RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT

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* Special Counsel to the Director, Bureau of Competition, Federal Trade Commission. The views expressed in this Article do not represent the views of the Federal Trade Commission or any individual Commissioner. I have discussed the topic of Section 5 and standard setting with innumerable people over the years, and a thank-you list would include virtually everyone I have worked with at the FTC over the last twenty years, particularly members of the Anticompetitive Practices Division. I should mention a few: Michael Antalics, Neil Averitt, Barry Costilo, Kent Cox, Robert Davis, Geoffrey Green, Abbott McCartney, Suzanne Michel, Karen Mills, Geoffrey Oliver, and Patrick Roach. I would also like to thank Kenneth Glazer, Michael Knoll, and Willard Tom for their specific comments on this Article. Finally, I would like to thank my wife, Pam Steinfeld, for her very helpful editing.

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INTRODUCTION

I had the pleasure of teaching Antitrust, Intellectual Property, and Technology with Joe Brodley at Boston University School of Law. This brief partnership, or joint venture as Joe might prefer, evolved after I met Joe during his year as a visiting scholar at the Federal Trade Commission.

Joe's visit to the FTC coincided with the beginning of the FTC's *Rambus*[1] odyssey, which involved the intersection of the three elements of the seminar we taught. In late 2000, the Anticompetitive Practices Division, which I headed at the time, began an investigation into allegations that Rambus had misled the Joint Electron Device Engineering Council ("JEDEC"), a standard-setting organization ("SSO"), into standardizing computer memory technology covered by Rambus's intellectual property rights. This is often referred to as patent hold-up. Like Homer's *Odyssey*, the case against Rambus proceeded with starts and stops, and an occasional shipwreck. After a long investigation and trial, the ALJ sunk our complaint, but the FTC unanimously reversed the ALJ. This victory was short lived, however. The D.C. Circuit reversed the FTC decision and no votes were recorded in favor of en banc review. Finally, in February 2009, almost ten years after the investigation began, the Supreme Court denied our petition for certiorari.[2]

[1] Rambus, Inc., No. 9302, 2006-2 Trade Cas. (CCH) ¶ 75,364 (Fed. Trade Comm'n July 31, 2006), *rev'd*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[2] *See infra* Part II (discussing *Rambus* in detail).

Joe and I taught this case three times in his seminar while *Rambus* was pending. Of small consolation was the fact that our class "judges" affirmed the FTC two out of three times.

It is important to draw lessons from tragedies, be they Greek epics or FTC cases. On a personal level, I learned that although it is more fun to discuss my role in cases where the D.C. Circuit got it right (for example *Three Tenors*,[3] *Heinz*,[4] *Whole Foods*[5]), it is easier to write about cases where I believe the court got it wrong.

More substantively, this Article explores the D.C. Circuit's decision and draws lessons for the future. Part I begins with an introduction to antitrust and the standard-setting process. Because standard setting involves agreements amongst competitors to utilize standard technology, the process carries with it significant risks of anticompetitive behavior.

In Part II, I turn to the *Rambus* odyssey. I first address the D.C. Circuit's two fundamental errors: its misinterpretation of Supreme Court precedent[6] and its misinterpretation of its own precedent.[7] Since the 1970s, the Supreme Court has limited the reach of Section 2 of the Sherman Act ("Section 2")[8] when certain elements of competition are present, such as unilateral pricing decisions and choosing with whom to deal. I call these elements "core competition." The Court has described these as, among other things, the "central nervous system of the economy."[9] Conduct involving these elements also shares the characteristic that they are essential to market transactions, while other conduct, such as exclusive dealing, is not. Section 2 permits condemnation of non-core and non-essential conduct under a more lenient standard than applied by the D.C. Circuit in *Rambus*. I then show that, even if the D.C. Circuit decided *Rambus* correctly under Section 2, the FTC's jurisdiction over "unfair methods of competition"[10] under Section 5 of the Federal Trade Commission Act ("Section 5") extends beyond the Sherman Act in ways that would support liability in a *Rambus*-type case.

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[3] Polygram Holding, Inc. v. FTC, 416 F.3d 29, 31 (D.C. Cir. 2005) (affirming FTC decision that agreement between PolyGram and Warner Communications, Inc to restrict marketing of previously released Three Tenors concert albums to increase sales of the Tenors' new album violated antitrust laws).

[4] FTC v. H.J. Heinz Co., 246 F.3d 708, 711 (D.C. Cir. 2001) (granting FTC's motion to enjoin the merger of Heinz and Milnot Holding Corp.).

[5] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1041, 1049 (D.C. Cir. 2008) (finding a likelihood of success on the FTC's motion to enjoin the merger of Whole Foods and Wild Oats Markets, Inc.).

[6] *See infra* notes 47-60 and accompanying text (discussing the D.C. Circuit's misreading of NYNEX v. Discon, 525 U.S. 128 (1998)).

[7] *See infra* notes 61-72 and accompanying text (discussing the D.C. Circuit's disregard of United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)).

[8] 15 U.S.C. § 2 (2006).

[9] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

[10] Federal Trade Commission Act, 15 U.S.C. § 45.

In Part III, I provide a more comprehensive analysis of Section 5. I begin with a general discussion of the breadth of Section 5 and then address the concern that using Section 5 to fill in gaps in the antitrust laws will cause mayhem. Although some maintain that the FTC should not use Section 5 because three different appellate courts chastised the FTC in the 1980s for trying to expand the antitrust laws, those defeats involved core competition practices that the courts protect the most. As the conduct moves away from either the core or the essential, authority under both the Sherman Act and the FTC Act is broader.

The focus of Part III then shifts to the standard-setting context. Misrepresentation in such a context is not closely related to the "central nervous system" of the economy; indeed, it has no efficiency-enhancing aspects. Such unfair conduct should fit within Section 5, even under circumstances where it might not violate Section 2.

There is an overblown fear that FTC involvement in standard setting will result in decreased participation. These fears are often accompanied by an overreliance on the ability of patent law defenses to protect the interests of SSO members and, more importantly, consumers. In the standard-setting context, Section 5 and patent law defenses derive from similar legal principles and result in similar remedies. The incremental impact on incentives to participate should therefore not be that great – firms must already include private law defenses in their cost-benefit analysis of whether to join an SSO. As a result, where there would otherwise be anticompetitive effects, the FTC can enforce the principles of certain patent law defenses, such as equitable estoppel, because FTC intervention does not substantially change the incentives to participate in standard setting. The same cannot be said for Section 2, with its potential treble damage remedy.

After discussing the standard-setting context, I suggest Section 2 elements that might be relaxed in a Section 5 case: market power, causation, and the types of cognizable harm. I conclude Part III with a brief policy analysis.

I. STANDARD SETTING, ANTITRUST, AND SECTION 5 OF THE FTC ACT

In preparing for this Conference, I reviewed one of Joe's landmark articles in which he explains that innovation, production, and allocative efficiency are all relevant to antitrust law and enforcement, but that innovation efficiency is most important.[11] Although not explicitly addressed in Joe's article, standard setting is arguably the prototype for innovation efficiency because its purpose involves the "invention, development, and diffusion of new products and production processes that increase social wealth."[12]

[11] Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1025 (1987).

[12] *Id.* at 1025; *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND

Standard setting is well-recognized for its ability to create substantial economic efficiencies.[13] At the same time, because competitors are implicitly agreeing on what to produce (and not to produce), there is concern that standard-setting activities may harm consumers through higher prices or less product variety.

The Sherman Act was enacted over one hundred years ago to prevent conduct likely to harm consumers.[14] Section 1 of the Sherman Act proscribes unreasonable agreements between competitors, such as naked price fixing.[15] Section 2 addresses exclusionary conduct by single firms, making it unlawful to "monopolize or attempt to monopolize" a market for goods or services in the United States.[16] The Sherman Act is enforced by federal and state authorities, as well as through private rights of action. Successful plaintiffs are entitled to treble damages under the Sherman Act. The FTC, created in 1914, enforces the antitrust laws through Section 5 of the FTC Act, which prohibits "unfair methods of competition."[17] As discussed at length below, Section 5 also "empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[18]

COMPETITION 33 (2007) ("The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical problems.").

[13] *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) (describing SSOs as systems that help to "maximize consumer welfare" by "ensur[ing] the interoperability of products [and] facilitat[ing] the sharing of information among purchasers of products from competing manufacturers" (citations omitted)).

[14] *See* Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7).

[15] 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). Although literally the act appears to ban all agreements, the Supreme Court has made clear that Section 1 "outlaw[s] only unreasonable restraints." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). Certain agreements are viewed as so inherently anticompetitive that they are condemned once the agreement is demonstrated. These agreements, which include naked price fixing and customer allocations, are per se unlawful. Other restraints, such as exclusive dealing and territorial restrictions, sometimes improve consumer welfare, and sometimes do not; as a result, these restraints are judged under a more lenient "rule of reason" standard. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

[16] 15 U.S.C. § 2.

[17] *Id.* § 45(a)(1). Although the FTC cannot directly enforce the Sherman Act, it does so indirectly through its Section 5 power. *See* FED. TRADE COMM'N, STRATEGIC PLAN FISCAL YEARS 2003-2008, at 42 (2003), *available at* http://www.ftc.gov/opp/gpra/spfy03fy08.pdf; *see also* FTC v. Cement Inst., 333 U.S. 683, 693 (1948) ("The Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act.").

[18] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

Until recently, antitrust issues involving standard setting have involved collusion among competitors. In this regard, the standard-setting cases decided by the Supreme Court, *Allied Tube* and *Hydrolevel*, both involved Section 1 concerted activity to squash outside competition.[19]

More recent attention has focused on anticompetitive unilateral conduct. These cases address the possibility that one SSO member will either actively encourage or passively permit an SSO to adopt certain technology for which the member secretly holds patents or patent applications, that other firms will invest substantially to implement the standard incorporating that technology, and then the SSO member will come forward with the patent that covers the standard. If there were close substitutes available during the selection process, the members could have bargained for reduced or no royalties on the selected technology or chosen an alternative.[20] In the absence of disclosure or other safeguards, firms can behave opportunistically and reap monopoly profits because those using the technology will be locked-in to using it, potentially for a long time.[21] This conduct is often referred to as the patent hold-up problem or the use of a submarine patent.

The FTC now has had several occasions to analyze alleged patent hold-up during the standard-setting process. Three such matters were resolved through consent agreement. In *Dell*, the FTC found that Dell violated Section 5 where a Dell representative twice certified in writing that Dell had no patents

[19] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) ("[P]rivate standard-setting associations have traditionally been objects of antitrust scrutiny."); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) ("[SSOs] can be rife with opportunities for anticompetitive activity.").

[20] *See* Brief for Twenty Scholars as Amici Curiae in Support of Petitioner at 5-7, FTC v. Rambus Inc., 129 S. Ct. 1318 (2009) (No. 08-694) [hereinafter Scholars' Amicus Brief] ("SSOs that are concerned about undisclosed patents are also concerned about the pricing of patent royalties. Such SSOs seek to ensure that competition occurs in the context of full disclosure and a commitment to reasonable pricing. Part of the reason for this insistence on pre-adoption patent disclosure and RAND (reasonable and non-discriminatory) commitment is that adoption of a standard brings the competitive process to a virtual close, and creates barriers that prevent it from re-starting. . . . The upshot is, that by practicing deception, including deceptive nondisclosure of patents, patentees can misuse the SSO process as a means to gain a monopoly."). In many cases, it may not matter if the alternative is patented – competition to become the standard may still reduce the royalty cost close to zero depending on alternative uses for the IP. *See* Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscrimatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 8-9 (2005).

[21] *See* 2 HERBERT HOVENKAMP ET AL., IP AND ANTITRUST § 35.5b2, at 35-50 ("[M]isrepresentation will cause a standard-setting organization to adopt a standard it otherwise would have rejected . . . ."). In addition to *Rambus*, other cases have raised this issue in the antitrust context. *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 303-05 (3d Cir. 2007); Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180, 181 (D. Conn. 2001); Townshend v. Rockwell Int'l Corp., 55 U.S.P.Q.2d (BNA) 1011, 1020-21 (N.D. Cal. 2000).

covering the standard at issue, and after which, Dell threatened to sue competitors for patent infringement.[22] As part of a consent agreement, Dell agreed not to enforce the patent at issue against those implementing the standard.[23]

In the second case, the FTC investigated an allegation that Unocal misrepresented its patent rights during California Air Resources Board ("CARB") hearings on the adoption of new standards for reformulated gasoline.[24] After the regulations were implemented, Unocal won a patent infringement suit against major refiners of CARB reformulated gasoline and obtained a court judgment awarding Unocal royalties of 5.75 cents per gallon.[25] Ultimately, a consent agreement prohibited the enforcement of the relevant patent, saving California consumers this gas "tax."[26]

More recently, in *N-Data*, N-Data's predecessor in interest agreed to license its intellectual property ("IP") for a nominal sum in return for the SSO adopting its technology as a new standard.[27] The FTC alleged that N-Data's subsequent revocation of the offer and demands for a substantially higher royalty constituted an unfair method of competition in violation of Section 5. The FTC reached a consent agreement that required N-Data to license its technology to those implementing the standard at the original royalty rate.[28]

The foregoing cases provide the general framework for the FTC's proceedings against Rambus, to which I turn now.

II. *RAMBUS*

A. *FTC Liability Decision*

The complaint against Rambus included both a Section 2 count and a Section 5 count. The FTC's finding of liability, however, did not rely on broad Section 5 authority, but rather solely on precedent underlying Sherman Act Section 2 monopolization claims. Section 2 condemns the acquisition of a monopoly on a basis other than competition on the merits.[29] The Act "targets

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[22] Dell Computer Corp., 121 F.T.C. 616, 617-18 (1996).

[23] *Id.* at 623.

[24] Complaint at 1, Union Oil Co. of Cal., No. 9305 (Fed. Trade Comm'n Mar. 4, 2003), http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[25] *Id.* at 3-4.

[26] Union Oil Co. of Cal., No. 9305, at 3 (Fed. Trade Comm'n July 27, 2005), http://www.ftc.gov/os/adjpro/d9305/050802do.pdf.

[27] Complaint at 1-4, Negotiated Data Solutions LLC, No. C-4234, (Fed. Trade Comm'n Sept. 22, 2008), http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf. The FTC complaint states that the Respondent obtained the patents "subject to any existing licenses and other encumbrances that [its predecessor in interest] may have granted." *Id.* at 5, ¶ 24.

[28] Negotiated Data Solutions LLC, No. C-4234 at App. D, 2008 WL 4407246 (F.T.C.) (Sept. 23, 2008).

