a minefield of problems that would be antithetical to effective standards development.'[55]

The ABA's Section of Science and Technology Law also worried about FTC intervention in every SSO case in which 'a patentee arguably engages in unfair competition'.[56] Citing the importance of SSO flexibility in its IP policies, because SSO stakeholders 'operate under different business models or have different objectives', the Section sought a fuller factual record on why, eg, the licence required of N-Data was not limited to essential claims, included subsequent improvements and enhancements, and precluded all other terms that might be reasonable and non-discriminatory.[57] The Section's two basic concerns: (1) If broadly read to undercut IEEE's policies, the decision would create uncertainty in SSOs that 'could discourage patentees from participating in the standards development process . . .'; and (2) the FTC or private parties might use the decision 'to attempt to modify the [SSO's] rules retroactively'.[58]

The American Intellectual Property Law Association ('AIPLA') agreed with ATIS that 'changes in licensing terms may be reasonable and justified under certain circumstances', and joined in warning that 'the Commission should be cautious in exercising jurisdiction under section 5 in cases involving disputes between well-armed competitors, as appears to exist here'.[59] Noting the difference between prior FTC cases against Dell, Unocal and Rambus, all involving deceptive conduct within the SSO, AIPLA urged that the record for 'coercive' or 'oppressive' conduct, including real consumer harm and the inability of implementers to protect themselves, should be well developed before FTC intrusion into the SSO process. 'The SSO will often be in the best position to balance the various competing interests in the standards development process.'[60] Requiring an initial licensing assurance to cover subsequent improvements, moreover, 'may in many cases discourage patent owners from developing improvements that will benefit implementers and consumers'.[61]

Finally worth considering were comments filed by Intellectual Ventures ('IV'), which came from a much different perspective. IV described itself as an inventor, investor in inventors so that they may conduct research, and an acquirer of IP from 'a wide variety of sources'.[62] IV accepted the FTC's invitation to comment on whether state treble-damage litigation might ensue from this section 5 enforcement, responding with a vigorous 'yes,' and explaining why.[63] It was therefore important, IV urged, to lessen the risk of misinterpretation or confusion about the decision, which might otherwise discourage patent acquisitions and licences or lower the prices paid, thereby devaluing the return from 'investment in innovation', and lessening innovation itself.[64] In particular, IV urged the Commission to clarify that N-Data had actual knowledge of National's 1994 commitment at the time it acquired the patents, and confirm such knowledge as requisite to N-Data's liability under section 5. IV joined the refrain of those fearing extension of *N-Data* to 'reasonableness' disputes under the RAND licensing policies so typical in SSOs.[65]

AAI Petition re Rembrandt, seeking expansion of *N-Data* to FRAND disputes

Some of the public comments, in seeking to limit or clarify *N-Data*, may have had one eye on a petition filed with the FTC barely a month after *N-Data* was announced. On 26 March 2008, the American Antitrust Institute ('AAI') petitioned the FTC to expand its enforcement in the standard-setting context by seeking an investigation of Rembrandt IP Management ('Rembrandt').[66] Like N-Data, Rembrandt is a non-practising entity ('NPE'), in the business of acquiring patents and licensing them for maximum returns.[67] Also like N-Data, it is the successor in interest to the original SSO participant, AT&T, which allegedly committed to FRAND licensing when its technology was incorporated in a digital television standard. AAI claims that Rembrandt has reneged on that commitment and is now engaged in a patent holdup, thereby violating both section 2 and FTC Act section 5; it seeks to have the FTC investigate and prohibit Rembrandt from enforcing its patent unless it as the IP owner has first offered FRAND terms.[68]

