

Patent Pools and Antitrust

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Patent Pools and Antitrust

- ◆ Antitrust Overview
- ◆ Antitrust and Intellectual Property
- ◆ Patent Pools and Antitrust



Antitrust Overview

- ◆ Purpose of Antitrust Law
- ◆ Main Prohibitions



Antitrust Overview

◆ Purpose of Antitrust Law

- Antitrust law protects competition
 - ◆ Rivalry that benefits consumers
 - ◆ Does not necessarily protect competitors from each other



Antitrust Overview

◆ Purpose of Antitrust Law

- Goal is to benefit consumers through competition leading to:
 - ◆ More innovation
 - ◆ Higher quality, better service
 - ◆ Lower prices



Antitrust Overview

◆ Main Prohibitions

- Multi-Firm Conduct
- Single-Firm Conduct



Antitrust Overview

◆ Main Prohibitions

■ Multi-Firm Conduct

◆ No “contract, combination . . . or conspiracy” that unreasonably restrains trade

■ Agreements between competitors are a source of antitrust risk

■ But not all such agreements are unlawful



Antitrust Overview

◆ Main Prohibitions

■ Multi-Firm Conduct

◆ Important analytical distinction

■ “Per se” illegal

- “Agreements of a type that always or almost always tend to raise price or reduce output”

■ “Rule of reason”

- Everything else



Antitrust Overview

◆ Main Prohibitions

■ Multi-Firm Conduct

◆ “Per se” illegal (do not even discuss with a competitor):

■ Fixing prices

■ Fixing other terms of sale

■ Bid rigging, market division

■ Group boycotts



Antitrust Overview

◆ Main Prohibitions

■ Multi-Firm Conduct

◆ Rule of Reason

- Gray area where most real-life cases fall
- Examples: Standard setting, joint ventures, trade association activities
- Lawfulness turns on motive and effect on competition



Antitrust Overview

◆ Main Prohibitions

- Single-Firm Conduct
 - ◆ Monopolies and abuse of monopoly power prohibited
 - But there is no prohibition against monopoly power gained by “superior skill, foresight, and industry”



Antitrust Overview

◆ Main Prohibitions

■ Single-Firm Conduct

◆ Business justification as a defense

- Defendants may show that their conduct is supported by a valid business justification



Antitrust Overview

◆ Main Prohibitions

- Single-Firm Conduct
 - ◆ Business justification as a defense
 - Evidence of a business justification may undercut plaintiff's contention that the challenged conduct was exclusionary or anticompetitive
 - Or that it was undertaken with the specific intent to monopolize



Antitrust and IP

- ◆ Federal antitrust enforcers once relied heavily on a “per se” approach to IP-related issues
- ◆ Beginning in the 1980s, the “rule of reason” played an increasingly important role
- ◆ In 1995, the Antitrust Guidelines for the Licensing of Intellectual Property (“IP Guidelines”) effectively made “rule of reason” the default approach for the antitrust analysis of most IP licensing issues



Antitrust and IP

◆ IP Guidelines

- Three general principles of the antitrust analysis of IP-related issues
 - ◆ IP viewed as comparable to other forms of property
 - ◆ IP rights not presumed to create market power
 - ◆ IP licensing viewed as generally procompetitive



Antitrust and IP

◆ IP Guidelines

- IP treated like other forms of property
 - ◆ One result is that IP rights do not trump antitrust law
 - ◆ A corollary is that antitrust law does not vitiate IP rights
 - ◆ Affects the application of “rule of reason” and the analysis of “business justifications”



Antitrust and IP

◆ IP Guidelines

- IP rights not presumed to create market power or monopoly power
 - ◆ Market power or monopoly power must be separately proved
 - ◆ Old view: Patent as “legal monopoly”
 - ◆ Current view: Patent confers right of exclusive use, like other property



Antitrust and IP

◆ IP Guidelines

- IP licensing viewed as generally procompetitive
 - ◆ Federal antitrust enforcers have formally recognized that procompetitive benefits to the public often come from the integration of complementary technology



Patent Pools and Antitrust

- ◆ IP Licensing in the Form of Patent Pools
 - Area of increased attention for Federal antitrust enforcers
 - ◆ Multi-firm conduct
 - Efficiency-enhancing patent pools
 - ◆ Single-firm conduct
 - Alleged attempts to hijack successful standards through “patent ambushes”



Patent Pools and Antitrust

◆ Multi-Firm Antitrust/IP Issues

- DOJ has reviewed three patent pools under the Business Review Letter program
 - ◆ MPEG-2
 - ◆ DVD
 - ◆ DVD-ROM
- All three found efficiency-enhancing and not likely to harm competition (but not binding on DOJ)



Patent Pools and Antitrust

◆ Three Patent Pools

- Only essential patents included in the pools
 - ◆ Essentiality independently determined
- Licenses were nonexclusive
- Licenses available to nonmembers on a nondiscriminatory basis
- Each of the pools offered procompetitive efficiencies to offset antitrust risk



Patent Pools and Antitrust

◆ Single-Firm Antitrust/IP Issues

- The FTC has challenged two firms for allegedly hijacking standards set by industry consortia
 - ◆ So-called “patent ambushes”
 - Dell
 - Rambus
 - ◆ A third case (Unocal) involves a government-set standard



Patent Pools and Antitrust

◆ “Patent Ambush” Cases

- Standards setting groups typically require:
 - ◆ Disclosure of essential IP
 - ◆ Willingness to license at a reasonable and nondiscriminatory rate
- Disclosures affect technology choice
- Delayed disclosure may hijack standard if the industry is already locked in