[29] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

‘the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’”[30] To prevail under Section 2, the FTC was required to establish two things: “(1) possession of monopoly power in the relevant market and (2) exclusionary conduct.”[31]

The FTC found that Rambus unlawfully monopolized the market for technology essential to manufacture synchronized DRAM (“SDRAM”),[32] in accordance with an industry standard created at JEDEC. JEDEC was very much aware that once a standard was implemented, any firm controlling that standard would have substantial market power. To prevent participants from using the JEDEC process to monopolize a market, JEDEC required participants to disclose any relevant patents or patent applications they held.[33]

Rambus initially maintained that while a member of JEDEC it did not seek patents covering the JEDEC standard for SDRAM and that it was not until after leaving JEDEC that it realized it owned valuable IP covering the standard. Soon thereafter, Rambus’s massive document destruction was discovered.[34] Documents found on an uncleansed personal computer supported the FTC’s claim that Rambus planned to monopolize the standardized memory from the outset.[35]

The FTC found that had Rambus disclosed its IP, either JEDEC would not have adopted the Rambus technology or the technology would have only been adopted subject to a commitment by Rambus to license on reasonable and non-discriminatory (“RAND”) terms.[36] In what the Third Circuit called a

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[30] Pac. Bell Tel. Co. v. Linkline Commc’n, Inc., 129 S. Ct. 1109, 1118 (2009) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

[31] *Grinnell Corp.*, 384 U.S. at 570-71.

[32] SDRAM is a type of random access memory (“RAM”) that, at the time, was commonly used in computers. Currently, computers use subsequent implementation of the standard – double data rate SDRAM (“DDR DRAM,” “DDR2,” or “DDR3”).

[33] Rambus, Inc., No. 9302, at 4, 2006-2 Trade Cas. (CCH) ¶ 75,364 (Fed. Trade Comm’n July 31, 2006), *rev’d*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[34] *See* Rambus, Inc. v. Infineon Techs. AG, 155 F. Supp. 2d 668, 682 (E.D. Va. 2001) (“Rambus implemented a ‘document retention policy,’ in part for the purpose of getting rid of documents that might be harmful in litigation.”); *Rambus, Inc.*, No. 9302, at 116 n.630 (describing how Rambus destroyed “185 burlap bags and 60 boxes full of documents” on one occasion and “approximately 150 burlap bags of documents” on another).

[35] *See, e.g.*, Reply Brief of Complaint Counsel Supporting the Complaint at 54-56, *Rambus Inc.*, No. 9302, at 54-56 (Fed. Trade Comm’n July 7, 2004), http://www.ftc.gov/os/adjpro/d9302/040707ccreplybrief.pdf. In its white paper to the FTC, prior to the discovery of the document destruction, Rambus asserted it “was not seeking any patents that covered the SDRAM standard during the time that the standard was being considered by JEDEC.” *Id.* at 54. After the attorney-client privilege was pierced under the crime-fraud exception, this position shifted substantially. *Id.* at 55.

[36] Firms agree to RAND terms (some even donate their IP) for various reasons. A manufacturing company might do so because the inclusion of its technology in a standard

"landmark" decision,[37] the FTC found that Rambus had engaged in exclusionary conduct to gain monopoly power.[38] Rambus's patent hold-up enabled it to seek royalties far in excess of RAND.[39] A separate statement by then-Commissioner Leibowitz argued that Rambus's conduct also violated Section 5 because it was oppressive without any business justification.[40]

B. *D.C. Circuit Reversal of FTC Monopolization Holding*

The D.C. Circuit reversed the FTC,[41] and not a single vote was recorded in favor of the FTC's petition for en banc review. The D.C. Circuit's holding only addressed monopolization, and the court reserved judgment on whether the conduct violated Section 5.[42]

In essence, the D.C. Circuit held that, as a matter of law, a company that intentionally deceives a standard-setting organization about its patent rights with the intent to gain a monopoly does not violate Section 2 unless the company's technology would not have been chosen in the "but for" world.[43] The court found that because the FTC did not rule out the possibility that the Rambus technology would have been adopted subject to a RAND commitment, the violation of this hypothetical RAND commitment was the

will result in a bigger pie, even if the company has a smaller share of it. Moreover, that company may have a first mover advantage over competitors. Other firms may participate in the standard-setting process because they have complementary products that will sell better when there is a standard in an adjoining market.

[37] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 311 (3d Cir. 2007).

[38] *Rambus, Inc.*, No. 9302, at 118-19.

[39] Among others, Richard Rapp, one of the economists for Rambus, explained how the failure to disclose patent rights could enable the patent holder to obtain greatly increased royalties. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 12, at 38 ("Anointing a patented technology as the standard improves the bargaining position of the owner of the needed technology in licensing negotiations because '[i]f you are the owner of one of the rights to one of those many equally valuable [technologies], then it is the standard-setting process that will reduce the substitution, possibly eliminate the substitutes, and elevate your technology to [be] the most valuable.'" (quoting Richard Rapp, President, Nat'l Economic Research Assocs.)).

[40] Concurring Opinion of Commissioner Jon Leibowitz at 18, Rambus Inc., No. 9302 (Fed. Trade Comm'n Aug. 2, 2006), [hereinafter Leibowitz, *Rambus* Concurrence] http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

[41] Rambus Inc. v. FTC, 522 F.3d 456, 467-69 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1318 (2009).

[42] *Id.* at 467. The court, however, warned the FTC of its "serious concerns about strength of the evidence relied on to support some of the Commission's crucial findings regarding the scope of JEDEC's patent disclosure policies and Rambus's alleged violation of those policies." *Id.*

[43] *Id.* at 466-67.

exploitation of "lawful" monopoly power by Rambus.[44] The D.C. Circuit based this conclusion on its interpretation of the Supreme Court's decision in *NYNEX*,[45] in which the Court found, under different circumstances, that deceptive conduct did not violate the antitrust laws.[46]

1. D.C. Circuit Decision Misreads *NYNEX* and Neglects *Microsoft*

In *Rambus*, the D.C. Circuit focused on the following passage from *NYNEX*, in which the Supreme Court explained that even if NYNEX's actions caused consumer injury,

> that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist . . . combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power.[47]

The *Rambus* court misinterpreted the import of this passage.[48]

The facts of *NYNEX*, briefly, are as follows. NYNEX, formerly a regional Bell operating company, needed to replace obsolete switching equipment.[49] Discon, which had been providing the equipment removal services to NYNEX, lost the bid for the contract to AT&T, a more expensive competitor.[50] Allegedly, NYNEX would pay AT&T an inflated price for removal services, NYNEX would then pass this extra cost on to its customers through higher regulated prices, and AT&T would give a special rebate to NYNEX (splitting the profit).[51] After refusing to participate in this alleged rebate scheme, Discon went out of business and filed an antitrust complaint.

[44] *Id.*

[45] NYNEX v. Discon, 525 U.S. 128 (1998).

[46] *See Rambus*, 522 F.3d at 464-66.

[47] *NYNEX*, 525 U.S. at 136.

[48] *See, e.g.*, Scholars' Amicus Brief, *supra* note 20, at 8-12; Robert A. Skitol & Kenneth M. Vorrasi, *Patent Holdup in Standards Development: Life After* Rambus v. FTC, ANTITRUST, Dec. 2009, at 26, 28 (declaring that the D.C. Circuit's rule ignores "anticompetitive effects of deceptive conduct in the course of a standards development process"); Joel M. Wallace, Note, Rambus v. F.T.C. *in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-up Problem*, 24 BERKELEY TECH. L.J. 661, 686 (2009) ("*NYNEX* does not address the issue of using deception to gain monopoly power in any way, which was at the heart of the *Rambus* dispute."); J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Section 2 and Standard Setting: *Rambus*, *N-Data* and the Role of Causation (Oct. 2, 2008) (transcript available at http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf) (describing the Supreme Court's reading of *NYNEX* as "unwarranted").

[49] *NYNEX*, 525 U.S. at 131.

[50] *Id.* at 132.

[51] *Id.*

Discon alleged that NYNEX engaged in a per se unlawful group boycott. But rather than an agreement between direct competitors, the NYNEX/AT&T agreement was a vertical agreement. The Supreme Court held that the per se rule against group boycotts covering certain horizontal agreements was inapplicable to a vertical agreement where a buyer simply favored one seller over another.[52] Although the conduct was not per se unlawful, the Court remanded on whether Discon could show harm to the competitive process, not just one competitor.[53]

The *NYNEX* Court rejected per se analysis, but it made no holding on whether the deception might violate the antitrust rules under a more fulsome rule of reason analysis because that issue was not before the court:

> Petitioners ask us to reach beyond the "per se" issues and to hold that Discon's complaint does not allege anywhere that their purchasing decisions harmed the competitive process itself and, for this reason, it should be dismissed. They note that Discon has not pointed to any paragraph of the complaint that alleges harm to the competitive process. This matter, however, lies outside the questions presented for certiorari. Those questions were limited to the application of the *per se* rule.[54]

Whether Discon could show an effect on competition under a rule of reason analysis was outside the scope of the certiorari petition. Rambus would have been at least a distant cousin to NYNEX if the FTC had found that Rambus's conduct was a per se violation of Section 2. As it was, the cases bear no relationship to one another.

The D.C. Circuit missed or ignored two fundamental points in *NYNEX*. First, *NYNEX* involved a customer's choice between one supplier and another. The Court was rightly concerned with putting such decisions under the microscope (transforming "nepotism or personal pique, into treble damages antitrust cases").[55] Choosing suppliers is "close to the heart of the competitive process."[56] The Court explained that the "*per se* rule would discourage firms from changing suppliers – even where the competitive process itself does not suffer harm."[57] Rambus's use of deception, which the D.C. Circuit assumed arguendo, is nowhere near the heart or any other part of the competitive body.

Further, the *NYNEX* Court emphasized that NYNEX was a lawful monopolist at the time of its deception – Rambus was not. NYNEX did not obtain its monopoly through deception – Rambus did. The *Rambus* decision does not discuss how a case involving conduct *after* a firm becomes a lawful

[52] *Id.* at 138.
[53] *Id.* at 140.
[54] *Id.*
[55] *Id.* at 137.
[56] *Id.* (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911)).
[57] *Id.*

monopolist is equivalent to conduct distorting the competitive process *before* the firm becomes a monopolist.

The D.C. Circuit believed that because the FTC did not rule out that Rambus technology would have been chosen, Rambus had achieved its monopoly lawfully. But having technology subject to a RAND commitment before lock-in gives Rambus *no* monopoly power, that is, no power to control price or output.[58]

The D.C. Circuit's rule creates perverse incentives – if your product is slightly better, you can engage in deception to increase the odds that your technology will be chosen, gain the monopoly, and then exploit it. Finding Rambus to be a "lawful monopolist" encourages opportunistic behavior that can result in substantial antitrust harm. The anticompetitive effects include not only royalties at a monopoly rate, but also the possibility that Rambus could gain an injunction against implementation of the standard.

The court's treatment of causation is also troublesome. The court's analysis was essentially as follows:

Path one is exclusionary (technology not adopted) (50%)

Path two is "lawful" monopolist (exploiting its monopoly) (50%)

Equal probability → No liability

In other words, the court found that if there was an equal chance that the technology would have been adopted or would not have been adopted, the monopolist gets the benefit of the doubt and can keep its monopoly.

Why find no causation under this 50-50 scenario? The D.C. Circuit cited to *Avins v. White*,[59] a defamation case that dealt with general verdicts where only one of three statements that went to the jury was found defamatory on appeal. In *Avins*, the jury awarded damages, but since there was no special verdict allocating damages to each statement, the court remanded so that this determination could be made.[60] This decision relating to the proper determination of damages seems straightforward.

Previously, however, the D.C. Circuit had determined that this general verdict standard is not applicable to government antitrust cases, particularly where the relief sought is an injunction.[61] In *Microsoft*, the court made this point repeatedly, holding that the public interest at stake in such a case

[58] *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) (finding that the breach of a RAND commitment violates Section 2).

[59] Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008) (citing Avins v. White, 627 F.2d 637, 646 (3d Cir. 1980)), *cert. denied* 129 S. Ct. 1318 (2009).

[60] *Avins*, 627 F.2d at 647.

[61] One might argue that the FTC's remedy – setting royalty terms – was more than a simple injunction. However, the FTC's order also included more straightforward injunctive relief (e.g., no misrepresentations in the future). The D.C. Circuit's decision related to liability – not remedy – and thus immunizes this deceptive conduct regardless of the relief sought. The distinction between causation for different types of relief was recognized by the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001).

warranted a lower causation standard.[62] The D.C. Circuit adopted a "rather edentulous test for causation;"[63] a "toothless," low threshold:

> [T]he question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue. As to the first, suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts. As to the second, the District Court made ample findings that both Navigator and Java showed potential as middleware platform threats.[64]

Certainly, Rambus's conduct "reasonably appear[s] capable of . . . creating or maintaining a monopoly."[65] Importantly, the *Microsoft* court applied the

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[62] For example, the court stated:

> [W]ith respect to actions seeking injunctive relief, the authors of that treatise [Areeda and Hovenkamp] also recognize the need for courts to infer "causation" from the fact that a defendant has engaged in anticompetitive conduct that "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power." To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.
>
> . . . To some degree "the defendant is made to suffer the uncertain consequences of its own undesirable conduct."

Id. at 79 (alteration within the interior quotation in original) (citations omitted).

[63] *Id.*

[64] *Id.*

[65] 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651g, at 124 (3d ed. 2008). Rambus suggested that the "reasonably appears capable" language in *Microsoft* was limited to "maintenance" cases, as opposed to those involving monopoly "acquisition." The argument was inventive. In the antitrust treatise, the authors used the phrase "reasonably appear capable of making a significant contribution to creating or maintaining" a monopoly. *Id.* The D.C. Circuit omitted "creating." *Microsoft*, 253 F.3d at 79. Hence, according to Rambus, the lesser causation standard only applies to maintenance cases. Of course, a more likely explanation is that it simply was not relevant to the decision given that the *Microsoft* court never explicitly expressed any such limitation, together with the fact that *Microsoft* was, in fact, a monopoly maintenance case rather than a creation case. Still, the issue is an interesting one, and one not addressed by the *Rambus* court. There are arguments on both sides of the question. There is the well-known statement from *Kodak* where Justice Scalia observed, "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary

low causation standard to license restrictions and exclusive dealing, both of which are often associated with procompetitive conduct.

In summarizing the Supreme Court's jurisprudence on tying, the D.C. Circuit further recognized that interference with consumer choice could, without an inquiry into causation, result in antitrust liability.[66]

> The core concern is that tying prevents goods from competing directly for consumer choice on their merits, *i.e.*, being selected as a result of buyers' independent judgment. With a tie, a buyer's freedom to select the best bargain in the second market [could be] impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product.

Tying, like other vertical restraints, has significant potential to benefit consumers. Nonetheless, the decision in *Microsoft* implicitly accepts that it is more important that the competitive process be based on accurate information than to show causation in fact.[67]

Misrepresentations and deceptive conduct, the conduct at issue in *Rambus*, have far less, if any, procompetitive potential than licensing restrictions, exclusive dealing, or tying. If any conduct should be subject to a "toothless" causation standard, one would think it would be deceptive conduct. In fact, the D.C. Circuit condemned deceptive conduct in *Microsoft* without regard to the "but for" world.[68] Microsoft had deceived software developers into believing

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connotations when practiced by a monopolist." Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 488 (1991) (Scalia, J., dissenting).

On the other hand, if the key to improving social welfare is investing resources to become a monopolist, doesn't it reduce the incentive to become a monopolist if the monopoly can be taken away by unscrupulous conduct? In his goals of antitrust article, Professor Brodley correctly observes that allowing the theft of a monopoly (e.g., monopoly acquisition through theft or deception) reduces the incentive to innovate "by making investment in innovation more risky and hence more costly." Brodley, *supra* note 11, at 1034-35.

