ICT Standards and Intellectual Property Rights Workshop

IPR Policies: U.S. Antitrust Enforcement Agency Perspectives

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Antitrust and IPR Policies: Underlying Principles

ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS:

Promoting Innovation and Competition





ISSUED BY THE
U.S. DEPARTMENT OF JUSTICE
AND THE
FEDERAL TRADE COMMISSION

APRIL 2007

- Procompetitive benefits of standard setting.
- Potential for <u>IP hold-up</u> may undermine benefits.
- Competing interests in developing IPR policies; no "one size fits all" policy.

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- SDO IPR policies provide primary solution.
- 1. Disclosure obligations.
- 2. Ex ante licensing commitments.
- 3. Ex ante licensing negotiations.
- IPR policies inform antitrust enforcement.

16 FEDERAL TRADE COMMISSION DECISIONS

Complaint

DIETC

IN THE MATTER OF

DELL COMPUTER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. SOFTHE REDERAL TRADE COMMISSION ACT.

Docket C-3658. Complaint, May 20, 1996--Decision, May 20, 1996

This consent order prohibits, among other things, a Tenas-based personal computer manufacturer from enforcing its parent rights against computer manufacturers using the VL-bus, a machanism to transfer instructions between the computer's central processing until and its peripherals.

Appearances

For the Commission: Michael E. Antalies and William J. Baer. For the respondent: Raymond Jacobsen and Kirin Corcoran, Howrey & Simon, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Dell Computer Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas.

PAR. 2. Respondent is a publicly traded for profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

- Dell Computer Corp., 121 F.T.C. 616 (1996).
- 1. IPR dislosure policy.
- 2. Dell certifies no IP.
- 3. SDO adopts technology; other options available.
- 4. Industry builds to standard.
- 5. Dell asserts patent.

In the Matter of Union Cil Company of California Ducket No. 9805

Opinion of the Commission

BY MURIS, Chairman:

A private business allegedly has used false and mickeding statement to induce a government help to issue regulatory standards that comformed matter power upon the firm. Respondent agree that, even taking the Compulsion's factual allegations as established as is required at this prolinatory stage, its deliberate use of microprosostations to secure recompely power is protected from sertions of histogram and on Norro-Foundageon discrete, which shelters oratio partitioning for government action. We diagrae.

On March 4, 2005, the Federal Trade Conneliston issued an attail situation complicit stinging, later also, that the Union Oil Company of Cultimate ("Union!") copped in such a restande of competition through knowing and within interpresentations, to the Cultimate Alexanders Beard ("CARD") and to competing gasoline refluent, that Unional below, or would not as surely partie rights contenting asteroids it emissions research results. The Complicit farther alleged that, through these misrepresentations, Unional (ii) induced CARD to adopt reformation gasoline standards that substantially overlapped Unional's pattern citims and (2) induced other reforms to reconfigure that refluents in very that subsequently expected than to Unional's pattern citims. According to the Compiliar, Unional citims in a scribed to handwide of millions of dollers in requirits from refluence who are now required to follow CARD's reactions.

Administrative litigation exceed. Unough filed two motions to dismin. One argued that Unough's conduct involved pathology the government and hence was immune from subtant hisblidy. The other associated that the Compilier folials to state sufficient allegations that Unough parameter, or draggeously threatment to possess, managingly power.

On Newcoker 25, 2000, Administrative Lev Judge D. Midsted Chappel invest as Initial Decision concluding that the Newer-Pressinger during protects much of the conduct allegate to constitute surfair methods of competition and that the FTC lacks jurisdiction over the remaining adjustment because their depend on modelate of statesticid questions of patent law? Judge Chappell distributed the Completist in the residenty. Completial Consent laws appealed. For the reasons rated believ, we crease and vector the Initial Decision, minutes the Complete, and remand for father consideration of the Completia's adjustment.

- Union Oil Co., 138 F.T.C. 1 (2004).
- 1. Government regulatory body setting standard.
- 2. No disclosure obligation.
- 3. Represents technology is "non-proprietary."
- 4. Alternatives available.
- 5. Government adopts std; industry invests.
- 6. Unocal asserts patents.

¹ The Initial Decision desired without projective the remainder of Uncosi's motion regarding market power.

		PUBLIC RECORD VERSION
		In the Matter of Randon, Inc.
		Dodget Na. 9992
		OPENSON OF THE COMMISSION
By H	ARBO	CR, Controlesioner, for a sensitence Commission.
		Table of Contents
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		FTC Adjustications 1. Relationship between Fetent and Assistant Law in Cases Involving
		Fraud on the Patent Office or Patent Enforcement Initiated in Bad Path
		 Stendard of Proof Should Be Commencurate With Proposed Remedy.
		3. Chilling Participation in SSCs
		 Reliance on Tertimony Righer than Contemporareous
		Written Evidence

- Rambus Inc., 2006 FTC LEXIS 60(2006).
- 1. IPR disclosure policy; scope unclear.
- 2. No direct representation; conduct mostly silence.
- 3. Represents technology is "non-proprietary"; prosecuting patent apps.
- 4. Industry builds to standard.
- 5. Rambus asserts patents.