AAI's Petition is a thorough and persuasive argument for antitrust liability, though it acknowledges some weaknesses. For example, the Petition does not assert actual knowledge by Rembrandt of the prior FRAND licensing commitment, but 'at least constructive' knowledge.[69] And it strains to establish causation of monopoly power through later repudiation of a predecessor's commitment to the SSO.[70] Relying on *N-Data* – but filed just weeks *before* the DC Circuit's decision in *Rambus* – AAI's argument for liability under both section 5 and section 2 of the Sherman Act was uninformed by the DC Circuit's decision.[71]

The AAI Petition is most noteworthy in its attempt to have the FTC extend its enforcement reach beyond *N-Data*, which dealt with a clear change to a fixed dollar royalty commitment, to disputes about compliance with FRAND licensing commitments. FRAND, by its nature, is an inherently vague benchmark for licensing terms. Most SSOs rely on FRAND in their IP licensing policies,[72] but eschew any role in determining what those rates are or should be, or whether FRAND obligations have been breached.[73] While the literature is replete with suggestions about what 'reasonable' and 'nondiscriminatory' should mean, there is little widespread consensus.[74] The meaning could differ, in any event, depending on the context and specific wording of the particular SSO's policies.[75]

Absent *ex-ante* commitments on licensing terms within the SSO deliberations, courts have become the ultimate arbiters of what 'fair, reasonable and nondiscriminatory' licensing terms should be. Patent courts have for years been determining reasonable royalties after findings of infringement, but there is little precedent in antitrust or SSO litigation. Some definition within the SSO realm may be forthcoming in the private antitrust litigation brought by Broadcom, which has challenged whether Qualcomm's licensing of its WCDMA wireless patents complied with its SSO-based FRAND obligations.[76] In confirming that Broadcom adequately stated antitrust claims last year, the Third Circuit Court of Appeals was 'unpersuaded by Qualcomm's argument that antitrust liability cannot turn on so vague a concept as whether licensing terms are 'reasonable', . . .'[77] Nevertheless, the number and complexity of differing markets, technologies and competitive conditions, overlaid with asymmetric licence terms, 'early adopter' pricing, differing IP bundles and varied applications all make daunting the task of determining FRAND compliance as part of an antitrust analysis.

For good reasons, then, antitrust agencies have been reluctant to undertake reasonable royalty determinations – with the notable exception of the FTC's remedial order in *Rambus* last year, which set maximum royalty rates (and happily did not have to deal with the 'nondiscriminatory' issue).[78] Regardless of agency inclination or capability, stacking FRAND issues on top of the already-unsteady antitrust infrastructure represented by the 3–2 decision in *N-Data* may be an unwise and premature extension of FTC enforcement – particularly given the already divergent views between the DOJ and FTC. The major SSO participants, moreover, would seem quite able to protect their licensing interests in the courts, if the Broadcom and Nokia challenges to Qualcomm, and Intel's suit against N-Data, are any indication. Finally, while litigated disputes on FRAND have been thus far infrequent, the issue is clearly arising more frequently. In addition to the multi-headed Qualcomm litigation and the FTC's laser focus on SSO abuse, the European Commission recently was convinced to enter the SSO arena with a Statement of Objections issued to Rambus on 30 July 2007, concerning possible infringement of Article 82 arising out of the activities challenged by the FTC.[79] Shortly thereafter, on 1 October 2007, came the EC's announcement of formal proceedings against Qualcomm.[80] As the number and notoriety of FRAND challenges increases, one can only expect private parties to seek out every available forum to gain leverage during high-stakes licensing negotiations. As a government agency with limited resources, the FTC might be expected to tamp down the temptation by every plaintiff with a FRAND dispute to present its antitrust concerns to the Commission.