[66] *Microsoft*, 253 F.3d at 87 (citations and quotations omitted).

[67] *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 983-87 (2005); *cf.* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 511 (1988) ("What petitioner may not do . . . is bias the [standard-setting] process . . . ."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692-93 (1978) (finding conduct anticompetitive if it "impedes the ordinary give and take of the market place and substantially deprives the customer of the ability to utilize and compare prices" (citations and quotations omitted)).

[68] In addition to the D.C. Circuit in *Microsoft*, many other courts have indicated that deception, misrepresentation, or other distortions to the provision of truthful information, can be the basis for antitrust liability. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 n.9 (1999) ("[F]alse or misleading advertising has an anticompetitive effect . . . ."); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("No credible argument has been advanced for the proposition that making it more costly . . . to obtain information needed for evaluating [the product] has any such procompetitive effect."); Cal. Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("Misrepresentations . . . are not immunized"

that using Microsoft's Java tools would result in cross-platform applications, when in fact the applications would only work with Windows.[69] Rather than focusing on causation, the court explained that Microsoft intended to deceive, and "served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive."[70] The *Rambus* court interpreted this holding to mean that their antitrust scrutiny should properly be focused "on the resulting harms to competition rather than the deception itself."[71] However, the fact that some indeterminate number of software developers was deceived would not establish causation under the test employed by the Rambus court, particularly where the district court found it unclear whether these software developers would have made Microsoft's monopoly "vulnerable."[72]

2. Analyzing Risk of and from False Positives

The conduct in *Rambus* bore little resemblance to any conduct that would increase consumer welfare. Thus, the risk from wrongly condemning procompetitive conduct is substantially less in *Rambus* than in *Microsoft* and other Section 2 cases.[73] The Supreme Court's concern with false positives (type one error) is inapplicable to *Rambus*.

Price cutting is the "central nervous system of the economy."[74] "[C]utting prices in order to increase business often is the very essence of competition."[75] The Supreme Court does not condemn price cutting lightly because to do so would pose substantial risk to the competitive process.[76] The choice of

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from antitrust liability); Caribbean Broad. Sys., LTD v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1262-63, 1270 (8th Cir. 1980).

[69] *Microsoft*, 253 F.3d at 76.

[70] *Id.* at 77.

[71] Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008).

[72] United States v. Microsoft Corp. (*Microsoft II*), 87 F. Supp. 2d 30, 43 (D.D.C. 2000) (conclusions of law), *aff'd in part*, *rev'd in part*, 253 F.3d 34 (2001).

[73] Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1197-98 (2009).

[74] United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 226 n.59 (1940).

[75] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

[76] *See id.* ("[M]istaken inferences in cases [seeking to impose antitrust liability for prices that are too low] are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); *see also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226-27 (1993) ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."); *cf.* Weyerhaeuser Corp. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007) ("Given the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in *Brooke Group*.").

suppliers is also "close to the heart of the competitive process."[77] Yet another fundamental element of competition is observing competitors and responding. Without permitting such interdependence, competition would start looking more like a command and control economy.[78] Thus, in *Twombly*, the Court required more than a mere allegation of parallel conduct to survive a motion to dismiss.[79]

Price cutting and choosing with whom to deal are among the areas of "core competition." They also share the characteristic that they are transactional necessities. At the most basic level, for there to be a sale of goods or services in a free market, the seller must choose a product to sell – a process that might include product design, setting a price, and choosing with whom to purchase and sell. In a capitalist society, as opposed to a command economy, these are among the basic underpinnings of the market. It is always necessary to pick a price; it is always necessary to pick with whom to deal.[80] In addition, it is impossible for firms to operate in a vacuum – they must continually observe and react to their competitors.

Although under some circumstances, even conduct involving transactional necessities or core competition can subject a firm to antitrust liability, on balance, antitrust law gives firms significant leeway in these areas.[81] This limits court involvement in the most fundamental, internal workings of the firm.[82] Courts are ill-equipped to do so "because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive

[77] NYNEX v. Discon, 525 U.S. 128, 137 (1998) (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911)).

[78] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1118 (2009) ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" (quoting Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004)); *Trinko*, 540 U.S. at 415 ("'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'" (quoting Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 851 (1990)) (alteration in original)).

[79] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (requiring a plaintiff to plead facts "suggestive enough to render a § 1 conspiracy plausible").

[80] The purchase and sale of commodities is an exception to knowing with whom the firm is dealing, but not important to this analysis.

[81] *See, e.g.*, *Linkline*, 129 S. Ct. at 1119 ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. But there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct." (citation omitted)); Lorain Journal Co. v. United States, 342 U.S. 143, 154-55 (1951) (monopolist's refusal to deal with customers patronizing a new radio station was unlawful).

[82] *See generally* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

effects."[83] A false positive involving an element of core competition or a transactional necessity can cause harm throughout the economy.

On the other hand, firms also make choices that do not involve transactional necessities or core competition. For example, as is evident from the *Microsoft* case, an exclusive dealing arrangement is not essential to the competitive process. Such an agreement might have procompetitive effects or anticompetitive effects,[84] but it is not an essential element of a transaction or competition.[85] In its recent decision addressing the agreement among National Football League teams to use an exclusive NFL headwear supplier, the Supreme Court explicitly acknowledged this concept of "necessary" conduct: "[B]ecause concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition."[86]

Trinko and other decisions narrow the scope the Sherman Act because of the perceived risk of harm to innovation or competition. For example, in *Matsushita*[87] the plaintiffs alleged a twenty-year conspiracy to engage in predatory pricing.[88] The Court found that the alleged conduct, lowering prices, is almost always good for consumers.[89] Consumers might lose aggressive price-cutting if a court incorrectly finds a conspiracy. By contrast, unlike price cutting, the conduct alleged in *Rambus* – that a firm misrepresented its patent

[83] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).

[84] *See* Joseph Farrell, *Deconstructing Chicago on Exclusive Dealing*, 50 ANTITRUST BULL. 465, 466 (rejecting a general presumption that exclusive dealing is efficient); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 638 (1999) (arguing that exclusive dealing is sometimes anticompetitive and should be subject to scrutiny, but that it can also "eliminate free-riding, improve coordination or create other efficiency benefits" (citations omitted)); Oliver Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 993 (1979) ("Absent the existence of a dominant firm or a tight monopoly within an industry . . . exclusive dealing . . . should be assumed to promote transaction costs economies.").

[85] One might assert that certain vertical restraints are transactional necessities. For instance, a firm might decline to sell a product without an exclusive dealing arrangement that prevents free riding. Typically, although such arrangements might yield superior distribution, they are not required for a transaction to occur.

[86] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2209 (2010).

[87] 475 U.S. 574 (1986). The Court also concluded that the predatory pricing conspiracy was implausible because such a strategy was not rational because it was unlikely to be profitable. By contrast, the conduct alleged in *Rambus*, that a firm misrepresented its patent rights to obtain a monopoly, is rational: gaining a monopoly through such deception is cheap and profitable. The FTC had an economically plausible case against Rambus. Creighton et al., *supra* note 67.

[88] *Matsushita*, 475 U.S. at 577-78.

[89] *Id.* at 594.

rights to obtain a monopoly – does not enhance consumer welfare. Misrepresentations are far away from the "nervous system" of the economy.[90]

The risk analysis in *Trinko*, *Matsushita*, and other Supreme Court cases should have a flip side. A restriction on deception does not pose the significant risk of harm to the competitive process discussed in those cases. Moreover, the harm from a false negative may be large. Under such circumstances, the balance should tilt toward liability.[91] *Trinko* should not be a one-way street.

3. Low Risk of and from False Positive in *Rambus* Favors Low Causation Standard

The FTC concluded that Rambus had knowledge of the rules of the SSO and the expectations of the members and that Rambus engaged in deception to obtain monopoly power over the standard. The D.C. Circuit assumed those findings to be true.[92] This Section analyzes potential harm if the FTC's decision was a false positive.

A false positive might impact standard setting in several ways, but none seem likely to harm consumers.[93] First, overall standard-setting activity might decrease if firms reduce research and development ("R&D") because they cannot easily deceive an SSO in the future. But it seems unlikely that firms invest in R&D based on the future payoff from a monopoly resulting from misrepresentations made before a standard-setting organization.[94]

[90] Caution is not warranted because unlike other areas, such as resale price maintenance ("RPM"), it cannot be said that "economics literature is replete with procompetitive justifications" for deception. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007). Notably, RPM, like exclusive dealing, is not essential and "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated." *Id.* at 894. Products are generally marketed without RPM, and there are other vertical practices that can substitute for RPM.

[91] ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 90 (2007) ("[I]t remains important to avoid underdeterrence that results in "false negatives" – that is, failing to condemn anticompetitive conduct – when the challenged conduct typically provides few or no benefits to consumer welfare and does not resemble competition on the merits.").

[92] Rambus Inc. v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1318 (2009) (finding, nonetheless, that Rambus did not violate antitrust laws because the FTC failed to prove the requisite causation element); Brief for Hewlett-Packard Co. et al. as Amici in Support of Petitioner at 5, *Rambus Inc.*, 129 S. Ct. 1318 (No. 08-694) [hereinafter Hewlett-Packard Brief] ("[T]he court of appeals accepted for its analysis the Commission's conclusions that 'willful' deception occurred . . . .").

[93] Rambus in fact did leave JEDEC soon after the FTC's decision in *Dell*. *See Rambus*, 522 F.3d at 460.

[94] *See, e.g.*, Cotter, *supra* note 73, at 1197 ("Farrell et al. make a convincing case that the prospect of deterring innovation by forbidding patentees from engaging in ex post, deception-based patent ambush seems unlikely to inhibit much, if any, ex ante innovation."); Joseph Farrell et al., *Standard Setting, Patents, and Holdup*, 74 ANTITRUST L.J. 603, 610 (2007).

Second, an antitrust rule against intentionally misrepresenting patent rights could induce existing patent holders to decrease participation in standard setting for different reasons. A firm with superior technology might not participate because it intended to engage in patent hold-up. Notably, even the American National Standards Institute ("ANSI"), an organization dedicated to the promotion of standard setting, believes that FTC action is justified when competitors intentionally deceive an SSO.[95]

Firms might also decrease participation in standard setting because they fear that the FTC will wrongly accuse them of misrepresentation. Firms could be concerned that merely negligent conduct will be viewed as intentional, and that their unintentional conduct might trigger treble damages and loss of patent rights.[96]

This argument cannot justify the D.C. Circuit's decision. As an initial matter, the court did not use this line of reasoning. Instead, the court's holding takes as given that Rambus engaged in deception. In addition, no one suggests that the FTC is unqualified to make these determinations in either consumer protection or other antitrust matters. As discussed below, the FTC invests more time in cases and has more specialized expertise than other factfinders.[97] If the FTC cannot make determinations about misrepresentations and bad intent, who can? In fact, this particular false positive argument leaves little room for antitrust enforcement, private or public.

Even if the risk of a false positive dissuades a firm from participating in standard setting, this withdrawal from the standard-setting process will not necessarily harm consumers. Professor Lemley observes:

> Companies that do not want to relinquish rights in their IP have a choice: they can decline to participate in the SSO altogether, or they can withdraw from consideration of a particular standard in which they have an interest. Because SSO rules necessarily bind only members of the SSO, exit is always an option. The only companies for whom this will not be a realistic choice are the ones whose goal is to push for group adoption of a standard to which they own the rights. But there is no reason such companies should have it both ways. If the SSO permits licensing on reasonable and nondiscriminatory terms, IP owners do not need to retain any further rights unless their true goal is to hold up

[95] *Standards-Setting Practices: Competition, Innovation and Consumer Welfare: Hearing Before the Fed. Trade Comm'n and Dep't of Justice* 1 (Apr. 18, 2002) (testimony of Amy A. Marasco, Vice President and General Counsel, ANSI), *available at* http://www.ftc.gov/opp/intellect/020418marasco.pdf [hereinafter Marasco, Joint Hearings Testimony] ("[I]n the case of deliberate misconduct, the FTC or DOJ can intervene.").

[96] More generally, firms might decrease participation if the cost of participation increases, either through using additional resources for increased vigilance, or more direct costs associated with disclosing patents or evaluating disclosed patents.

[97] *See infra* text accompanying note 123 and note 130 (discussing Congress's establishment of the FTC as a body with business and economic expertise).

> members after the standard is adopted. Even if the SSO requires royalty-free licensing, the option of exit is not terribly onerous. If the intrinsic value of the proposed standard is great enough, the SSO may adopt it anyway – or if the SSO won't, the market may.[98]

As Lemley indicates, if technology has high "intrinsic value," the market may adopt it as a de facto standard, even if it is not chosen as a de jure standard by an SSO.[99] This alternative may lessen the harm from a false positive. On the other hand, if the technology is just one among several, the patent's value, with respect to the industry standard, is low. The increased value of the patent after lock-in is attributable to the standard. Thus, a firm that holds up an SSO is not treated unfairly even if it loses hundreds of millions of dollars once it is caught. The patentee is no more entitled to its ill-gotten gains than is the robber engaged in a more typical hold-up.

Another factor impacting the risk from a false positive is the ease with which the market can contract around an error. Most care is required when firms cannot easily contract around an error. For example, with regard to transactional necessities such as pricing, choosing with whom to deal, and observing and reacting to competitors, private parties cannot easily undo a wrong decision. By contrast, in *Rambus*, the firm's conduct likely caused harm, but even if not, discouraging misrepresentations is hardly bad, and even if it were, the SSO could change its rules to eliminate disclosure requirements and expectations or make clear that misrepresentations are tolerated.[100]

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[98] Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1945 (2002).

[99] *Id.* The competition between de facto standards and de jure standards, as well as between SSOs, should encourage SSOs to support rules that will improve its competitiveness. JEDEC's unequivocal support of the FTC's case against Rambus is another factor in favor of the FTC decision. *See* Amicus Curiae Brief of JEDEC Solid State Tech. Ass'n in Support of Complaint Counsel, Rambus Inc., No. 9302 (Fed. Trade Comm'n Sept. 15, 2006), http://www.ftc.gov/os/adjpro/d9302/060915jedecamicusbrief.pdf. Other interested parties, who would be reluctant to discourage standard setting or otherwise negatively impact IP, also supported the Commission's action. *See* Hewlett-Packard Brief, *supra* note 92, at 1-2; Brief of Amici Curiae in Support of Petition for Writ Of Certiorari of Advanced Media Workflow Ass'n ("AMWA") et al. at 1-5, FTC v. Rambus Inc., 129 S. Ct. 1318 (2009) (No. 08-694) [hereinafter AMWA Brief]. For most of these entities, they had no direct financial stake; their interest was to support the application of sound economic and antitrust principles to standard-setting activities.

[100] Professor Wright defends the D.C. Circuit's *Rambus* decision on the grounds that "parties cannot contract around heavy mandatory antitrust remedies." Joshua D. Wright, *Why the Supreme Court Was Correct to Deny Certiorari in* FTC v. Rambus 3 (George Mason Univ. Law & Econ. Research Paper Series, Working Paper No. 09-14, 2009) *available at* http://ssrn.com/abstract_id=1349969. But Professor Wright ignores the other side of the equation: the risk of, and harm from, error is substantially greater with the heightened standard of causation in *Rambus*. *See, e.g.*, Hewlett-Packard Brief, *supra* note 92, at 2 ("Amici are concerned that the court of appeals' decision in this case rests on

On the other hand, it is difficult to contract around a false negative here, which may cause substantial harm.[101] Avoiding opportunistic behavior is expensive.[102] SSOs and others recognize that firms are less likely to participate in standard setting if the end result is that the firm unwittingly assists a competitor in gaining monopoly power over it. Firms will reduce participation in standard setting if they know their rivals may engage in deceptive conduct. This risk assessment supports a lesser standard of causation than when transactional necessities are involved.

