ICT Standards and Intellectual Property Rights Workshop

IPR Policies: U.S. Antitrust Enforcement Agency Perspectives

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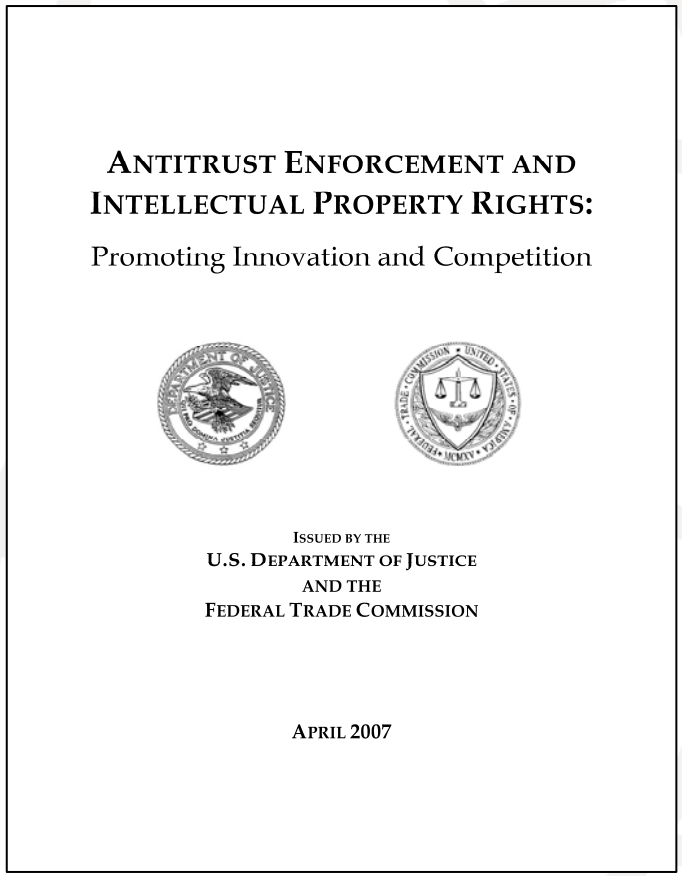
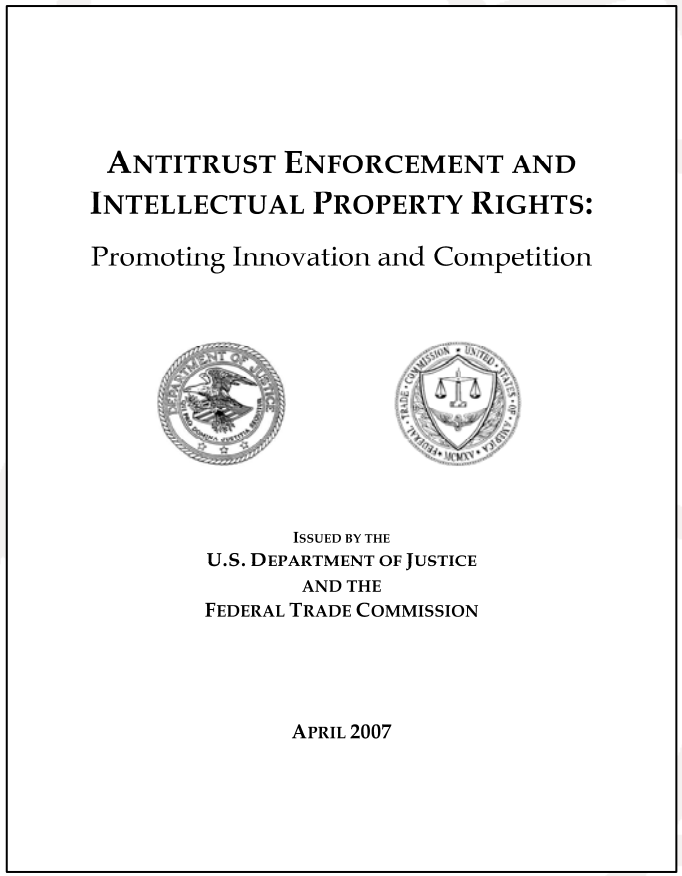
Geneva, 1 July 2008