The FTC stands undissuaded

Neither the dissenting voices in *N-Data*, the public comment warnings nor the *Rambus* defeat seem to have lessened the FTC's appetite for applying section 5 to various forms of IP abuse in the standard-setting context. On 23 September 2008, for example, the Commission approved the final consent order in *N-Data*, adding no clarifications or limitations to the statement and analysis proposed on 23 January.[81] In an interview published in August, moreover, Chairman Kovacic stated that despite *Rambus*, 'I expect the FTC to continue to look for good cases involving standards'.[82]

Most striking, however, was a paper presented in May by FTC Commissioner Rosch, one of the 3–2 majority in *N-Data*.[83] Assailing the competitive threats posed by NPEs – firms that do not themselves make, use or sell a product or service but hold intellectual property rights for licensing to others[84] – the Commissioner suggested a broad future application of section 5. He commented favourably on extending antitrust liability to those he broadly defined as 'patent trolls,'[85] even outside the standard-setting context. A challenge may be appropriate under the Sherman Act, he argued, even where an NPE does nothing more than purchase IP, wait for others to develop products that may infringe, and then assert those (presumptively valid) patents against the infringing firms. Describing this scenario as a 'patent holdup', Commissioner Rosch posits that 'the troll's conduct would be subject to challenge under the *Singer* and *Kobe Pump* theories' discussed in his paper.[86] The Commissioner acknowledged that 'neither the Commission nor the Justice Department has ever vindicated that theory in an appellate court'; even so, such conduct would at least be subject to challenge on a stand-alone section 5 basis if there were evidence of anti-competitive intent or the absence of a legitimate business purpose.[87]

Since the primary purpose for an NPE is typically to license its IP for maximum returns, it is unclear if any further intent would be required for NPE liability under this view of section 5. One worrisome clue may be Commissioner Rosch's repeated references to NPEs as trolls lying 'in wait' for others to be locked in before asserting their IP.[88] The implication is that mere delay in asserting the NPE's legitimate IP rights – even absent any misconduct harming the standard-setting process – may be sufficient, if by then some are 'locked in' to their infringing use, to convert an NPE's conduct from benign to exclusionary, or 'oppressive' under section 5.[89]

Commissioner Rosch concedes that the application of section 5 to 'patent trolls' outside the standard-setting context is 'more problematic' than otherwise.[90] It is fair to say, however, that his recent paper shows no hint of reticence in pushing toward the outer bounds of section 5 – no matter the reactions to *N-Data* and the appellate decision in *Rambus*.

Further divergence with the DOJ?

If *N-Data* proves to be the harbinger of a freshly expanded FTC use of section 5 to attack perceived SSO abuse, the antitrust policy gap with the DOJ discussed in the Introduction to this paper can only become wider. First, the DOJ is bound by section 2 of the Sherman Act, which has traditionally underlain most enforcement by the FTC under section 5 of the FTC Act. To the extent the agencies pursue separate enforcement against SSO abuse under different statutes, and the FTC takes section 5 well beyond the bounds of section 2, differences in liability outcome threaten the clear business and SSO guidance that both agencies have sought to provide. The resulting uncertainty could damage standard setting and the very competition and innovation that SSOs facilitate.

Secondly, apart from the DOJ's silence on standard setting in its 8 September report on single firm conduct, there is reason to believe that the DOJ shares the view that agency intrusion could damage rather than protect the standard-setting process. In a paper presented to the ABA Antitrust Section Spring Meeting this year, Deputy Assistant Attorney General David Meyer addressed the question: when is patent holdup in the SSO context 'an *antitrust* problem?'[91] Describing the Division's perspective: 'Antitrust has a role to play, but it should be a supporting player, not the main event.'[92] AAG Meyer argued that SSOs should have the flexibility to fashion their own policies and protections against patent holdup. He cited rule-of-reason treatment for *ex ante* discussion of licensing terms or limitations and the encouragement offered such efforts by the Department's business review letters, such as those issued to VITA and IEEE.[93] But just as antitrust should not deter SSOs from experimenting with such mechanisms to deter holdup, 'standards users should not look to antitrust as an omnipresent shield against the desire of patent owners to collect royalties . . . . If antitrust claims are too easy to assert, antitrust will threaten the efficiency of the standards development process.'[94] Where statements are not objectively false, or omissions are made absent any clear duty to disclose during the SSO process, a continuing threat of trebled damages or caps on royalty rates would cause IP holders 'to think twice about participating'[95] in SSO activities. In sum, antitrust should not impose liability:

> 'every time the mechanism chosen by the SDO fails to avoid hold up, and a decision maker (judge, jury or Commission) believes the resulting price charged was excessive. Instead, antitrust should focus on the propriety of the SDO *process* itself, and . . . impose liability only where competition has been harmed.'[96]

It may be that the FTC's aggressive use of section 5 in standard-setting is more in harmony with the EU's approach than with that of the DOJ today; the progress of *Qualcomm* and *Rambus* before the European Commission will reveal more about that. For now, in the US, the two agencies have clearly different views about how much intervention is wise concerning single-firm conduct in general, and standard-setting in particular. That difference is only partly explained by the FTC's unique authority under section 5 of the FTC Act.

As SSOs take further advantage of *ex ante* licensing latitude and business review letters; as the intricate dynamics and wide variances among SSOs are better understood; as the flood of 'bad' patents recedes in the face of Supreme Court decisions, Patent and Trademark Office changes and reform legislation;[97] as we see whether private treble-damage litigation ensues after *N-Data*; and as further appellate guidance comes forward in *Rambus*, *Qualcomm* and other litigation; the need for the FTC, alone under section 5, to pursue SSO enforcement may prove a lessened imperative. In the meantime, SSOs and their participants would be well served by cautious intervention, increased guidance about their antitrust risks[98] and more consistency by the two US antitrust agencies in addressing unilateral conduct.

Notes

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1 US Dep't of Justice, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act' (2008) (hereinafter 'DOJ Report').

2 Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice, 8 Sept 2008, at 1, 5, available at **www.ftc.gov/os/2008/09/080908section2stmt.pdf**. (hereinafter 'FTC Statement').

3 *Ibid* at 1.

4 *Ibid* at 11. Chairman William Kovacic, the other current Commissioner, was far more politic in describing his disappointment in the DOJ Report. Noting that 'dominant firms today have relatively broad freedom to choose pricing, product development, and marketing strategies as they please', he concluded that 'a proper appreciation' for the policy trends inspired by the Chicago and Harvard Schools' emphasis on modern economic theory and efficiencies 'ought to inspire caution before one embraces the proposition that US antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive liability rules.' Dissenting Statement of Federal Trade Commission Chairman William E Kovacic, 8 September 2008, at. 3–5, available at **www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf**.

5 See, eg, *Schering-Plough Corp v FTC*, 402 F3d 1056 (11th Cir 2005), cert denied, 548 US 919 (2006).

6 Commissioner Harbour issued an unusual 'Open Letter' urging the Supreme Court to retain the *Dr Miles* rule as it was deciding to reject per se treatment of resale price maintenance in last year's *Leegin Creative Leather Products v PSKS, Inc*, 127 S Ct 2705 (2007), available at **www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf**.

7 The FTC declined to join the DOJ recommendation that the Supreme Court review the Ninth Circuit's decision in *linkLine Commc'ns, Inc v SBC Cal, Inc*, 503 F3d 876 (2007), cert granted, 128 S Ct 2957 (2008). The FTC's 23 May 2008 press release and statement is available at **www.ftc.gov/opa/2008/05/linkline.shtm**.

8 FTC Statement at 10 & n 53.

9 The omission contrasts with the agencies' last joint report on antitrust and IP. Though largely a catalogue of stakeholder views rather than agency position statements, that report included an entire chapter on standard setting issues. US Dep't of Justice & Fed Trade Comm'n, Antitrust Enforcement and Intellectual Property rights: promoting innovation and competition (2007), ch 2, available at **www.usdoj.gov/atr/public/hearings/ip/222655.pdf**.

10 See *Dell Computer Corp*, 121 FTC 616 (Complaint and Decision May 20, 1996) and news release available at **www.ftc.gov/opa/1996/06/dell2.shtm**.