Because false positives carry low risk of harm to consumers, the court should have used a causation standard comparable to or even weaker than the one used in *Microsoft*.[103] Even if Rambus's technology were superior and Rambus would have obtained monopoly power without the deception, the court should have required Rambus "to suffer the uncertain consequences of its own undesirable conduct."[104]

Outside of Section 2, the Court has in fact applied lower causation standards where the risk of consumer harm is substantial but where there is little risk of chilling procompetitive conduct. For example, when competitors agree to fix prices, the per se rule applies – the most abbreviated rule of reason analysis. While not every price fixing agreement will cause harm, naked price fixing lacks redeeming social value, and so the causation requirement is jettisoned.[105]

The D.C. Circuit need not have adopted a per se rule to find liability. Section 2 analysis is a form of rule-of-reason analysis but rule-of-reason analysis does not always involve the most fulsome causation treatment.[106] The Supreme Court described rule-of-reason analysis in *California Dental Ass'n v. FTC*:

serious misunderstandings about the manner in which patent-related deception in the course of standards development can undermine the success of open standards efforts to Amici's great detriment and with resulting harm to competition and to the consuming public.").

[101] Hewlett-Packard Brief, *supra* note 92, at 2.

[102] *See* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 555 n.91 (1981) ("Prohibiting the . . . behavior when its only result is to transfer wealth discourages such behavior and accordingly reduces the amount of resources spent on it and protecting against it."); *see also* Farrell et al., *supra* note 94, at 647 ("[A]nticipation of hold-up encourages a range of inefficient forms of self-protection, such as postponing or minimizing investment, or ensuring that standards use only antique technology.").

[103] *See supra* notes 61-72 and accompanying text (discussing the relative weakness of the *Microsoft* causation standard).

[104] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam) (citations omitted).

[105] *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005).

[106] *See Microsoft*, 253 F.3d at 59 ("As the Fifth Circuit more recently explained, '[i]t is clear . . . that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied . . . .'" (quoting Mid-Tex. Commc'ns Sys., Inc. v. AT&T, 615 F.2d 1372, 1389 n.13 (5th Cir. 1980)).

> What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.[107]

Rule-of-reason analysis prescribes an inquiry appropriate for the conduct examined. When a firm deceives a standard-setting organization, the circumstances require a lower burden than the D.C. Circuit imposed; the defendant should be made to bear the uncertain consequences of its conduct.

Even in cases in which the government cannot prove that alternative technologies would have been adopted, imposing liability is consistent with antitrust law. "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will . . . ."[108] The other technologies under consideration at JEDEC when Rambus engaged in its deception are directly analogous to the "nascent, albeit unproven, competitors" that the D.C. Circuit protected in *Microsoft*.[109]

The *Microsoft* court found liability even without finding that either Netscape or Java could have successfully challenged the Microsoft monopoly. Netscape's threat to Microsoft was far more tenuous than alternative technologies' threats to Rambus. Three things had to be true for Microsoft's conduct to cause anticompetitive effects: (1) middleware (e.g., Netscape) would have to survive against Internet Explore in the browser competition; (2) sufficiently many software developers would have to write applications for middleware rather than the Microsoft Windows platform so that Microsoft's operating system monopoly was impacted; and (3) Microsoft's exclusives would have to be without justification. The first two were highly speculative.[110]

By contrast, in *Rambus*, there is considerably less need to speculate: Rambus interfered in the competitive process to become the standard. As in

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[107] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

[108] *Microsoft*, 253 F.3d at 79.

[109] *See id.*

[110] Despite Microsoft's exclusionary conduct, Netscape still distributed 160 million copies of Navigator by other means and more than doubled its installed base during the period of the exclusives. United States v. Microsoft Corp. (*Microsoft II*), 87 F. Supp. 2d 30, 53 (D.D.C. 2000) (conclusions of law), *aff'd in part*, *rev'd in part*, 253 F.3d 34 (2001). Moreover, Netscape's share of the browser market was still close to fifty percent just prior to the district court's November 5, 1999 decision. United States v. Microsoft Corp. (*Microsoft I*), 84 F. Supp. 2d 9, 101-02, ¶ 372 (D.D.C. 1999) (findings of fact). Here, Rambus's deception prevented the nascent technologies from competing at all. It is also worth noting that the "excluded" technologies in *Microsoft* were not those of Microsoft's direct competitors at the time. In *Rambus*, the alternative technologies were direct competitors. The line of causation in *Rambus* is therefore much stronger and easier to follow.

Microsoft, the alternative technologies in *Rambus* "reasonably constituted nascent threats at the time [Rambus] engaged in the anticompetitive conduct at issue."[111] A competitor that poses a "nascent threat" is not guaranteed or even likely to win the competitive battle.

If anything, the *Microsoft* standard makes more sense in *Rambus* than it did in *Microsoft*. The *Rambus* court lost sight of the fact that JEDEC sought disclosure precisely to avoid the type of post-hoc juridical analysis that occurred.[112] The defendant eliminated ex ante competition between the technologies and replaced the standard-setting process with a government inquiry conducted well after the fact, when memories have faded and documents have disappeared.

In most Sherman Act cases, the allegedly anticompetitive conduct is ongoing. For example, in *Microsoft*, the restrictive licensing provisions and the exclusive dealing were ongoing.[113] In Section 1 cases, the conspiracy is often ongoing at the time the case begins. Further, intent may not play a significant role in conspiracy cases. However, intent is an element in a monopolization case based upon misrepresentations. Accordingly, determining who knew what many years earlier is often critical.

This latter point about aging evidence deserves emphasis. Because the deceptive conduct delays analysis of the conduct itself, it is less likely that the wrongdoer will be found to be an unlawful monopolist. Successful prosecution of a Section 2 deception case requires proof of (1) the defendant's knowledge of the relevant IP; (2) the defendant's knowledge of the SSO's practices, policies, and rules that induced the other SSO members' expectations; and (3) the existence of alternatives to the selected technology. At the time of the deception, a preponderance of the evidence might show that the monopolist had knowledge of its IP, the rules of the SSO, and that its disclosure would have prompted the SSO to choose alternative technology. As time passes, this evidence will surely disappear. For example, even under an ordinary document retention program, potentially relevant documents may disappear over time. The other SSO members have no reason to retain records of their conversations with the future monopolist relating to, for example, the disclosure expectations. Nor do they have reason to maintain documents showing the equality or superiority of alternative technologies. As such, the passage of time clearly favors the wrongdoer. The deceptive SSO member has a much greater chance of becoming a monopolist as time passes. Thus, the

[111] *See Microsoft*, 253 F.3d at 79.

[112] *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 313 (3d Cir. 2007) (stating that SSOs requirements that members agree to license their technologies on fair, reasonable, and non-discriminatory terms *prior* to the adoption of any standard is "an important factor" the SSO uses when comparing prospective technologies, is "a key indicator of the cost of implementing" the standard, and is necessary "[t]o guard against anticompetitive patent hold-up").

[113] *See Microsoft I*, 84 F. Supp. 2d at 61, ¶ 213.

D.C. Circuit's causation standard in *Rambus* has the perverse result of rewarding the wrongdoer. And recall that the ex ante disclosure obligation was imposed to *avoid* this delayed ex post analysis.

Why, then, did the D.C. Circuit turn its back on the *Microsoft* standard in *Rambus*?[114] It is possible that the court was concerned that the lower causation standard was being used outside the context of a government action for an injunction. Perhaps the court's conclusion that the facts were weak influenced the court's liability decision. The court stated more than once that JEDEC's disclosure policy was unclear.[115] The court should have attacked the FTC's fact finding directly using the substantial evidence standard. If the evidence had been found wanting, the impact of the decision would have been relatively limited. Instead of engaging in such review, however, the court created broader problems by adopting the heightened causation standard. The *Rambus* rule now applies even when a disclosure policy is crystal clear. In other words, even if a future Rambus concedes that it intentionally violated an unequivocal obligation to disclose its patents, its conduct would not constitute monopolization unless the government proves – with whatever evidence that remains – that an alternative would have been adopted in the "world that would have existed but for [that future] Rambus's deception."[116] Such a rule is untenable.[117] More generally, the *Rambus* decision makes it easier for defendants to gain and maintain monopolies obtained through anticompetitive conduct.

[114] The court did not even mention the standard that it adopted in *Microsoft*, let alone explain its decision to heighten the standard.

[115] *See, e.g.*, Rambus Inc. v. FTC, 522 F.3d 456, 467-69 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1318 (2009).

[116] *Id.* at 466.

[117] In his article defending the *Rambus* causation standard, Professor Wright, like the D.C. Circuit, does not even mention the *Microsoft* standard. *See* Wright, *supra* note 100, at 8-9 (arguing that the *Rambus* standard is proper given, among other things, the Supreme Court's decision in *NYNEX v. Discon*). Instead, Professor Wright suggests that there should be no causation where "Rambus has a strong patent and strong technology compared to rivals that it is highly likely to be selected for the standard, or at the least become the de facto standard." *Id.* Professor Wright does not explain why Rambus would engage in intentional misrepresentation if either result were likely. *See, e.g.*, HOVENKAMP ET AL., *supra* note 21, § 35.5a, at 35-40 ("Proof of manipulation of the process towards an anticompetitive end . . . should incline a court to doubt the technical superiority of the standard ultimately adopted."). Professor Wright also assumes that the strongest patent and the strongest technology will be accepted, which is curious given JEDEC's desire to achieve consensus on a *cost-effective* standard. *See About JEDEC*, JEDEC, http://www.jedec.org/about-jedec (last visited Mar. 5, 2010).

III SECTION 5 UNFAIR METHODS OF COMPETITION

The FTC enforces Section 5, which makes unlawful "unfair methods of competition."[118] In *FTC v. Sperry & Hutchinson Co.*, the Supreme Court held that Section 5 "empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[119] Many believe that the interpretation of Section 5 as broader than the Sherman Act is a remnant of a bygone era. But even during the Chicago School era, the Supreme Court reaffirmed its understanding that Section 2 and Section 5 differed. For example, in *Copperweld Corp. v. Independence Tube Corp.*, while attempting to limit the reach of the Sherman Act, the Reagan antitrust team, led by Assistant Attorney General William Baxter, and FTC Chairman James Miller, submitted an amicus brief highlighting that "[t]he courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act."[120] The Court thereafter explained that single firm conduct was governed not only by Section 2 but also by Section 5.[121] In 1986, the Court more specifically and directly referenced the "spirit" of Section 5, stating that Section 5 "encompass[es] not only practices that violate the Sherman Act and other antitrust laws, . . . but also practices that the Commission determines are against public policy for other reasons."[122]

Congress sought to provide broad and flexible authority to the FTC – an administrative body of presumably practical people with business and economic expertise – in order that they might preserve competition on the merits. Congress's aim was to protect society against oppressive anticompetitive conduct and thus ensure that the FTC's Section 5 enforcement would supplement the Sherman and Clayton Acts as necessary.[123]

It is generally conceded that Section 2 does not cover all potential anticompetitive conduct.[124] Caselaw and legislative history support the use of

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[118] 15 U.S.C. § 45(a) (2006).

[119] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

[120] Brief for the United States as Amicus Curiae Urging Reversal at 9 n.8, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 732 (1983) (No. 82-1260), 1983 U.S. S. Ct. Briefs LEXIS 399 (citing FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-95 (1953)).

[121] *Copperweld*, 467 U.S. at 777 (suggesting that the presence of Section 5, inter alia, limited "gaps" in antitrust laws).

[122] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986).

[123] *Id.*

[124] *See Copperweld*, 467 U.S. at 775 ("Because the Sherman Act does not prohibit unreasonable restraints of trade as such – but only restraints effected by a contract, combination, or conspiracy – it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability."); Tom Krattenmaker, Of Counsel, Wilson

Section 5 to fill these gaps.[125] Nonetheless, many in the antitrust bar have criticized the FTC's use of Section 5 beyond the Sherman Act. One well-known antitrust practitioner opined: "Section 5 enforcement is unnecessary. Section 5 enforcement is dangerous. Section 5 enforcement is highly likely to be harmful to the American economy."[126] I recently moderated a Commission

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Sonsini Goodrich & Rosati, P.C., Remarks at the FTC Workshop on Section 5 of the FTC Act as Competition Statute 197 (Oct. 17, 2008) (transcript available at http://www.ftc.gov/bc/workshops/section5/transcript.pdf) [hereinafter FTC Workshop] ("The thrust of my remarks is to say there might be room under Section 5 where there is a reason why you can't prevail under the Sherman Act, but under the economics and the policy of the Sherman Act, you should.").

[125] *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 684-85 (D.C. Cir. 1973) ("The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws. . . . And while the boundaries of the Commission's power to proscribe conduct it deems harmful to the consumer or to competition are not clearly defined, they are indeed expansive." (citations omitted)); *see also* Am. Fin. Servs. Ass'n. v. FTC, 767 F.2d 957, 965 (D.C. Cir. 1985) (citing Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (2006))). At the time of this original delegation, Congress expressly declined to enact a statutory definition of the term "unfair methods of competition." *See* S. REP. NO. 63-597, at 13 (1914) ("The committee gave careful consideration to . . . whether it would attempt to define the many and variable unfair practices which prevail in commerce . . . or whether it would . . . leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better . . . ."). The House Conference Report outlines Congress's rationale:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

H.R. REP. 63-1142, at 19 (1914) (Conf. Rep.).

[126] JOE SIMS, JONES DAY, SECTION FIVE OF THE FTC ACT: *DÉJÀ VU* ALL OVER AGAIN? 4 (2006) [hereinafter SIMS, *DÉJÀ VU*], *available at* http://www.jonesday.com/files/Publication/ada01408-4d39-47fd-a45f-001236f0a43f/Presentation/PublicationAttachment/2603f94c-e095-4503-b2a6-092b8f248805/Section5.pdf. For a general statement of the proposition that Section 5 is "essentially boundless," and therefore "a very dangerous statute" if untethered from the Sherman Act, see Joe Sims, *A Report on Section 5*, GLOBAL COMPETITION POL'Y MAG., Nov. 2008, at 5-6 [hereinafter Sims, *Report*], *available at* http://www.jonesday.com/files/Publication/c597157d-198a-48b9-a842-af0f2ad22bdd/Presentation/PublicationAttachment/f9f6a38c-b154-4bbb-9378-b848acef7437/Sims-Nov08%20%281%29.pdf. This point has also been made in the following terms:

hearing on Section 5's history and future where even the former FTC Chairman – who presided over a revival of Section 5 at the FTC – urged caution in this area.[127] Similarly, then-Chairman Kovacic expressed some concern about the FTC's likelihood of success under Section 5.[128]

The critics maintain that the intent of the "framers" of the FTC Act should be disregarded because today's world is very different from the world of 1914. Foremost among these changes is the incorporation of more economic analysis into Sherman Act cases, and a rejection of populism. Thus, some would say, Section 5 should similarly evolve, and so construed, there is no reasonable basis for use of Section 5 outside the Sherman Act.