Antitrust and IPR Policies: Underlying Principles



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

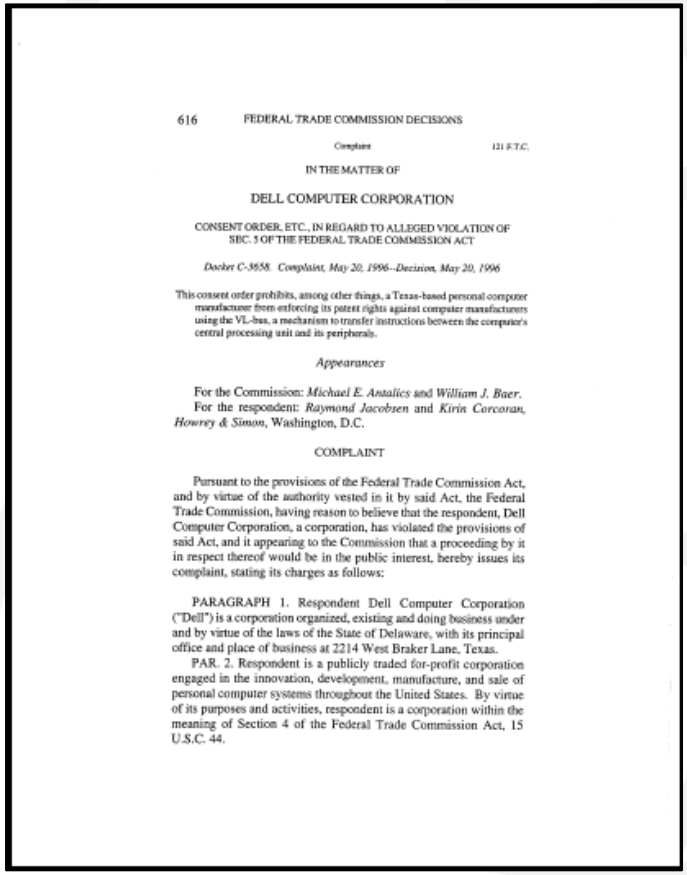
Antitrust and IPR Policies: Underlying Principles



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

- IPR policies inform antitrust enforcement.

Antitrust and IPR Policies: Disclosure Obligations



616 FEDERAL TRADE COMMISSION DECISIONS

Complaint 121 F.T.C.

IN THE MATTER OF

DELL COMPUTER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

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

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

Appearances

For the Commission: *Michael E. Antalics* 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:

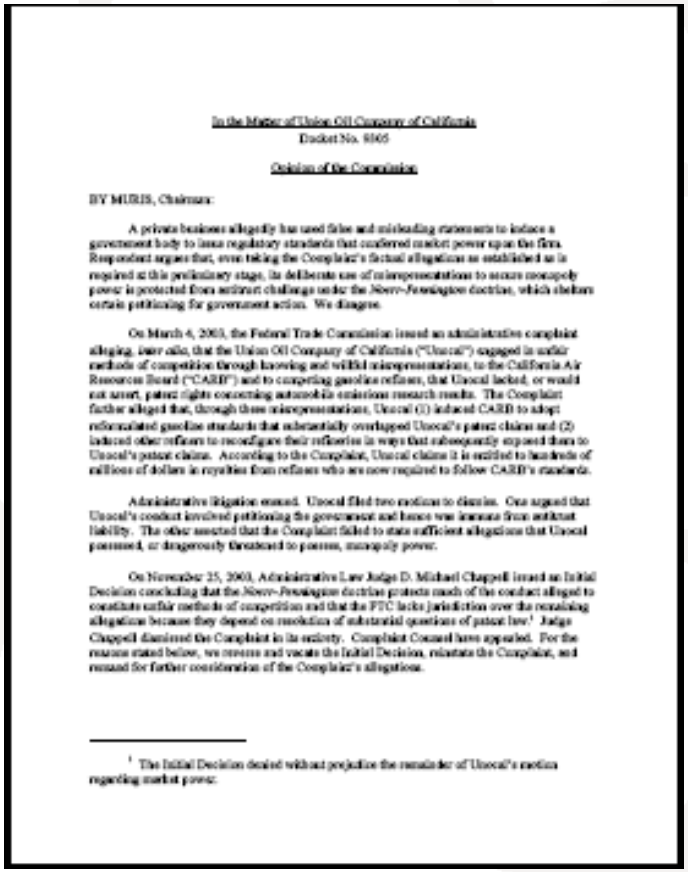
PARAGRAPH 1. Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas.

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 virtue 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.

Antitrust and IPR Policies: Disclosure Obligations



In the Matter of Union Oil Company of California
Docket No. 9305

Opinion of the Commission

BY MURIS, Chairman:

A private business allegedly has used false and misleading statements to induce a government body to issue regulatory standards that conferred market power upon the firm. Respondent argues that, even taking the Complaint's factual allegations as established as is required at this preliminary stage, its deliberate use of misrepresentations to secure monopoly power is protected from antitrust challenge under the *Noerr-Pennington* doctrine, which shelters certain petitioning for government action. We disagree.