Patent Pools and Antitrust

◆ "Patent Ambush" Case Issues

- Did defendant have a duty to disclose?
 - ◆ Were the group's rules ambiguous?
 - ◆ Was defendant a member at the time the rules required disclosure?
- Not clear there is a general antitrust duty to disclose if the standard setting group's rules do not require it



Patent Pools and Antitrust

◆ Dell

- In 1996, the Federal Trade Commission issued a consent order prohibiting Dell from enforcing a patent against any person using the invention to implement the VESA Local Bus, or VL Bus



Patent Pools and Antitrust

◆ Dell

- Dell employee signed patent disclosure statements attesting that Dell had no relevant patents
- But he was technically participating on his own behalf, not as a representative of Dell
- Because the result was a settlement, the FTC did not have to prove its allegations



Patent Pools and Antitrust

◆ Dell

- Two key analytical points
 - ◆ Dell allegedly acted wrongfully in failing to disclose patents in violation of VL-Bus disclosure rules
 - ◆ Adoption of the VL-Bus standard allegedly gave Dell monopoly power it would not otherwise have had



Patent Pools and Antitrust

◆ Dell

- First key analytical point
 - ◆ Unless Dell's nondisclosure was wrongful, it could not have contributed to an antitrust violation
 - There is no prohibition against monopoly power gained by "superior skill, foresight, and industry"



Patent Pools and Antitrust

◆ Dell

- Second key analytical point
 - ◆ Standard allegedly gave Dell monopoly power it would not otherwise have had
 - No antitrust issue if Dell did not acquire monopoly power
 - No antitrust issue if Dell would have obtained monopoly power even if it had made the disclosure



Patent Pools and Antitrust

◆ Rambus

- High stakes
 - ◆ FTC suit grew out of efforts by Rambus to collect royalties from memory makers
 - Billions of dollars in royalties covering perhaps three generations of RAM used in PCs and other computers



Patent Pools and Antitrust

◆ Rambus

- High stakes
 - ◆ Rambus has little or no fall-back position
 - Not a manufacturer
 - Has niche memory design used in high-end computer video cards
 - Business model is to create IP and collect royalties



Patent Pools and Antitrust

◆ Rambus

■ Background

- ◆ Joint Electron Device Engineering Council (JEDEC) standards for Synchronous Dynamic Random Access Memory ("SDRAM")
- ◆ Widespread adoption of SDRAM standard conferred a de facto monopoly over JEDEC-compliant memory



Patent Pools and Antitrust

◆ Rambus

- Member of a JEDEC committee that ultimately drafted the SDRAM standard
- Remained passive and never promoted any technology at JEDEC
- Left JEDEC before SDRAM standard was finalized, possibly on advice of counsel
- Later sought patent royalties from memory manufacturers producing SDRAM memory



Patent Pools and Antitrust

◆ Rambus

- Key contested issues:
 - ◆ Was nondisclosure of the Rambus patent position wrongful?
 - ◆ Did nondisclosure give Rambus monopoly power it would not otherwise have had?



Patent Pools and Antitrust

◆ Rambus

- Was nondisclosure of the Rambus patent position wrongful?
 - ◆ Was Rambus actually a member of JEDEC at the relevant time period?
 - ◆ When did Rambus learn its IP was in the standard?



Patent Pools and Antitrust

◆ Rambus

- Did nondisclosure give Rambus monopoly power it would not otherwise have had?
 - ◆ Rambus argued its patents were so fundamental there was no way to implement SDRAM without infringing
 - ◆ FTC argued that alternative technologies would have been chosen if the Rambus IP position had been known



Patent Pools and Antitrust

◆ Rambus

- FTC recently (October 2003) concluded an administrative trial against Rambus based on allegations similar to those in Dell
 - ◆ Initial decision currently due to be released soon (December 2003)
 - ◆ Result will inevitably be appealed in a process that will likely take an additional year or so



Patent Pools and Antitrust

◆ Lessons Learned

- Industry consortia must consider antitrust issues in advance
 - ◆ In the past, the focus was on multi-firm conduct issues
 - MPEG and DVD patent pools
 - ◆ Now, avoiding the effects of single-firm conduct problems is also a concern
 - Patent ambushes



Patent Pools and Antitrust

◆ Lessons Learned

- Both Dell and Rambus might have been avoided by more robust patent disclosure requirements
- Easy to say, hard to do
 - ◆ Disclosure rules tend to be compromise statements because consortia members have divergent business interests



Patent Pools and Antitrust

◆ Lessons Learned

- Minimalist patent disclosure requirement to avoid the Rambus problem:
 - ◆ Commitment to license on reasonable and nondiscriminatory terms
 - ◆ Disclosure of essential patents early enough for the group to choose another technology to avoid infringement, if necessary



Patent Pools and Antitrust

◆ Lessons Learned

- Problems with even a minimalist solution
 - ◆ Reasonable and nondiscriminatory terms
 - Nobody knows what that means
 - Negotiating specific terms in advance, as part of the disclosure requirement, could violate European antitrust rules
 - Concern in a global economy



Patent Pools and Antitrust

◆ Lessons Learned

- Problems with even a minimalist solution
 - ◆ Robust disclosure requirement
 - Hard to reach agreement on requirement because different companies have different business models and different IP strategies
 - What to do about pending applications?



Patent Pools and Antitrust

◆ Conclusion

- Antitrust rules governing the organization of patent pools are reasonably clear and should be followed
- How to avoid a patent ambush is less clear
 - ◆ Changing area of law, with new cases apparently in the pipeline
 - ◆ Effective patent disclosure rules are essential



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