The critics think that no sound economic and policy reasons can justify extending Section 5 beyond the Sherman Act. They point to the trilogy of Section 5 cases that the FTC lost on appeal during the 1980s.[129] They also note that the Court's recent Section 2 cases warn about the dangers of over-inclusive antitrust enforcement. For these and other reasons, the critics maintain that the FTC should not venture down the Section 5 road again.

The criticism is provocative but ultimately without foundation. Caution is always prudent in antitrust, but probably less applicable to Section 5 than to Section 2.[130] Section 2 is amorphous. In *Microsoft*, a Section 2 case, the D.C.

> Had the Commission pursued every commercial practice that could have been characterized as a facilitating practice within an oligopolistic industry . . . [m]ost leading U.S. industries would have stopped what they were doing to respond to a blizzard of subpoenas demanding justifications for things like delivered pricing, product differentiation activities, slotting allowances and that sort of thing . . . . Hundreds of industries were examined [in the 1970s and 1980s] – I think 300 is pretty close to the exact number – for evidence of oligopoly-facilitating practices. Yet, we had only a tiny handful of cases, all of which failed to show it, and it was a colossal waste of time.

Tad Lipsky, Partner, Latham & Watkins, Remarks at FTC Workshop, *supra* note 124, at 185-86.

[127] Robert Pitofsky, former Chairman, Fed. Trade Comm'n, Remarks at FTC Workshop, *supra* note 124, at 64.

[128] Reflecting on an earlier time at FTC, then-Chairman Kovacic mused:

> I can't accept a likelihood that it is a mirage, and I can't escape my own history in working on these things. But I think back and look at the old folders from the 70s and the early 80s when, oh, yes, I worked on some of these things, where we thought we had the good line-up in place and, ultimately, how much deference did we get on these issues? Not a whole lot. And, again, the question is, why will this be better today? Are we going to say, oh, the judicial setting is much more favorable? The courts are more inclined today to support intervention. They'll be much more willing to accept the notion of administrative decision-making and discretion in this area. You know as well as I do that's a doubtful proposition.

William Kovacic, Chairman, Fed. Trade Comm'n, Opening Remarks at FTC Workshop, *supra* note 124, at 5-6.

[129] *See infra* Part III.A.1 (discussing implications of the FTC's losses in these cases).

[130] Professor Crane argues that the institutional expertise should lead the FTC to reject certain strictures imposed by the Supreme Court in Sherman Act cases:

Circuit observed that "the means of illicit exclusion, like the means of legitimate competition, are myriad."[131] And different tests govern different conduct: tying, exclusive dealing, predation, bundling, sham litigation, and other conduct can all violate Section 2, but the analytical frameworks for each type of conduct, like the means of illicit exclusion, are myriad.

Despite the vagaries of monopolization law, the bipartisan Antitrust Modernization Commission, created in 2004 to analyze the state of U.S. antitrust jurisprudence, "judge[d] the state of the U.S. antitrust laws as 'sound'" and concluded that Section 2 standards are "appropriate."[132] Breadth and vagueness, then, are not sufficient grounds on which to criticize Section 5 as worse than Section 2.[133] Neither Section 2 nor Section 5 is a model of clarity. As Professor Crane noted at the FTC's Section 5 Workshop: "Unfair methods of competition, just like restraint of trade or monopolization, is not a textually determinant set of words. We're not going to get anywhere by talking about what the words mean on paper."[134]

The critics are right that Section 5 should be based on sound economics, but wrong to believe that the Sherman Act will catch all – or "enough" – economically sound prosecutions. The Section 5 cases of the 1980s may have overreached, but the lesson of these cases is not that Section 5 has no role beyond the Sherman Act. The critics correctly note that the Supreme Court has recognized that an overly broad application of Sections 1 or 2 can discourage competition, but they incorrectly assert that Section 5 prosecutions will, almost by necessity, overreach. Section 5 can be based on sound economic principles without being subject to the criticisms heaped upon the FTC in the 1980s or even today. After all, if a standard can be crafted from the

> We don't have to even think about the possibility that there's something different about the FTC Act. I think this is a huge mistake in terms of the institutional context. You're taking baggage you don't have to take and you shouldn't take and it leads to weakened liability norms in the FTC.

Daniel Crane, Professor, Benjamin Cardozo School of Law, Remarks at FTC Workshop, *supra* note 124, at 77. This baggage includes treble damages, abusive competitor suits, contorted standing issues that spill over into liability rules, and "marginally competent and maybe directionally biased juries." *Id.* at 74. He also notes that FTC personnel are specialists, while federal judges are generalists. *Id.* at 77.

[131] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam).

[132] ANTITRUST MODERNIZATION COMM'N, *supra* note 91, at i-ii; *see also id.* at 89 ("Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate."). The Commission was made up of a broad cross section of practitioners and academics. The AMC's Section 2 recommendations concerned "(1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market." *Id.* at iii.

[133] Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003) ("[U.S.] monopolization doctrine has been governed by standards that are not just vague but vacuous.").

[134] *See* Crane, *supra* note 130, at 73.

Sherman Act's rudderless "no agreement in restraint of trade" and "do not monopolize" phrases, a proper standard can be drawn from Section 5's prohibition of "unfair methods of competition."[135]

Professors Areeda and Hovenkamp provide a good starting point for such a standard: Section 5 could prohibit more behavior than the Sherman or Clayton Acts do when (1) a practice constitutes at least a moderate threat to competition and offers few offsetting benefits in the form of reduced costs, improved products, or other efficiencies; (2) enforcement is limited to a government agency; and (3) relief is limited to an injunction prohibiting or undoing the challenged conduct. "In such cases, we need not worry about the overdeterrence that may result from private damage actions; and the social cost of errors will be largely limited to the error of condemning an activity that, while not particularly anticompetitive also failed to confer any significant benefit."[136] There are many areas where there is little danger of overdeterrence from FTC action.

A. *Section 2 Lessons for Section 5*

What can we learn from the Supreme Court's Sherman Act cases? Increasingly, the Court has emphasized economic realities and innovation efficiency, and has properly insisted that antitrust law take seriously the risk that procompetitive conduct could be chilled by enforcement. As explained previously, this means accepting that some anticompetitive conduct may escape condemnation to avoid fundamental harm to the competitive process by wrongly condemning innocent conduct.[137]

This concern with false positives is most urgent when the conduct involves core competition or transactional necessities, such as unilateral pricing, choosing with whom to do business, and determining business responses to competitors.[138] The Court will only condemn conduct in those areas under extremely limited circumstances. However, when core competition or

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[135] *See* A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GLOBAL COMPETITION POL'Y MAG., Nov. 2008, at 4, *available at* http://www.wilmerhale.com/files/Publication/704e2922-6df7-4bb7-bd88-014695e523b1/Presentation/PublicationAttachment/f5c9a3c8-3a90-4b16-900b-2a54a5ba420a/Melamed_Nov_08_1.pdf (finding it "least problematic" to use Section 5 against invitations to collude and other conduct which is anticompetitive or "injure competition as those terms are understood in the context of the antitrust laws").

[136] 2 AREEDA & HOVENKAMP, *supra* note 65, ¶ 302, at 31-32.

[137] *See supra* Part II.B.2 (discussing the risks associated with overdeterrence).

[138] This list is not necessarily exhaustive. For example, product design likely also falls into this category. 3B AREEDA & HOVENKAMP, *supra* note 65, ¶ 776a, at 285-86 ("At the very least, as all courts recognize, product improvement is protected and beyond antitrust challenge.").

transactional necessities are not involved, Section 5 might be a way around Sherman Act gaps that have little efficiency justification.[139]

1. Risk of Chilling Core Competition in FTC Section 5 Losses

The Commission's Section 5 defeats in the 1980s involved conduct that resembled essential elements of the competitive process. Thus, for example, in *Ethyl Corp*., the Commission challenged (1) advance notice of prices; (2) base point pricing; and (3) most favored nation ("MFN") clauses.[140] *Boise Cascade Corp. v. FTC*, like *Ethyl*, involved base point pricing.[141] The Commission found that these unilaterally-adopted practices would likely lead to anticompetitive effects by reducing uncertainty regarding rival pricing strategies and facilitating supracompetitive pricing. The Commission concluded that these unilateral practices violated Section 5 and therefore issued a cease-and-desist order.

At the most general level, each of these challenged practices involves pricing and is therefore subject to the highest degree of solicitude. One could question whether base point pricing and most favored customer clauses are transactional necessities or otherwise necessary components of competition,[142] but they do facially involve unilateral pricing decisions.

While reversing the Commission's finding of liability, the Second Circuit in *Ethyl* recognized (albeit in dicta) that certain trade practices of companies can amount to unfair methods of competition in violation of Section 5 even though those same practices do not violate antitrust law.[143] The Second Circuit first suggested what it believed to be non-controversial: the Commission could attack "conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful."[144] On the other hand, where the

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[139] *See* Crane, *supra* note 130, at 91-92.

[140] Ethyl Corp., 101 F.T.C. 425, 467-73 (1983), *vacated sub nom.* E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

[141] Boise Cascade Corp. v. FTC, 637 F.2d 573, 575 (9th Cir. 1980).

[142] Both the FTC and DOJ have challenged MFN clauses. *See, e.g.*, United States v. Delta Dental of R.I., No. Civ.A. 96-113P, 1997 WL 527669, at *2 (D.R.I. July 2, 1997) (DOJ challenged dental insurer's use of MFN clauses); RxCare of Tenn., Inc., 121 F.T.C. 762, 768 (1996) (FTC challenged state prescription provider's use of MFN clauses). Base point pricing need not be anticompetitive. *See, e.g.*, David Haddock, *Basing-Point Pricing: Competitive vs. Collusive Theories*, 72 AMER. ECON. REV. 289, 300 (1982) ("Basing-point prices may arise from firms' noncollusive decisions in seeking to maximize firm profits."). Nonetheless, restricting the use of base point pricing still permits the use of other means to price. Compared to the risk to competition from restrictions on discounting, the harm from limiting one means of charging for freight is not likely to be nearly as substantial.

[143] *Du Pont*, 729 F.2d at 136-37 (finding that the FTC Act may cover some conduct that violates the "spirit" though not the text of the Sherman and Clayton Acts).

[144] *Id.* at 137 (finding that the FTC may pursue the listed behavior but more closely scrutinizing FTC action regarding legitimate trade practices).

Commission "seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review."[145]

Thus, the court appeared to take as given that *Rambus*-type deceitful conduct, which is by no means "legitimate," can be prohibited as an unfair method of competition.[146] Further, the court explained that the FTC may even condemn conduct outside this enumerated list of forbidden conduct: "Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in determining whether the challenged conduct is 'unfair.'"[147]

Nonetheless the court reversed in *Ethyl* because the Commission did not announce a standard whereby "businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[148] The court further stated that

> before business conduct in an oligopolistic industry may be labeled 'unfair' within the meaning of § 5[,] a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of a independent legitimate business reason for its conduct.[149]

The FTC also lost in *Official Airline Guides, Inc. v. FTC*, in which the FTC questioned a publisher's choice of which airlines to include in its guide.[150] The FTC charged that the publisher arbitrarily refused to provide information about commuter airlines' connecting flights, while providing connecting flight information for major carriers.[151] This choice of reporting format did not affect the respondent's own business or profitability, but the Commission alleged that the omission did tend to lessen competition in the adjacent market for air transportation.[152] The court found that Section 5 could not reach that

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[145] *Id*.

[146] *See id.* (asserting that illegitimate trade practices are unquestionably within the FTC's Section 5 jurisdiction).

[147] *Id.* at 138.

[148] *Id.* at 139; *see also* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009) ("Perhaps most troubling, firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices. At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost. No such guidance is available for price-squeeze claims." (citations omitted)).

[149] *Du Pont*, 729 F.2d at 139. The court also pointed out that Ethyl Corporation had adopted the practices at issue years earlier when it was the only producer in the market, thereby undercutting the inference that the practices were designed to facilitate collusion. *Id*. Moreover, there was evidence that customers favored the challenged practices. *Id.* at 139-40.

[150] Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 922-23 (2d Cir. 1980).

[151] *Id.* at 922.

[152] *See id.* at 927.

conduct.[153] The publisher's conduct related to choosing with whom to do business, and the court would not lightly permit government review of such a core unilateral business decision.[154] The court added that granting a cease and desist order would allow the FTC to delve into "'social, political, or personal reasons' for a monopolist's refusal to deal."[155]

In all of these cases, the courts did not question the proposition that the FTC's Section 5 authority exceeded the Sherman Act's reach. In fact, in each case, the courts, at a minimum, recited prior Supreme Court authority endorsing the Commission's broad latitude. Finally, the fact that the Commission had a losing streak should not be determinative. After all, the agency lost seven straight hospital merger challenges but the FTC has continued forward.[156]

2. Section 5 Beyond Core Competition and Transactional Necessities

Beginning in the 1990s, the FTC entered a number of consent agreements alleging Section 5 violations that did not involve core competition or transactional necessities. These cases are similar to two of the FTC's contested victories before that period.

In the first of these contested victories, *American Cyanamid Co.*, the FTC charged that the patent holder had (1) engaged in inequitable conduct and fraud before the patent office and (2) enforced those patents in a manner that harmed competition.[157] Although under Section 2, the plaintiff must prove fraud by clear and convincing evidence and prove that the patent would not have issued

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[153] *See id.* (finding such an extension of the FTC's power would supplant the targeted competitor's business judgment too much).

[154] *See id.* (declining to give the FTC free rein to examine a competitor's decisions about with whom to deal).

[155] *Id.* (quoting Reuben H. Donnelly Corp., 95 F.T.C. 1, 80 (1980)). The FTC also filed complaints in *Kellogg Co.*, 99 F.T.C. 8, 8-16 (1982), and *Exxon Corp.*, 98 F.T.C. 453, 454-59 (1981). Both complaints alleged improper conduct that resembles core competition. In *Kellogg*, the complaint charged that the cereal companies were independently raising barriers to entry through their proliferation of types of ready-to-eat cereals. *Kellogg*, 99 F.T.C. at 12. The complaint was dismissed and the Commission did not appeal because the defendants were "simply refusing to compete," and expanding the range of cereals available to consumers was not "predatory conduct that serve[d] little, if any, legitimate competitive ends." *Id.* at 276-77 (separate statement of Comm'r Clanton). In *Exxon*, the FTC alleged that oil companies pursued "common courses of action" to maintain a shared monopoly. *Exxon*, 98 F.T.C. at 456-58. The Commission dismissed the complaint without reaching the merits because continuing the matter was not in the public interest. *Id.* at 461.

[156] *See, e.g.*, Evanston Nw. Healthcare Corp., No. 9315 (Fed. Trade Comm'n Aug. 2, 2007).