On March 4, 2003, the Federal Trade Commission issued an administrative complaint alleging, *inter alia*, that the Union Oil Company of California ("Unocal") engaged in unfair methods of competition through knowing and willful misrepresentations to the California Air Resources Board ("CARB") and to competing gasoline refiners, that Unocal lacked, or would not assert, patent rights concerning automobile emissions research results. The Complaint further alleged that, through these misrepresentations, Unocal (1) induced CARB to adopt reformulated gasoline standards that substantially overlapped Unocal's patent claims and (2) induced other refiners to reconfigure their refineries in ways that subsequently exposed them to Unocal's patent claims. According to the Complaint, Unocal claims it is entitled to hundreds of millions of dollars in royalties from refiners who are now required to follow CARB's standards.

Administrative litigation ensued. Unocal filed two motions to dismiss. One argued that Unocal's conduct involved petitioning the government and hence was immune from antitrust liability. The other asserted that the Complaint failed to state sufficient allegations that Unocal possessed, or dangerously threatened to possess, monopoly power.

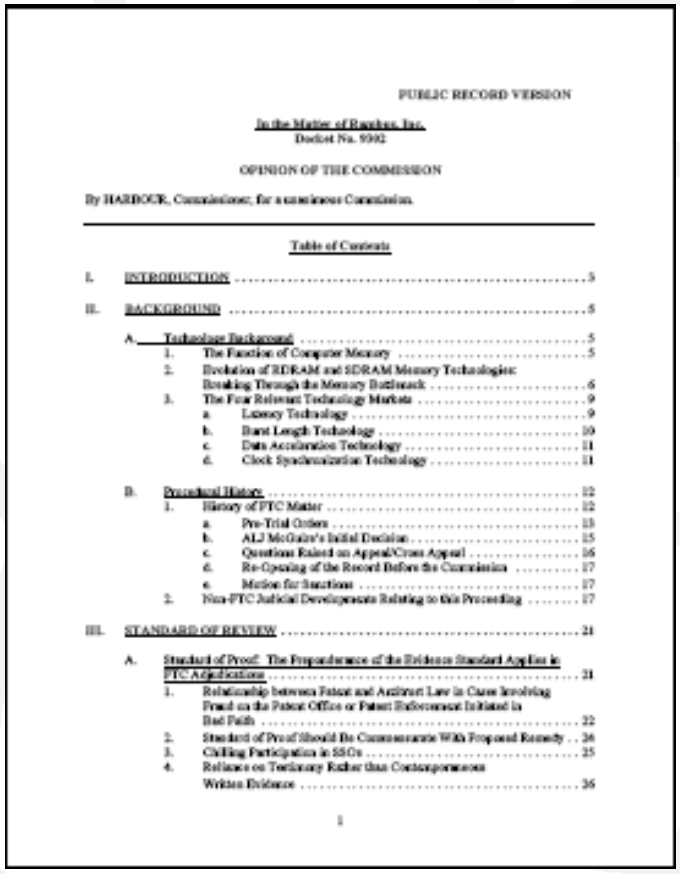
On November 25, 2003, Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the *Noerr-Pennington* doctrine protects much of the conduct alleged to constitute unfair methods of competition and that the FTC lacks jurisdiction over the remaining allegations because they depend on resolution of substantial questions of patent law.[1] Judge Chappell dismissed the Complaint in its entirety. Complaint Counsel have appealed. For the reasons stated below, we reverse and vacate the Initial Decision, reinstate the Complaint, and remand for further consideration of the Complaint's allegations.

[1] The Initial Decision denied without prejudice the remainder of Unocal's motion regarding market power.

- 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.