11 Reinstated Complaint, *Union Oil Co. of Cal*, FTC No 9305, 7 July 2004, available at **www.ftc.gov/opa/2004/07/unionoil.shtm**. Full administrative proceedings available at **www.ftc.gov/os/adjpro/d9305/**

12 Section 5, an enforcement authority unique to the FTC, prohibits 'unfair methods of competition' and 'unfair or deceptive acts or practices' 15 USC § 45(a) (1).

13 The Commission's administrative proceedings in *Rambus, Inc*, FTC Docket No 9302, since the June 2002 Complaint are available at **www.ftc.gov/os/adjpro/d9302/index.shtm**.

14 In the Matter of Negotiated Data Solutions LLC, FTC File No 051 0094, Complaint, 23 January 2008, available at **www.ftc.gov/os/caselist/0510094/080122complaint.pdf**.

15 The FTC's administrative proceedings in *N-Data* are available at **www.ftc.gov/os/caselist/0510094/index.shtm**.

16 Analysis of Proposed Consent Order to Aid Public Comment, at 2, available at **www.ftc.gov/os/caselist/0510094/080122analysis.pdf**.

17 *Ibid* at 3.

18 *Ibid* at 5.

19 *Ibid*.

20 *Ibid* at 6.

21 Statement of the Federal Trade Commission, at 3, available at **www.ftc.gov/os/caselist/0510094/080122statement.pdf**. In support of its expansive reading of section 5, the majority cited only the Supreme Court's 1972 decision in *FTC v Sperry and Hutchinson Co*, 405 US 233, 239 (1972), and recent comments by Commissioners Leibowitz and Rosch. Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 16, at 4–5 & n 3, and citations therein.

22 Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 16, at 6–9.

23 15 USC § 45(n).

24 Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 16, at 8.

25 *Ibid*, citing Susan A Creighton, et al *Cheap Exclusion*, 72 *Antitrust LJ* 975, 994 (2005). The citation seems inapposite, since the author was making the point that SSO participants, when victims of patent holdup, *may not* be able to pass on price increases, therefore warranting government intervention. In general, however, *Cheap Exclusion* makes a strong case for heightened antitrust scrutiny in SSO cases, where deceptive conduct is 'cheap' and lacking any arguable efficiencies.

26 Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 16, at 8.

27 *Ibid* at 9, citing *In re Orkin Exterminating Co*, 108 FTC 263 (1986), *aff'd*, 849 F2d 1354, 1361 (11th Cir 1988), and suggesting a distinction between an open-ended commitment and a contract having a fixed duration.

28 Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 16, at 9.

29 Dissenting Statement of Commissioner Kovacic, January 23, 2008, available at **www.ftc.gov/os/caselist/0510094/080122kovacic.pdf**.

30 *Ibid*.

31 Dissenting Statement of Chairman Majoras, 23 January 2008, available at **www.ftc.gov/os/caselist/0510094/080122majoras.pdf**.

32 *Ibid*, citing *In the Matter of Valassis Commc'ns, Inc.*, No. 051-0008, 14 March, 2006, available at **www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf**.

33 Dissenting Statement of Chairman Majoras, *supra* note 31. Intel has indeed subsequently filed a private action against N-Data, *Intel Corp v Negotiated Data Solutions, LLC*, No 2:2008cv00319 (ED Tex 15 Aug 2008), claiming, inter alia, that N-Data's patents are unenforceable for the reasons alleged in the FTC action. N-Data reportedly claims that the patents at issue are different than those subject to the original National commitment.

34 *Rambus Inc v FTC*, 522 F.3d 456 (DC Cir 2008), reh'g *en banc* denied, No. 07-1086, (DC Cir 26 Aug 2008).