[157] Am. Cyanamid Co., 72 F.T.C. 623, 684-85 (1967) (finding a violation of both Section 2 of the Sherman Act and Section 5 of the FTC Act), *aff'd sub nom*, Charles Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968); Am. Cyanamid Co., 63 F.T.C. 1747, 1752-55 (1963), *vacated*, 363 F.2d 757 (6th Cir. 1966).

but for the fraud,[158] such is not the case under Section 5. The FTC held that it is "not really necessary to determine what would have occurred had Pfizer not made misleading statements and had disclosed the information, as long as the statements and the information withheld were material to the examiner's determination of . . . patentability."[159] In affirming the FTC's decision, the Sixth Circuit rejected the appellant's argument that "the proper standard of proof to support a finding of misrepresentation is 'clear, unequivocal and convincing' evidence as in cases of fraud."[160]

In the second case, *Indiana Federation of Dentists*, the FTC challenged an agreement among dentists to withhold x-rays from insurance companies.[161] Although the FTC litigated the case as a Section 1 case, the Supreme Court nonetheless reaffirmed the FTC's authority to reach beyond the Sherman Act.[162]

a. *Invitations to Collude*

Many of the recently issued consent orders involved invitations to collude. All of these occurred after the Department of Justice's case against American Airlines for attempted monopolization.[163] In that case, the president of American Airlines telephoned his counterpart at Braniff and stated, "I think it's dumb as hell, for Christ's sake, all right, to sit here and pound the [expletive] out of each other and neither one of us making a [expletive] dime. . . . Raise your goddamn fares twenty percent. I'll raise mine the next morning."[164] The president of Braniff recorded this conversation and called the DOJ.[165]

This conduct did not clearly violate Section 1 because there was no agreement.[166] As a result, the DOJ prosecuted American Airlines for attempted monopolization. American and Braniff, combined, shared about

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[158] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 179 (1965).

[159] *Am. Cyanamid*, 63 F.T.C. at 1853; *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 32 (1995) ("Actual or attempted enforcement of patents obtained by inequitable conduct that falls short of fraud under some circumstances may violate section 5 of the Federal Trade Commission Act . . . ." (citing *Am. Cyanamid*, 72 F.T.C. at 684-85)).

[160] *Pfizer*, 401 F.2d at 585 (refuting a contention that substantial evidence is the appropriate standard of proof in these circumstances).

[161] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 449-50 (1986).

[162] *Id.* at 454 ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons." (citations omitted)).

[163] United States v. Am. Airlines, Inc., 743 F.2d 1114, 1115 (5th Cir. 1984).

[164] *Id.* at 1116.

[165] *Id.*

[166] *See* 15 U.S.C. § 1 (2006) (forbidding any contract, combination, or conspiracy in restraint of trade).

seventy-six percent of the traffic at Dallas-Fort Worth.[167] American Airlines was found guilty. Taking as given that Section 2 reaches certain attempts to monopolize,[168] it is not clear why the FTC should only prosecute invitations to collude that satisfy Section 2. If invitations to collude were only unlawful when all the elements of Section 2 were satisfied, such as finding at least a dangerous probability of monopoly power, conduct with anticompetitive potential and no procompetitive value might go unaddressed.[169]

Mead Johnson,[170] the FTC's first invitation to collude case, is an excellent example of an appropriate use of Section 5 beyond the Sherman Act. *Mead Johnson* involved the very concentrated infant formula industry, in which three firms accounted for ninety percent of the market.[171] The manufacturers were attempting to win contracts to supply formula to the individual states pursuant to the federally-funded Women, Infants, and Children program.[172] The bids were sealed, and as the bid prices continued to fall, the two largest firms sought to end the bidding war. The smaller of the two firms sent a letter to four small states with upcoming bid solicitations; the firm announced that it intended to bid substantially lower rebates.[173] The company expected these letters to become public and signal its desire to end the bidding war. The letters did become public; the other major formula manufacturer saw the letter,

[167] *Am. Airlines, Inc.*, 743 F.2d at 1115-16.

[168] The finding of attempted monopolization was not free from criticism; some courts require that there be a single monopolist, not a shared monopoly. *See, e.g.*, H.L. Hayden Co. v. Siemens Med. Syst., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 322-23 (6th ed. 2007) ("Even where competitors allegedly have conspired to monopolize the market, the traditional view has been that the offense of monopolization requires that a single firm possess monopoly power.").

[169] The DOJ not only noticed this gap in the antitrust laws, but prosecuted some of the behavior that fell into the gap. Subsequent to *American Airlines*, the DOJ prosecuted certain invitations to collude under the wire fraud and mail fraud statutes. *See* United States v. Ames Sintering Co., 927 F.2d 232, 233-34 (6th Cir. 1990) (affirming a conviction of a defendant who placed two interstate calls to arrange bid-rigging). Notably, the wire fraud conspiracy in *Ames* involved a corporation and one of its managers, which would have not have been prosecuted under Section 2 because it was intra-enterprise activity under *Copperweld*. Here, however, the court rejected a *Copperweld* defense, holding that Sherman Act precedent did not apply to an alleged wire fraud conspiracy. *Id.* at 236. The FTC's use of Section 5 to extend beyond the Sherman Act is conservative in comparison.

[170] FTC v. Mead Johnson & Co., No. 92-1366 (D.D.C. June 11, 1992).

[171] Complaint ¶ 5, *Mead Johnson*, No. 92-1366 [hereinafter *Mead Johnson* Complaint]. In the interest of disclosure, I note that I played a role as attorney or manager (e.g., Assistant Director) in many of the invitation to collude cases, including *Mead Johnson*; *YKK (U.S.A.) Inc.*, 116 F.T.C. 628 (1993); *Stone Container Co.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1997); and *AE Clevite Inc.*, 116 F.T.C. 389 (1993).

[172] *Mead Johnson* Complaint, *supra* note 171, ¶ 10.

[173] *Id.* ¶ 14.

and, predictably, the subsequent bid prices were substantially higher.[174] The Commission charged the letter sender with a violation of Section 5 and the parties entered a consent agreement.[175]

YKK involved zippers that were found on nearly all clothing at the time.[176] The FTC alleged that YKK's lawyer proposed to a competitor that they each stop providing free zipper installation equipment to customers.[177]

AE Clevite involved the aftermarket sales of locomotive engine bearings.[178] There, the complaint alleged that the general manager of the respondent's bearing division complained to a rival that its prices for bearings were lower than those of the respondent, and "as a result, they were ruining the marketplace."[179]

Similar conduct occurred in *Precision Moulding*, where respondent's president allegedly visited a new competitor's headquarters to complain about his competitor's "ridiculously low" prices for competing stretcher bars used in artists' canvases.[180] The respondent's general manager stated that the competitor would not survive a price war.[181] The FTC alleged that this conduct "constituted an implicit invitation" to collude.[182]

In *Stone Container*, which involved linerboard paper used in making corrugated cardboard,[183] the respondent's CEO took the unusual step of telephoning competitors to find out how much excess inventory linerboard they each had.[184] It suspended production at its own plants to reduce inventory and simultaneously arranged to purchase inventory from several of its competitors.[185] The complaint alleged that "[t]he specific intent of Stone Container's communications with its competitors was to coordinate an industry wide price increase."[186] According to the complaint, Stone Container's strategy was an "unqualified success."[187]

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[174] *Id.* ¶¶ 14-15.

[175] Final Order and Stipulated Permanent Injunction at 3, *Mead Johnson*, No. 92-1366.

[176] *See YKK*, 116 F.T.C. at 629, ¶ 4.

[177] *Id.* ¶ 5.

[178] AE Clevite Inc., 116 F.T.C. 389, 394 (1993).

[179] *Id.* at 391, ¶ 8.

[180] Precision Moulding Co., 122 F.T.C. 109, 110-11, ¶¶ 7-8 (1997).

[181] *Id.* at 110, ¶ 8.

[182] *Id.* ¶ 10.

[183] Complaint ¶ 5, Stone Container Corp., 125 F.T.C. 853, 854 (1998).

[184] *Id.* ¶ 4.

[185] *Id.* ¶¶ 5-6.

[186] *Id.* ¶ 5.

[187] *See* Stone Container Corp.; Analysis to Aid Public Comment, 63 Fed. Reg. 10,628, 10,629 (Mar. 4, 1998).

Valassis Communications involved free-standing newspaper advertising inserts.[188] During a routine conference call with industry securities analysts, Valassis announced a plan to cease competing for its rival's customers, to price as aggressively as needed to retain its own customers, and to monitor the rival's response to this action.[189] The disclosed details were extraordinary for a securities analyst call, but important for successfully coordinating conduct.[190]

These cases would not easily fit under Section 1 and would either not satisfy Section 2 or require the expenditure of unnecessary resources to prove the Section 2 violation. For example, in the infant formula case, the firm sending the letter accounted for only thirty-five percent of the market, no specific intent to gain a monopoly was present, and it was unlikely that sending this letter would lead to a monopoly. Following *American Airlines*, one might still find a Section 2 violation, but as noted above, some courts would find attempted monopolization only if one firm has a monopoly – clearly not the case with the Mead Johnson conduct. Proof that infant formula was a relevant market with high barriers to entry might also be possible, but there is little to be gained by such an endeavor. Some might argue that the Commission could allege a violation of Section 1; however, this would require finding that another firm agreed with the letter sender. The other firm in a duopoly will take action based on the signal, but this interdependent conduct is not agreement. It would be untenable to require the dominant firm to wear blinders and ignore its competitor's actions.[191]

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[188] Complaint at 1, ¶ 2, Valassis Commc'ns, Inc., No. C-4160 (Fed. Trade Comm'n Apr. 19, 2006) [hereinafter *Valassis* Complaint], *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf.

[189] *Id.* at 2-3, ¶ 11; Valassis Commc'ns, Inc.; Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13,976, 13,978 (Mar. 20, 2006) [hereinafter *Valassis* Analysis].

[190] *Valassis* Complaint, *supra* note 188, at 3, ¶ 13 ("[W]ith regard to customers with expiring contracts with News America, Valassis will submit bids at a level substantially above current prices."); *Valassis* Analysis *supra* note 189, at 13,978 ("[F]or News America's historical customers, Valassis would submit bids at a level substantially above prevailing market prices."); *see also* U-Haul Int'l, Inc., No. 081-0157, at 3-8, 2010 WL 2453891 (F.T.C.) (June 9, 2010) (alleging U-Haul's Chairman instructed employees to raise rates and encourage counterparts at Budget to do the same).

[191] *See* 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1418b3, at 117-19 (2d ed. 2003); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.) ("[I]ndividual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act . . . because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set prices *without regard* to the likely reactions of its competitors?"). As discussed

The "pure" Section 5 allegation can and did easily address the situation. There was none of the hue and cry after this consent agreement that current critics predict will occur whenever the FTC strays from the Sherman Act. This is because there was a sound basis for concluding that such signaling could lead to anticompetitive results and there was no concern with chilling procompetitive conduct. The risk from a false positive was low. The sending of these letters was neither a transactional necessity nor a fundamental element of competition. In fact, in *Mead Johnson*, the company internally recognized that the main purpose of the letter was to reduce competition.[192] Prohibiting such conduct would not deprive Mead Johnson of its ability to engage in legitimate competition. Nor does use of Section 5 here suggest a command and control economy.

Nor would the plan of Stone Container's CEO to signal competitors fit neatly within Section 2 (oligopoly structure, not monopoly) or Section 1 (lack of agreement), but the conduct had the potential for substantial anticompetitive effects. Prohibiting this conduct poses little risk of harm; before and after this CEO's activities, containerboard companies were able to balance inventories without resorting to conduct so directly intended to signal its competitors.

Scholarly commentary has generally supported these invitation-to-collude cases. The conduct is generally seen as serving no legitimate business purposes. It therefore poses a risk to competition with no offsetting benefits,[193] and enforcement activities create little risk of overdeterrence or overbroad results.

Although the invitations to collude cases involve price, they do not interfere with a firm's ability to set its own price. The decisions in *Ethyl*[194] and *Boise*

above, competitors have to be free to observe and react. Thus, a Section 1 violation based on these facts would be subject to substantial criticism and, if litigated, would likely be reversed on appeal like the Commission's cases of the 1980s.

[192] *See* Mary L. Azcuenaga, Comm'r, Fed. Trade Comm'n, Shimmers in the Penumbra of Section 5 and Other News, Address Before the 13th Annual Antitrust and Trade Regulation Seminar National Economic Research Associates, Inc. 19 (July 9, 1992), (transcript available at http://www.ftc.gov/speeches/azcuenaga/ma7992.pdf) ("Mead allegedly intended to inform and influence its competitors in the sealed bid process, and no plausible business reason for the unsolicited letters was advanced.").

[193] *See* Kovacic, *supra* note 128, at 17 ("Is there anything to be gained by the behavior, that is hey, would you like to collude? Probably not. Real potential harms? Yes."); *see also* 6 AREEDA & HOVENKAMP, *supra* note 191, ¶ 1419e, at 129-38. For a discussion of these issues, see Susan DeSanti & Ernest Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 108-13 (1994).

[194] Ethyl Corp., 101 F.T.C. 425, 467-73 (1983) (detailing the FTC's challenge of (i) advance notice of prices; (ii) base point pricing; and (iii) MFN clauses), *vacated sub nom.* E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

Cascade,[195] on the other hand, would impact the firm's ability to set its own price.[196]

b. CD MAP

The FTC has also used Section 5 outside the context of invitations to collude. A series of five recent FTC consent agreements is at least facially similar to the cases in the 1980s. These cases, collectively referred to as the CD MAP cases, challenged Minimum Advertised Price ("MAP") programs adopted unilaterally, but in parallel, by the five major music distributors.[197] Typically, such programs only impact media advertising paid for at least in part by the distributor, on the condition that the retailers advertise no prices below a stated minimum level. Here, however, the restrictions prevented the retailers from advertising discounts on signs and banners within the store and even if paid for by the retailer. The FTC alleged that the MAP restrictions were unnecessary to secure any bona fide efficiencies in cooperative advertising, because they extended to the retailers' own promotional activities. The policies also appeared to restrict horizontal competition. The FTC reasoned that such rigid restrictions on the ability to advertise discounts would "materially facilitate interdependent conduct" among the distributors because it would help them to "easily monitor the pricing and policies of their competition."[198]

At first glance, the CD MAP cases look like *Ethyl*-type cases. The conduct looks like unilateral pricing decisions – a transactional necessity. But on closer examination, unlike base point pricing, advance price notices, and even most favored customer clauses, the conduct extends beyond pricing. The

[195] Boise Cascade Corp. v. FTC, 637 F.2d 573, 575 (9th Cir. 1980) (bringing challenge of base point pricing).

[196] Unilateral pricing decisions do not get a free pass, even under Section 2. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) ("[W]e interpret § 2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous probability of actual monopolization . . . .'" (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993))); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 906-09 (9th Cir. 2008) (discussing the allocation test for bundled pricing); LePage's v. 3M, 324 F.3d 141, 169 (3d Cir. 2003) (finding liability for certain bundled pricing).

[197] *See* Capitol Records, Inc., No. C-3975, 2000 WL 1257795 (F.T.C.) (Aug. 30, 2000); Universal Music & Video Distrib'n Corp., No. C-3974, 2000 WL 1257798 (F.T.C.) (Aug. 30, 2000); BMG Music, No. C-3973, 2000 WL 1257794 (F.T.C.) (Aug. 30, 2000); Time Warner Inc., No. C-3972, 2000 WL 1257797 (F.T.C.) (Aug. 30, 2000); Sony Music Entm't, Inc., No. C-3971, 2000 WL 1257796 (F.T.C.) (Aug. 30, 2000).