Antitrust and IPR Policies: Disclosure Obligations



PUBLIC RECORD VERSION

In the Matter of Rambus Inc.
Docket No. 9302

OPINION OF THE COMMISSION

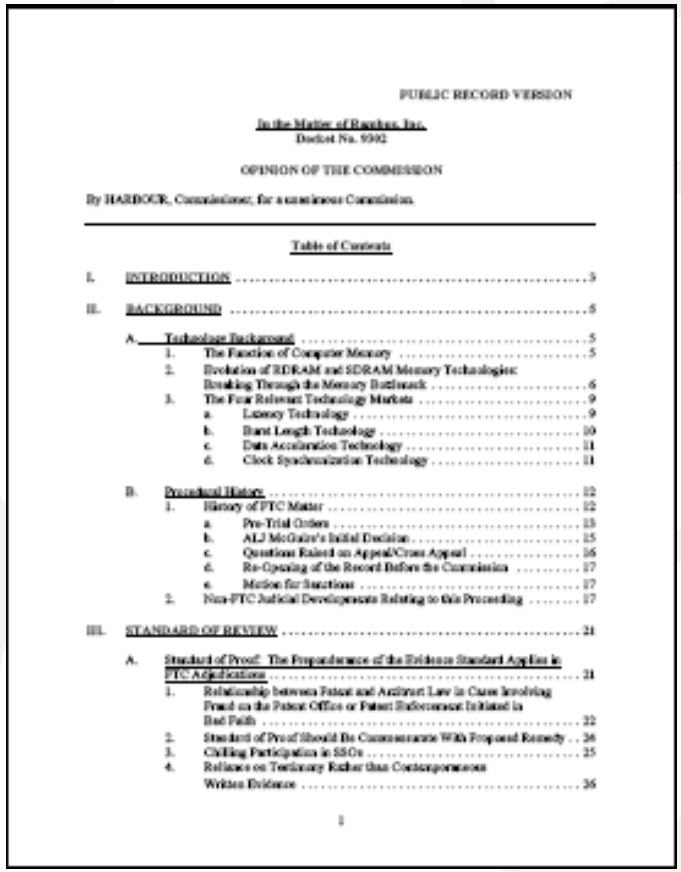
By HARBOUR, Commissioner, for a unanimous Commission.

Table of Contents

1

- 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.

Antitrust and IPR Policies: Disclosure Obligations



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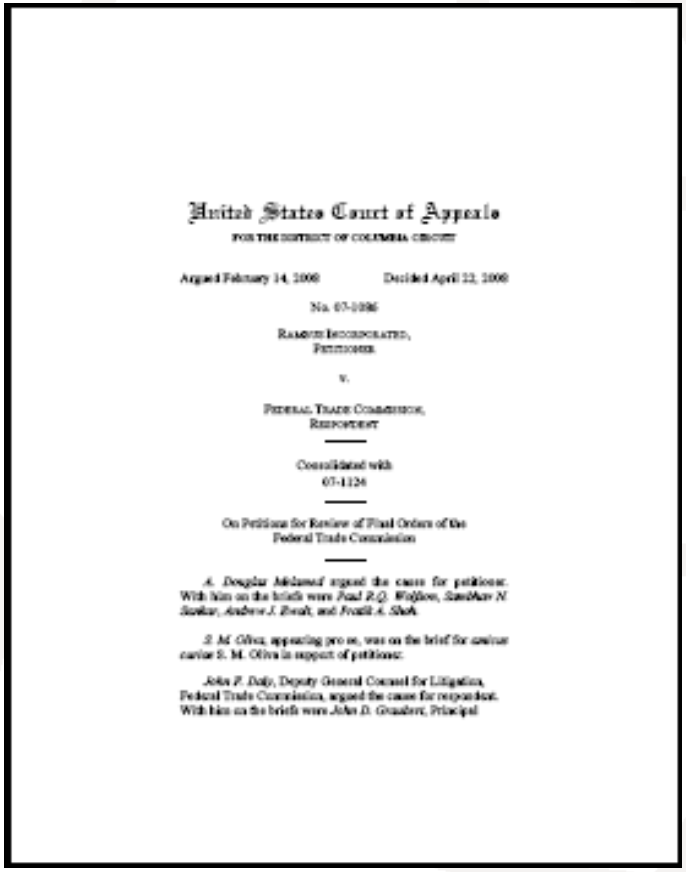
- Rambus Inc., 2006 FTC LEXIS 60(2006).
- Had Rambus disclosed:

1. SDO would have adopted alternative; OR
2. SDO would have secured RAND commitment.

Antitrust and IPR Policies: Disclosure Obligations



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 14, 2008 Decided April 22, 2008

No. 07-1086

RAMBUS INCORPORATED,
PETITIONER

v.

FEDERAL TRADE COMMISSION,
RESPONDENT

Consolidated with
07-1124

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

A. Douglas Melamed argued the cause for petitioner. With him on the briefs were *Paul R.Q. Wolfson*, *Sandhya N. Sankar*, *Andrew J. Ewalt*, and *Fredli A. Shah*.