35 See eg, *supra* note 13.

36 The FTC's most recent decision was a ground-breaking remedial order on 5 February 2007, compelling Rambus to license its DRAM technology and setting maximum royalty rates for those licenses. See Opinion of the Commission on Remedy by Chairman Majoras, available at **www.ftc.gov/os/adjpro/d9302/070205opinion.pdf.**

37 See eg, litigation filings on Rambus's website, available at **http://investor.rambus.com/downloadCenter.cfm?CategoryList=Rambus**

%20vs%20H%20N%20I.
38 522 F3d 463**.**
39 *Ibid* at 465**.**
40 *Ibid*, citing *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).
41 *Ibid* at 467.
42 Matthew Newman, 'FTC May Appeal Rambus Antitrust Ruling to U.S. Supreme Court,' Bloomberg.com, Sept. 26, 2008 available at **www.bloomberg.com/apps/news?pIbid=20601204&sIbid=aUGeP.p9IH0Q#**. FTC General Counsel William Blumenthal is reported to have said at a Brussels conference on 26 September that the FTC is reportedly considering an appeal because of 'issues of doctrine, not about the facts of the case', and that if the ruling stands, it could have 'lasting effects' on the FTC's ability to enforce the antitrust rules. *Ibid.*
43 522 F3d 456 at 467, 468 (internal quotation and citation omitted).
44 See Public Comments, In the Matter of Negotiated Data Solutions LLC, available at **www.ftc.gov/os/comments/negotiateddatasol/index.shtm**.
45 eg, Public Comment by Association of Corporate Counsel *In the Matter of Negotiated Data Solutions LLC*, 10 April 2008 at 1, available at **www.ftc.gov/os/comments/negotiateddatasol/534241-00004.pdf**. Patent holdup in standard setting 'undermines competition, and discourages pro-competitive and beneficial standards setting activities and participation in such activities by well-intentioned companies'.
46 Public Comment by IEEE Standards Ass'n, 26 February 2008, *supra* note 44. Similarly, IEEE revised its rules in 2006 to require that any SSO participant give notice of licensing commitments or RAND obligations to any assignee of relevant IP, and to impose on the assignee the obligation of notice to subsequent holders. *Ibid* at 5.
47 *Ibid* at 7.
48 *Ibid* at 5.
49 *Ibid* at 6.
50 Public comment by TIA, 22 April 2008, *supra* note 44, at 1.
51 *Ibid*.
52 *Ibid* at 2.
53 *Ibid* at 2, 3.
54 Public Comment by ATIS, 24 April 2008, at 2, 3, *supra* note 44.
55 *Ibid* at 3–4.
56 Public Comment by ABA Section of Science and Technology Law, 24 April 2008, at 3, *supra* note 44.
57 *Ibid* at 2.
58 *Ibid* at 3.
59 Public Comment by AIPLA, 5 April 2008, at 2, 4, *supra* note 44.
60 *Ibid* at 2, 3.
61 *Ibid*. Professor Robert H Lande also lamented the vagueness of the FTC's 'unfairness' standard in these cases, noting that the Opinion's use of 'terms like 'unjust', 'inequitable', and 'contrary to good morals' to identify illegal conduct arguably (even if unfairly) could be saIbid to give the Commission too much discretion.' Public comment, 21 April 2008, at 1, *supra* note 44.
62 Public comment by Intellectual Ventures, 24 April 2008 at 1, *supra*, note 44. Intellectual Ventures reportedly holds over 20,000 patents or applications that it seeks to license; it has not yet, however, needed to file infringement litigation.
63 *Ibid* at 2–4.
64 *Ibid* at 4–5.
65 *Ibid* at 8. '[U]nless clarified, the Commission's actions might be seen to invite parties involved in disputes over RAND terms to seek Commission intervention, or to tempt states or private plaintiffs to intervene in what would otherwise be good faith commercial disputes over licensing terms.'
66 Petition to the Federal Trade Commission by the American Antitrust Institute, *Request for Investigation of Rembrandt, Inc for Anticompetitive Conduct that Threatens Digital Television Conversion*, 26 March 2008, available at **www.antitrustinstitute.org/archives/files/AAI%20Petition%20Rembrandt%203.26.08_032520082308.pdf** (hereinafter 'AAI Petition').