[198] BMG Music et al.; Analysis to Aid Public Comment, 65 Fed. Reg. 31,319, 31,320 (Fed. Trade Comm'n May 17, 2000) (considering five separate proposed consent agreements among the largest distributors of prerecorded music). The FTC had previously stated that co-op advertising payments that limited the dealer's right to discount in advertising that the retailer paid for itself would be questionable. *See* Am. Cyanamid Co., 123 F.T.C. 1312, 1321-22 (1997).

distributors imposed vertical restraints – restrictions on promotion by the retailers. Vertical restraints may generally be procompetitive, but they are neither necessary to engage in transactions nor are they essential elements of competition. Although vertical restraints often improve efficiency and improve interbrand competition, the Court has never associated such restraints with the central nervous system of the economy.

c. *Standard Setting*

As discussed above, the FTC tackled unilateral conduct in the standard-setting area with *Dell*, *Unocal*, *N-Data*, and *Rambus*.[199] In *Dell*, the Commission majority found reason to believe that Dell's conduct gave Dell market power, including the ability to demand licensing fees once the standard was adopted.[200] The complaint also alleged a variety of other adverse effects on the competitive process, such as delays or reduced participation rates in standard-setting activity.[201] These latter effects are typically not part of a Sherman Act antitrust case.

The public comments on *Dell* suggested that core competition values were implicated. Many suggested that a decision implicitly requiring patent searches for SSO members would result in less participation[202] and therefore less innovation efficiency. The dissenting statement in *Dell* argued that the Commission should take a closer look at patent law before imposing liability in the absence of deliberate misconduct.[203] After the public comment period, the Commission approved the consent and issued a statement explaining that Dell's conduct was "not inadvertent" and that the Commission was not seeking

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[199] *See supra* notes 22-28 and accompanying text (discussing Dell Computer Corp., 121 F.T.C. 616 (1996), Union Oil Co. of Cal., No. 9305 (Fed. Trade Comm'n March 4, 2003), and Negotiated Data Solutions LLC, No. C-4234, (Fed. Trade Comm'n Sept. 22, 2008)); *supra* Part II (discussing Rambus, Inc., No. 9302 (Fed. Trade Comm'n July 31, 2006), and its subsequent history).

[200] *See Dell*, 121 F.T.C. at 624 n.2.

[201] Complaint ¶ 9, *Dell*, 121 F.T.C. 616.

[202] ANSI and others submitting comments had fewer concerns with the *Dell* decision than Commissioner Azcuenaga. The comments focused on the nature of the intent required to show a violation of Section 5 rather than anticompetitive effects and market power. ANSI, for example, expressed concern that Section 5 liability might be based on negligence. *Hearings on Global and Innovation-Based Competition Before the Fed. Trade Comm'n*, No. P951201, at 3784-88, 3800-02 (Dec. 1, 1995) (statement of Amy A. Marasco, Vice President & Gen. Counsel, ANSI), *available at* http://www.ftc.gov/opp/global/gc120195.pdf.

[203] *Dell*, 121 F.T.C. at 630-34 (Comm'r Azcuenaga, dissenting). Commissioner Azcuenaga believed that the rationale for this theory had not been sufficiently grounded in a showing of either deliberate deception or an acquisition of market power. *See id.* at 627-33 As for patent law defenses, "[p]atent law is not within the institutional expertise of the Commission, but it would seem useful to study the history and policy underlying these strict requirements for establishing liability." *Id.* at 631.

to impose an affirmative duty to search on firms participating in standard setting.[204]

The next FTC standard-setting cases initiated after *Dell* both focused on monopolization. *Unocal* and *Rambus* both had Section 5 allegations, but the cases primarily used Section 2 precedent and theory. Most recently the FTC used a pure Section 5 theory in *N-Data*. It was this case that spurred the recent debate about Section 5.[205] As discussed above, none of these cases involved core competition or transactional necessities. The risk of harm was great and the risk from false negatives was high.

B. *The Case for More Aggressive Section 5 Enforcement in Standard Setting*

1. Willfulness, Negligence, and Luck Under the Antitrust Laws

In *Dell*, the Commission found conduct that was "not inadvertent" to be sufficient for liability under Section 5 as an unfair method competition. What if in *Dell* the Commission had concluded that Dell was "merely" negligent? The Commission clearly suggested that no liability would attach.[206] But is there a role for the Commission in the case of a negligent failure to disclose?

What are the economic consequences when a firm negligently forgets to inform the SSO of its patent rights and then obtains a monopoly? For example, Firm A belongs to an SSO and believes that its IP does not apply to technology under consideration. Many equal alternatives exist that are in the public domain, and the SSO members flip a coin. Firm A's technology is adopted. Many other firms then invest billions in implementing the standard. Firm A then looks again at the patent and discovers that it misread a limitation and now concludes that the patent does cover the technology. Firm A sues and recovers millions of dollars in royalties, which are passed on in higher prices to consumers.

Is there any remedy under the antitrust laws? Historically, the answer would appear to be no. Although Firm A did not gain its monopoly through superior business acumen or otherwise win a competition on the merits, there would be no Sherman Act violation. The conduct is not the "willful acquisition" of monopoly power – the traditional standard. Section 2 would not apply until at least gross negligence or recklessness could be shown.[207]

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[204] *Id.* at 625-26 (majority statement).

[205] One part of that debate involves the FTC's use of the "unfair acts and practices" prong of Section 5. That issue is not discussed here.

[206] On its face, the Commission statement did not foreclose the possibility that negligence could suffice – only that the *Dell* decision did not create a negligence standard. *Dell*, 121 F.T.C. at 625-26.

[207] *See* Lemley, *supra* note 98, at 1933 ("One might also draw an inference of at least reckless indifference from an IP owner's failure to do any investigation, particularly in that small subset of SSOs that impose an obligation to search one's own patent portfolio."); *see also* Michael G. Cowie & Joseph P. Lavelle, *Patents Covering Industry Standards: The*

If the conduct is not willful, then what is it? In the famous *Alcoa* decision, Judge Learned Hand provided several explanations for how a company can "inadvertently" acquire monopoly power:

> [P]ersons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.[208]

Was Firm A just lucky, and if so, should there be relief from a monopoly gained by luck? Could Firm A claim to be the beneficiary of an "historic accident" as mentioned in *Grinnell* in the sense that its misinterpretation of the patent was an accident?[209]

There are legitimate reasons not to punish pure luck. "[I]it is easy to exaggerate the role of luck in regime-changes of this kind; luck often is ingenuity in disguise."[210] Professors Areeda and Hovenkamp concur: "[E]ven though power may have been obtained because of blind luck . . . it is extremely difficult to distinguish luck from foresight . . . ."[211] According to Professors Areeda and Turner, "blind luck may merit no reward, but neither does it deserve criminal or quasi criminal penalties."[212]

Risks to Enforceability Due to Conduct Before Standard-Setting Organizations, 30 AIPLA Q.J. 95, 106-07 (2002) (discussing whether gross negligence might suffice in a Section 2 case and whether the holder would have "specific intent to mislead").

[208] United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 429-30 (1945). Some suggest that gaining a monopoly is always willful. *See* Elhauge, *supra* note 133, at 261 ("[W]hile cases of historic accident can be distinguished because they are not willful, it is hard to think of cases where a firm really has a monopoly thrust upon it without the aid of any willful conduct."). And *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* states famously "no monopolist monopolizes unconscious of what he is doing." 472 U.S. 585, 602 (1985). These SSO cases clearly demonstrate that the assertion in *Aspen* is not absolute.

[209] *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[210] Kenneth G. Elzinga & David E. Mills, *PC Software*, 44 ANTITRUST BULL. 739, 767 (1999).

[211] 3A AREEDA & HOVENKAMP, *supra* note 65, ¶ 720a, at 4.

[212] 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 624c, at 70 (1978).

On the other hand, good luck can be distinguished from culpable conduct. The belief that we can distinguish between bad luck, reasonable care, and negligence is a cornerstone of American tort law.[213]

In *Alcoa*, "force of accident" or historic accident suggests some force independent of or otherwise exogenous to the monopolist. In the Firm A example, there were no exogenous shifts in costs/tastes resulting in a monopoly. Firm A is different from the monopolist contemplated by Judge Hand: the "unwitting" monopolist that gained its monopoly by virtue of either luck or just plain superior skill. Although Firm A's monopoly was not gained willfully under a Section 2 standard, neither was it gained by luck or historic accident.

The best rationale for excusing Firm A's conduct from Sherman Act liability returns to the potential chilling effect caused by the prospect for treble damages. Lemley in effect puts negligence into the same category as "blind luck" and concludes neither of them should be subject to treble damages.[214]

Although luck and negligence might be treated the same under the Sherman Act, they need not be treated the same under Section 5. On the one hand, luck does not satisfy the Section 5 requirements of unfairness or oppressiveness. On the other hand, where Firm A obtains a monopoly through its own negligence, the concept of unfairness seems to naturally arise. As between the negligent party and the innocent parties (i.e., those participating in the standard setting and those relying on the standard setting), it is both appropriate and efficient to prevent the patent holder from gaining monopoly rents because of its own negligence.

Intentional misconduct should not be required for a Section 5 violation. On its face, the negligent acquisition of a monopoly fits within the test that the treatise endorses: (1) it offers at least a moderate threat to competition with no offsetting benefits; (2) enforcement is limited to FTC Section 5 enforcement; and (3) relief is a cease and desist order undoing the conduct. One would expect that the treatise would favor, or at least not reject, enforcement under Section 5 in the case of negligence. The treatise concludes, however, that use

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[213] *See, e.g.*, David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1680 (2007) ("While many . . . incidents are attributable to the negligence of one or more persons, many others result from simple bad luck or the careless behavior of victims themselves. Negligence law allows an accident victim to recover damages only if the defendant was at least partially to blame for causing the accident."); Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1329 (1997) ("[I]n the absence of another's negligence, the plaintiff must bear the brunt of bad luck's contribution to her injury.").

[214] Lemley, *supra* note 98, at 1933 ("One might argue that failure to disclose [IP] is problematic regardless of intent. While that argument may have some force . . . , antitrust law properly requires more. For an IP owner to violate the antitrust laws and be subject to treble damages, the law requires willful conduct in an effort to monopolize. Inadvertence does not suffice.").

of Section 5 is inappropriate to address Firm A's conduct. As under Section 2, Hovenkamp would limit Section 5 to intentional misrepresentations.[215]

The treatise provides no explanation why its Section 5 enforcement criteria are not met. It would have seemed that because of the absence of treble damages, Hovenkamp's treatise might have approved of Section 5 enforcement.[216] If the concern is that Section 5 enforcement in standard setting, even without treble damages, would chill procompetitive conduct, that concern is overstated.[217]

2. Participation in Standard Setting Not Significantly Affected by Section 5 Enforcement

In concluding that Section 5 should only reach clearly intentional misrepresentations, Hovenkamp and others ignore the fact that patent law defenses already impact a patent holder's behavior. FTC intervention will not significantly affect a patent holder's incentives.

As discussed previously, the most oft-cited risk is that liability in the absence of intentional misrepresentations will discourage participation in standard setting.[218] ANSI has repeatedly taken this position:

> Companies that have invested billions in research and development in order to develop a patent portfolio will likely choose not to participate in a standards-setting activity if they are obligated to undertake an enormous

[215] HOVENKAMP ET AL., *supra* note 21, § 35.5b2, at 35-49 ("Even under such broader statutes as the FTC Act only intentional misrepresentations should constitute anticompetitive conduct. While an accidental failure to disclose the existence of a patent might have anticompetitive consequences, that sort of mistake is not the kind of conduct that should be punished as an antitrust violation."); *see also* Lemley, *supra* note 98, at 1933.

[216] The government, and the FTC in particular, have broader interests than a private plaintiff seeking treble damages:

> while the private plaintiff may sue the drunken driver only to recompense a completed wrong, such as wrongful death or property damage, the government may arrest and condemn the drunken driver who has not yet caused harm to anyone. The point is that drunken driving is highly likely to cause social harm, and it is less costly to arrest such a driver before rather than after that harm occurs.

3 AREEDA & HOVENKAMP, *supra* note 65, ¶ 651e1, at 120.

[217] In *N-Data*, Commissioner Kovacic expressed the concern that even pure Section 5 cases might result in follow-on treble damage actions. Dissenting Statement of Commissioner William E. Kovacic at 2, Negotiated Data Solutions, LLC, No. 051-0094 (Fed. Trade Comm'n Jan 23, 2008), http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf. To the extent that plaintiffs allege Sherman Act violations where Section 5 applies but certain Sherman Act elements are missing, the increasing use of *Twombly* to dismiss cases without merit should lessen that concern. Further, legislative action could be taken if follow-on treble damage actions become common.

[218] *See supra* notes 98-102 and accompanying text (discussing the concern of decreased participation in SSOs).

> patent portfolio search and be burdened in connection with each such activity or risk losing their intellectual property rights.[219]

This argument was raised by ANSI and others in connection with *Dell.* In its final statement, the Commission provided an assurance that negligence would not result in liability.[220] Firm A, if negligent, would keep its monopoly under the *Dell* standard.

Patent holders would be subject to equitable defenses regardless of whether the Commission intervenes. As ANSI explained: "[V]arious legal claims, such as equitable estoppel, laches, patent misuse, fraud and unfair competition may be available to prevent a patent holder from enforcing a patent covering an industry standard due to the patent holder's improper conduct in a standards-setting context . . . ."[221]

The existence of these private patent law defenses reduces the likelihood that FTC intervention will result in dynamic inefficiency. In other words, ANSI and others have it backwards. The *Dell* "clarification" went unnecessarily far. In short, to the extent that there are disincentives to participate in standard-setting, they exist regardless of Section 5 enforcement.

3. Section 5 Enforcement Results in Minimal Incremental Impact on Incentives to Participate Where Pre-Existing Patent Defenses Exist

As ANSI testified, under various circumstances, the patent law precludes a patent holder from obtaining damages from an infringer. Patent law defenses include equitable estoppel, implied license, patent misuse, laches, inequitable conduct, and others.

Equitable estoppel applies when a patent holder's course of conduct reasonably implies that the patent will not be enforced. Accordingly, "estoppel should apply even in the relatively common case in which a patent owner's failure to disclose was inadvertent or merely negligent, and not part of a scheme to deceive the SSO."[222] Bad intent is not required. A course of

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[219] Marasco, Joint Hearings Testimony, *supra* note 95, at 9-10.

[220] Dell Computer Corp., 121 F.T.C. 616, 625-26 (1996).

[221] Marasco, Joint Hearings Testimony, *supra* note 95, at 14. Similarly, the U.S. Chamber of Commerce has written:

> It is also important to consider whether other remedies exist to address particular issues before expanding Section 5 jurisprudence. In the *N-Data* matter, for example, very serious issues were presented whether the conduct at issue was better addressed under state contract or tort law, once it was acknowledged that the conduct did not fit well within the Sherman Act.

U.S. Chamber of Commerce, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules "Above and Beyond Antitrust"?*, CPI ANTITRUST CHRON., Sept. 24 2009, at 8, http://www.uschamber.com/NR/rdonlyres/ewm3ib4uqvbdp7mfa6n7pjcuxdp2o6qp2hxr5sej55n5otvuwxhgo5t57ojl2f3bvcl32zmza24jtrolhnbd4vmidvf/0909antrust.pdf.