	PUMAC RECORD VERSION
	In the Matter of Russians, Inc. Dodget No. 9902
	OPENSON OF THE COMMESSION
By HA	ARDOUR, Commissioner, for a unenimous Commission.
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	c. Questions Existed on Appeni/Cross Appeni 6. Re-Opening of the Record Before the Commission
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III.	STANDARD OF REVIEW
	A. Standard of Proof: The Preponderance of the Evidence Standard Applies in
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	 Relationship between Fetent and Auditorst Law in Cases involving Front on the Patent Office or Patent Enforcement Initiated in
	Princip on the Patient Office or Patient Importantian Indianal in Bad Palife
	 Steedard of Proof Should Be Commencurate With Proposed Remedy
	3. Chilling Participation in SSOs
	 Reliance on Tortimany Eigher than Contemporareous
	Written Evidence

- Rambus Inc., 2006 FTC LEXIS 60(2006).
- Had Rambus disclosed:
- 1. SDO would have adopted alternative; OR
- 2. SDO would have secured RAND commitment.

Huited States Court of Appeals rearmourner or courses encour

Argued February 14, 2008

Decided April 22, 2008

No. 07-1096

RAMOUTE INCOMPOSATED, PROTECTION

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PRESENT TRADE COMMERCIA, RESPONDENT

> Consulidated with 07-1124

On Petitions for Review of Final Orders of the Pedent Trade Commission

A. Doughts Mildaned argued the cause for publicate. With him on the briefs were Food R.Q. Welflow, SandAce N. Sankar, Andrew J. Break, and Fredik A. Shok.

2 M Office, appearing prose, was on the brief for aminus carrier 9. M. Office in support of patitions:

Asks F. Daly, Deputy General Counsel for Litigation, Pederal Trade Commission, argued the cause for respondent. With him on the briefs were John D. Grunders, Principal

- FTC v. Rambus Inc., (D.C. Cir. 2008).
- Overturns FTC decision:
- 1. SDO would have adopted alternative may be exclusionary; BUT
- 2. Deceptive conduct that prevents SDO from securing RAND commitment not exclusionary.

Antitrust and IPR Policies: Licensing Commitments

0510094

UNITED STATES OF AMERICA BUDGE PETERAL TRADE COMMISSION

CO MINISSIONERS:

Beburah Part Majores, Chairman Pamela Bose Harbour Lea Lelbevitz William E. Kovario J. Thomas Bosch

In the Matter of

NEGOTIATED DATA SOLUTIONS I.E.C., a Builted Held by company. Booled No. C-

DECISION AND ORDER

The Federal Ted. Commission of Commission (I), having instance as investigation of certain acts and particles of Negotiated Bats Solutions EEC, benefit or afferred to as "Respections N-Data," and Respections N-Data having been foreighed the restroy with a copy of a draft of Compilatorian the Barrows of Competition proposed to present to the Commission for its consideration and which, if it such by the Commission, usually change Responders N-Data with violation of Section 5 of the Federal Trade Commission Act, as an enable, 15 USC, § 45; and

Respondent N-Data, its atterneys, and control for the Commission having the matter accounted an Age ensent Containing Consent Order ("Consent Agreement") containing an admission by Respondent N-Data of all the jurisdiction affects on first in the adversaid dust of Compaint, a streament that the algoring of said Consent Agreement is for set tensor purpose only and descend constitute an admission by Respondent N-Data that the law has been violated as alleged in each Compaint, or that the facts as alleged in each Compaint, other than jurisdictional facts, are true, and valvers and other provisions as required by the Commissionic Relation and Compaint of the Commissionic Relation Relation Relationship Relationshi

The Commission, having thereafor considered the matter and having determined that it had a seen to believe that Respondent N-That has violated the said Act, and that a Complaint should use stating its charges in the trapect, and having accepted the executed Consent. Agreement and placed such Consent Agreement on the public record for a partic of thiny (10) days for the receipt and consideration of public comments, now in further conformity with the precedure described in Commission Soils 234, 16 C.F.R. § 234, the Commission brinky makes the following justification findings and issues the following Decision and Order (**Otto**).

- Negotiated Data
 Solutions, FTC No. 051
 0094 (Jan. 2008)
- 1. Licensing offer in SDO for set amount.
- 2. No firm takes license.
- 3. Rules on modification unclear.
- 4. Modifies offer; more patents for RAND.
- Violates Section 5 unfair competition/ practice.

Antitrust and IPR Policies: Ex Ante Negotiations

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APRIL 2007

- Need to mitigate hold up (RAND insufficient)
- Potential buyer's cartel
- 1. IPR policy requiring disclosure of license terms not unlawful.
- 2. Joint ex ante negotiations not per se unlawful.
- 3. Agencies do not require either policy.

Antitrust and IPR Policies: Conclusions

- U.S. agencies do not require IPR policies; solution left to the market.
- U.S. agencies use competition law to prevent standards capture through deception or repudiating licensing commitment.
- U.S. agencies balance pro- and anticompetitive potential of ex ante negotiations through rule of reason.