67 The AAI Petition includes a section headed 'Special concerns of the conduct of NPEs', which argues that they 'pose a far more significant threat of patent holdup' and require 'heightened scrutiny . . . to ensure that they adhere to standard setting rules, such as RAND commitments.' *Ibid* at 19. The identity or business model of the IP owner, of course, should justify no waiver, loosening or shifting of the burden of proof for the essential elements of an antitrust violation.
68 *Ibid* at 24.
69 *Ibid* at 11.
70 *Ibid* at 20 & n 69 ('To the extent any small gaps may be found in this chain of causation . . .').
71 *Ibid* at 21–23.
72 *See* Mark A Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 *Cal L Rev* 1889 Appendix. (2002), observing that the great majority of SSOs considered required RAND licensing by their participants.
73 See eg, Public Comments of IEEE and TIA discussed at text accompanying notes 46–53, *supra*.
74 See eg, William J Baumol & Daniel G Swanson, *Reasonable and Nondiscriminatory (RAND) Royalties, Standard Selection, and Control of Market Power*, 73 *Antitrust L J* 1, 5 (2005); Neil Marshall, et al, *The Price of Intellectual Property: What is FRAND? Global Competition Review* (2008), available at **www.globalcompetitionreview.com/hce2008/intellectualproperty.cfm**.
75 See generally Charles T (Chris) Compton, *International Roundtable on Antitrust & Intellectual Property in Standard Setting*, AT-IP Report, ABA Section of Antitrust Law, 3 July 2002, available at **www.abanet.org/antitrust/committees/intell_property/july3.html.**
76 *Broadcom Corp v Qualcomm Inc*, 501 F.3d 297 (3d Cir 2007), holding that section 2 liability could ensue from an 'intentionally false promise' to an SSO to license on RAND terms. *Ibid* at 314. The later DC Circuit decision in *Rambus,* discussed above, firmly disagreed. 522 F3d at 466.
77 *Broadcom Corp*, 501 F3d at 314 n 8, citing, for example, the 15 factor test set forth in *Georgia Pacific Corp v United States Plywood Corp*, 318 F Supp 1116, 1120 (SDNY 1970) and the FTC's remedial order in *Rambus*.
78 See *supra* note 36. In the *Microsoft* consent decree, the DOJ required licensing of communications protocols on RAND terms. Rather than setting those terms, the Division relied on pressuring Microsoft to revise royalties viewed as noncompliant.
79 Press Release, European Commission, (23 August 2007) available at **http://europa.eu/rapIbid/pressReleasesAction.do?reference=MEMO/07/330&format=HTML&aged=0&language=EN&guiLanguage=en.**
80 Press Release, European Commission, (1 October 2007), available at **http://europa.eu/rapIbid/pressReleasesAction.do?reference=MEMO/07/389&format=HTML&aged=0&language=EN&guiLanguage=en.**
81 See Press Release, FTC (23 September 2008), available at **www.ftc.gov/opa/2008/09/nds.shtm**, and related documents available at that site. With Commissioner Majoras having since left the agency, the vote was 3–1; Chairman Kovacic continued to vote no. For all the *N-Data* public comments, *see* the FTC's website at **www.ftc.gov/os/comments/negotiateddatasol/index.shtm**.
82 ABA 'Interview with William E Kovacic, Chairman, Federal Trade Commission', The Antitrust Source, August 2008 at 4, available at **www.abanet.org/antitrust/at-source/08/08/Aug08-KovacicIntrvw8=6f.pdf**.
83 J Thomas Rosch, 'Patent Trolls: Broad-Brush Definitions and Law Enforcement Ideas,' Address before the Newport Summit on Antitrust and Economics, (31 May 2008), available at **www.ftc.gov/speeches/rosch/080531roschlecg.pdf.**
84 Though some NPEs are pejoratively referred to as 'patent trolls,' as by Commissioner Rosch, NPEs broadly include everything from universities and laboratories, sole inventors working out of their garages, patent aggregators, financial investors and even manufacturing firms such as IBM or Texas Instruments that no longer have use for certain of their IP.
85 Typically the term 'patent troll' refers to NPEs that acquire IP of dubious merit from third parties, and then go on to bring infringement litigation in hopes of coercing large settlements. Recent Supreme Court decisions, such as *eBay* (limiting injunctions) and *KSR v Teleflex*, 127 S Ct 1727 (2007) (expanding the 'obviousness' defence), have curbed such threats, as may proposed patent reform legislation which, eg, limits infringement damages.
86 Rosch, *supra* note 83, at 12.
87 *Ibid* at 13–14.