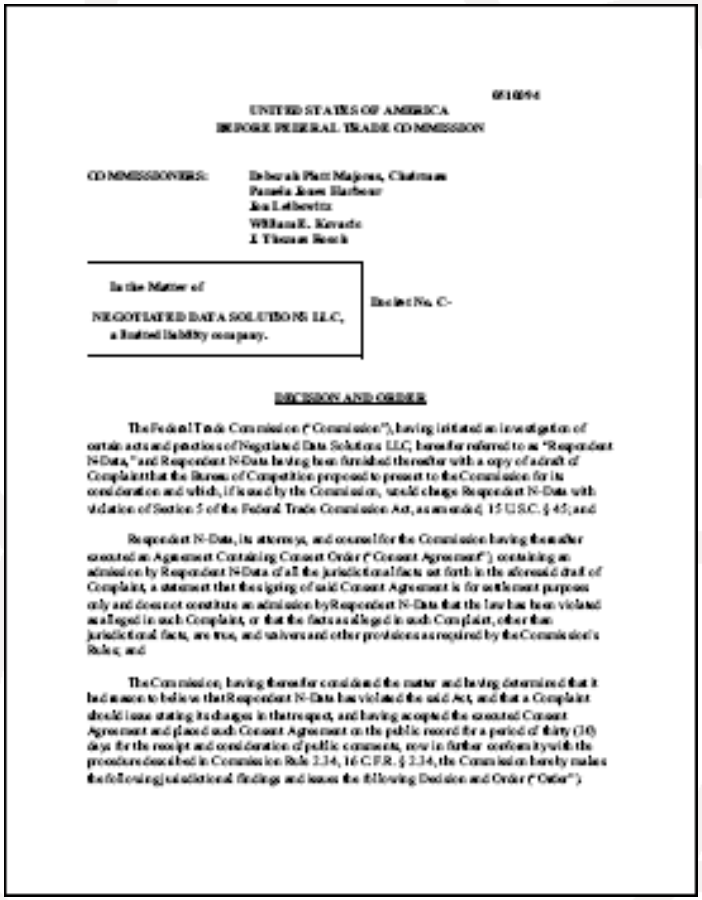
S. M. Oliva, appearing pro se, was on the brief for *amicus curiae* S. M. Oliva in support of petitioner.

John F. Daly, Deputy General Counsel for Litigation, Federal Trade Commission, argued the cause for respondent. With him on the briefs were *John D. Graubert*, 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



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of

NEGOTIATED DATA SOLUTIONS LLC,
a limited liability company.

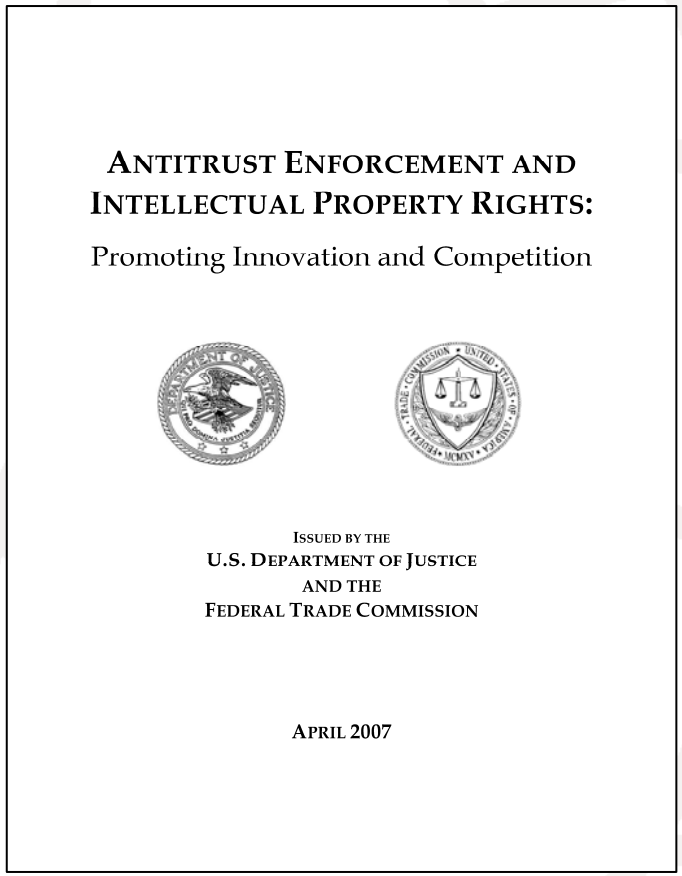
Docket No. C-

DECISION AND ORDER

- 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.
5. Violates Section 5 – unfair competition/ practice.

Antitrust and IPR Policies: Ex Ante Negotiations



- 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.