88 *Ibid* at 2, 3, 12, 13. Consider the perspective of one celebrated creator of IP: 'I just invent, then wait until man comes around to needing what I've invented.' R Buckminster Fuller, US architect, engineer and inventor of the geodesic dome.

89 Commissioner Rosch is not, of course, the first to cast a jaundiced antitrust eye at 'mere owners' who seek to license IP rather than commercialise it. See Justice Kennedy's concurring opinion in *eBay Inc v MercExchange LLC*, 547 U.S. 388, 396 (2006) (NPEs may use the threat of injunctions 'as a bargaining tool to charge exorbitant fees' from licensees); and FTC Report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, ch. 3 at 38 (October 2003), available at **www.ftc.gov/os/2003/10/innovationrpt.pdf** (warning that NPEs 'can successfully employ a hold-up strategy without fear of retaliation.'). See also *supra* note 67.

90 Rosch, *supra* note 83, at 12.

91 *See* David L Meyer, 'How to Address 'Hold Up' in Standard Setting without Deterring Innovation: Harness Innovation by SDOs,' 26 March 2008, ABA Section of Antitrust Spring Meeting, Washington, DC, available at **www.usdoj.gov/atr/public/speeches/234124.pdf.**

92 *Ibid* at 5.

93 *Ibid* at 3–4 & nn. 6–7, citing the 30 October 2006 Letter re VITA, available at **www.usdoj.gov/atr/public/busreview/219380.pdf**, and the Division's 30 Apr 2007 Letter re IEEE, available at **www.usdoj.gov/atr/public/busreview/222978.pdf**.

94 Meyer, *supra* note 91, at 7–8.

95 *Ibid* at 10.

96 *Ibid* at 11. AAG Meyer made no mention of 'special scrutiny' for NPE owners of IP. There is increasing recognition that even pure patent aggregators, if asserting valid patents, may serve pro-competitive purposes, such as providing a liquid, smoothly functioning market for IP that facilitates licensing and rewards individual inventors – to that extent encouraging innovation. See, eg, Peter N Detkin, *Leveling the Patent Playing Field*, 6 J. *Marshall Rev Intell Prop L* 636 (2007); Damien Geradin, Anne Layne-Farrar & A Jorge Padilla, *Elves or Trolls? The Role of Non-Practicing Patent Owners in the Innovation Economy* (May 2008), TILEC Discussion Paper No 2008-018.

97 For example, the US Court of Appeals for the Federal Circuit is reconsidering *en banc* the extent to which business methods will remain eligible for patent protection under US law. *In Re Bilski*, No. 2007-1130 (Fed Cir 15 Feb 2008). Oral arguments were held on 8 May 2008.

98 See Thomas O Barnett, Ass't Att'y Gen. Antitrust, 'Competition Enforcement in an Innovation Economy', *The Antitrust Counselor*, July 2008, at 6. (Among five guiding principles for the Antitrust Division, to 'clearly communicate our standards to the business community '.)