[222] Lemley, *supra* note 98, at 1918-19; *see also* A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1043 (Fed. Cir. 1992) (finding intent to mislead "immaterial" in

dealing, including misleading silence, can result in unenforceability. Estoppel can apply in a wide variety of situations: it is "not limited to a particular factual situation, or subject to simple, hard and fast rules."[223]

Implied license is a separate, but related, defense for which "the estoppel doctrines serve as guidelines."[224] Under the doctrine of implied license, a patent holder may be estopped from enforcing his patent if his conduct reasonably appears to be "an affirmative grant of consent or permission to make, use, or sell: i.e., a license. Equitable estoppel, on the other hand, focuses on 'misleading' conduct suggesting that the patentee will not enforce patent rights."[225]

Under laches, if a firm waits too long to enforce its patent, the firm may lose the right to recover past damages, regardless of intent. This remedy is imposed despite the "amorphous character of the laches defense."[226] The accused infringer must establish (1) a patentee's unreasonable and inexcusable delay in bringing suit, and (2) the suffering by the accused infringer of material prejudice or injury directly attributable to the procrastination.[227] The prejudice can be evidentiary (the loss of material evidence necessary to defend against the infringement claim), economic, or both.[228] A rebuttable presumption of both undue delay and resulting prejudice arises when a patent holder has deferred in bringing suit for more than six years after actually or constructively learning of a defendant's allegedly infringing conduct.[229] The patent holder

an equitable estoppel case because the only pertinent issue is whether the plaintiff's "course of conduct reasonably gave rise to an inference" that he will not enforce his patent against the defendant); Adelberg Labs., Inc. v. Miles Inc., 921 F.2d 1267, 1274 (Fed. Cir. 1990) ("Bad faith on the part of the patentee is not, as Adelberg asserts, a requirement of an estoppel defense. All that is required is that the patentee conduct itself in such a way as to induce the belief that it has abandoned its claim, regardless of its good or bad faith."); *cf.* Cowie & Lavelle, *supra* note 207, at 106-07 ("It would seem plausible for a court to infer bad faith silence from persistent or systematic negligence in failing to disclose patents when required by an SSO. In these circumstances, the patent holder may lack specific intent to mislead.").

[223] Forest Labs., Inc. v. Abbott Labs., No. 96-CV-159-A, 1999 U.S. Dist. LEXIS 23215, at *20 (W.D.N.Y. June 23, 1999).

[224] Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc., 103 F.3d 1571, 1581 (Fed. Cir. 1997).

[225] *Id.* at 1581 (citations omitted).

[226] Cornell Research Found., Inc. v. Hewlett-Packard Co., No. 5:01-CV-1974, 2007 U.S. Dist. LEXIS 89637, at *115 (N.D.N.Y. Jan. 31, 2007) (magistrate decision).

[227] *See* Wanlass v. Gen. Elec. Co., 148 F.3d 1334, 1337 (Fed. Cir. 1998).

[228] *Id.* (citing, inter alia, A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992)).

[229] *Wanlass*, 148 F.3d at 1337; *Aukerman*, 960 F.2d at 1037. The laches period begins when "a reasonable patentee would suspect [infringement]." *Wanlass*, 148 F.3d at 1338.

can rebut the presumption by offering proof reflecting reasonable or excusable delay, or an absence of prejudice to the defendant.[230]

There is also the more general patent misuse defense. "The key inquiry is whether, by imposing a challenged condition (e.g., the imposition of an onerous term in a license granted under the patent), the patent owner has 'impermissibly broadened the "physical or temporal scope" of the patent grant with anticompetitive effect.'"[231]

Under the doctrine of inequitable conduct, a patent holder found to have failed to disclose to the patent office material information known to the patent applicant, loses the right to enforce the patent against everyone.

Patent holders must take care not to engage in conduct that will cost them their patent rights. For example, because equitable estoppel exists, firms are on notice that they run a substantial risk if they fail to disclose patents while a member of a SSO or take any action that suggests the firm acquiesces in a royalty-free license.[232] Firms are advised by their lawyers to take reasonable steps to avoid equitable estoppel. In other words, firms decide whether to participate in standard setting already aware of the risk that they could lose their patent rights under some circumstances, with or without FTC intervention.[233]

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[230] *Wanlass*, 148 F.3d at 1337; *Aukerman*, 960 F.2d at 1038.

[231] Janice Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH. L.J. 623, 673 (2002) (citing Windsurfing Int'l, Inc., v. AMF Inc., 782 F.2d 995, 1001 (Fed. Cir. 1986)); *cf.* Townshend v. Rockwell Int'l Corp., 55 U.S.P.Q.2d 1011, 1020-21 (N.D. Cal. 2000) (rejecting patent misuse defense). Professor Mueller explains:

> Patent misuse is a rather amorphous doctrine, generally understood as "a method of limiting abuse of patent rights separate from the antitrust laws." Procedurally, patent misuse is asserted as an affirmative defense to an allegation of patent infringement. The misuse doctrine has its genesis in judicial decisions that predate any significant development of U.S. antitrust law.

Mueller, *supra*, at 671 (citations omitted). She proposes that the doctrine be used to address opportunism in the SSO context.

[232] Wang participated in a JEDEC standard-setting process, during which it encouraged Mitsubishi to manufacture and design infringing products according to its own design, and with the hope that Mitsubishi would help drive prices down for Wang as a consumer of the product. The court found that this "consideration" provided Mitsubishi with an implied royalty-free license. Wang Labs., Inc. v. Mitsubishi Elecs., 103 F.3d 1571, 1575 (Fed. Cir. 1997).

[233] David Teece and Edward Sherry point out that, due to equitable estoppel, some firms may choose not to participate, and that "if non-participants can argue that they should be able to claim the benefits, under the legal theories of equitable estoppel or third-party beneficiary, of disclosure policies for SSOs for which they are not members," this non-participation becomes more likely. David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1980 n.213 (2003).

a. *Use of Section 5 Is Appropriate Because Patent Law Has Not Kept Up with Standard Setting*

ANSI, the expert body in standard setting, has traditionally believed that private remedies would generally suffice in the standard-setting context. It is little wonder that patent law has not fully accounted for the economic significance of whether conduct has occurred inside rather outside the standard-setting context.

The equitable estoppel defense requires that the alleged infringer reasonably relied on the course of conduct of the patent holder. This would generally require actual knowledge of the conduct and some relationship between the patent holder and the alleged infringer:

> Reliance is not the same as prejudice or harm, although frequently confused. An infringer can build a plant being entirely unaware of the patent. As a result of infringement, the infringer may be unable to use the facility. Although harmed, the infringer could not show reliance on the patentee's conduct. To show reliance, the infringer must have had a relationship or communication with the plaintiff which lulls the infringer into a sense of security in going ahead with building the plant.[234]

A duty to disclose to the SSO may supply the requisite relationship to establish reliance, and silence in the face of that duty can constitute the requisite conduct.[235] However, firms not present during the SSO deliberations can claim neither the relationship nor reliance on the silence. In other words, anyone implementing the standard that was not present during the standard setting could not take advantage of the equitable estoppel defense.[236]

Outside of the standard-setting context, the reliance requirement will not generally result in anticompetitive effects. Typically, the patent holder has no market power.[237] If firms have not satisfied the reliance requirement and must pay royalties, competing products or competing technologies mitigate any harm to consumers.

In the standard-setting context the likelihood of market power, and hence anticompetitive effects, is substantially higher. Moreover, open standards are created with the knowledge that firms outside the standard-setting process will rely upon them, and the firms that participate in an SSO know this.

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[234] *Aukerman*, 960 F.2d at 1043.

[235] *See id.* at 1041-43.

[236] One article focused on the issue of companies outside the standard-setting organization:

> [A]n outside company may have reason to believe that the SSO members developed the standard in compliance with the patent disclosure policy. In this respect, an outside company arguably can rely to its detriment on a patent holder's failure to comply with an SSO's patent disclosure policy. Still, it would seem that the outside company's reliance on any alleged misstatements is likely to be tenuous in many cases.

Lemley, *supra* note 98 at 110-11.

[237] Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

Using Section 5 to relax the reliance requirement in the standard-setting context would not create significant disincentives to participate in standard setting. The standard-setting process typically involves most of the affected parties. Thus, conduct giving rise to equitable estoppel may cost a firm nearly all of its expected return. As a result, patent holders account for this possibility whether or not the FTC steps in. The decision whether to participate in standard-setting activities should not be materially affected by Section 5 enforcement. It seems even more unlikely that ex ante incentives to engage in R&D would be materially affected by the prospect that broader reliance interests are protected by the Commission than by the patent law.[238]

Laches, too, has several significant drawbacks as a private remedy in the SSO context. Laches does not prevent collection of future damages: once the lawsuit is filed, damages start to accrue.[239] This limitation typically would not result in consumer harm as firms can switch to competing products because the typical patent does not confer market power.[240] In the standard-setting context, however, market-wide lock-in is far more likely and thus switching is not readily available. Therefore, consumer harm is much more likely. Moreover, because those implementing the standard cannot easily stop infringing when given notice, the requirement of "economic harm" will be harder to establish.[241] Section 5 could incorporate laches principles and reduce consumer harm with little risk to innovation.[242]

Consumer welfare is not always protected by private companies, nor is it protected by private litigation. For example, in situations where patents are disclosed after the standard has been adopted, companies may settle for a non-

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[238] One cannot relax the reliance requirement outside the standard-setting context because without any requirement of a relationship or duty, the patent holders' right would be substantially eviscerated.

[239] *Aukerman*, 960 F.2d at 1041.

[240] *Ill. Tool Works*, 547 U.S. at 31, 44.

[241] Maxwell v. J. Baker, Inc., 875 F. Supp. 1371, 1390 (D. Minn. 1995), *aff'd in part, rev'd in part, vacated in part*, 86 F.3d 1098 (Fed. Cir. 1996). The FTC could consider enforcing the laches principles even when the firm is not a member of an SSO. Even though equitable estoppel would be unlikely because of the lack of a course of conduct, if a firm stands by and watches an industry become locked-in to its patented technology, laches might apply at some point. Between 1984 and 1994, GIF, a compression format for photos, bore no royalties. Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CAL. L. REV. 1, 10 (2009). In 1994, Unisys announced that it would start collecting royalties on this format, which had become a de facto standard. *Id.* If laches applied, this might have been an appropriate case for Section 5 enforcement. There have been other instances of substantial delay in enforcing patents on industry standards. *See, e.g.*, *id.* at 10-11 (referencing the history of the JPEG file format as another example of delayed patent enforcement).

[242] The remedy in these cases need not be permanent unenforceability, as sometimes occurs in patent law. Instead, the FTC could determine a reasonable number of years to undo the "lock-in" effects. This number could vary substantially.

discriminatory royalty rate vis-à-vis competitors. A substantial part of this royalty is likely to be passed on to consumers, a cost that has no corresponding benefit.[243] Relatedly, transaction costs of litigating are not trivial and the technical requirements of certain equitable defenses may not be met, diminishing the incentive of private litigants to fight in any given situation. The Commission is better positioned than private litigants to overcome these problems and achieve a closer-to-"optimal" level of equitable estoppel enforcement.[244] For this reason, although the proposal by Merges and Kuhn

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[243] In *N-Data*, where the patent holder revoked its licensing commitment after lock-in, critics maintain that the FTC improperly "simply assumed" that prices to consumers would rise. *See, e.g.*, Joshua D. Wright & Aubrey N. Stuempfle, *Patent Holdup, Antitrust and Innovation: Harness or Noose?*, 61 ALA. L. REV. 559 (2010). For example, Anne Layne-Farrar argues:

> [T]he extent to which an input cost like patent licensing fees affects downstream prices is a complex determination depending on a number of factors, including the relative size of the input cost for the component at hand as compared to total costs and the degree of competition in the end market.

Anne Layne-Farrar, *Patents in Motion: The Troubling Implications of the* N-Data *Settlement*, GLOBAL COMPETITION POL'Y, Mar. 2009, at 4-5. It is beyond doubt that the extent of pass-through is a complex determination, but it is not wrong for the FTC to assume there would be *some* price increase to consumers. Economic theory predicts that in a competitive downstream industry, consumers will suffer harm in patent hold-up situations. In their Amicus Brief on *Rambus*, several well-respected economists analyze these "complexities" and conclude that in the long run, "royalties – and the effect of hold-up on royalties – are passed through to downstream buyers and have little effect on manufacturers' profits." Brief Amicus Curiae of Economic Professors and Scholars at 12, Rambus, Inc., No. 9302, (Fed. Trade Comm'n Apr. 15, 2006) http://www.ftc.gov/os/adjpro/d9302/040415scholarsamicusbrief.pdf; *see also* Farrell et al., *supra* note 94, at 645 ("[W]hen a standard used in a fairly competitive industry is subject to *uniform* hold-up, direct buyers may bear little of the cost, which falls primarily on final consumers."); Damien Geradin & Miguel Rato, *Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND*, 3 EUR. COMPETITION J. 101, 145 n.127 (2007) ("Economic theory and empirical analysis suggest that there is always pass through of costs to at least some extent, except in highly idealized circumstances."). The FTC would no doubt be criticized for expending resources on a complex model to show the exact amount of pass-through given the strong theoretical foundation for simply presuming it. Such a model might be necessary to estimate damages, but not to support a government injunction.

[244] *See* Negotiated Data Solutions LLC; Analysis of Proposed Consent Order to Aid Public Comment, 73 Fed. Reg. 5846, 5849 (Jan. 31, 2008) ("[I]n the standard-setting context – with numerous, injured third parties who lack privity with patentees and with the mixed incentives generated when members may be positioned to pass on royalties that raise costs market-wide – contract remedies may prove ineffective, and Section 5 intervention may serve an unusually important role."). The Commission may also be able to achieve greater relief than private litigants. Finally, the Commission is able to devote substantially greater time, resources, and expertise. For example, in the *Rambus* case in Virginia, almost no time was devoted to antitrust issues, but in the FTC *Rambus* case, the FTC devoted fifty-

for a new patent defense called "standards estoppel"[245] is beneficial, that defense will likely leave hold-up victims and the public with suboptimal protections because the defense would be left in the hands of private entities. If adopted, however, standards estoppel would further reduce any disincentive effect attributable to FTC Section 5 enforcement.

The flip side of the transaction costs is that patent holders may forgo guarding against laches, equitable estoppel, or other patent defenses precisely because they know it is expensive to defend patent cases. In this case, Commission action that overcomes the transaction cost problem might lower expected returns. However, the existence of high transaction costs should not justify the effective elimination of the equitable estoppel or other patent law defenses.[246]

It is not unheard of to of modify principles such as estoppel where needed. For instance, the Supreme Court has held that succeeding on an estoppel claim against the government is more difficult because the interests of the citizens are undermined.[247] The greater interests in consumer welfare justify relaxing the patent defenses principles in the standard-setting context.

Outside the standard-setting context, the patent law defenses may be sufficient. Patent law, however, has not yet caught up with issues implicated by standard setting. There are no substantial costs borne by consumers in the typical case and patent law need not necessarily address this special case. On the other hand, in this special SSO context, concepts of privity and reliance stand in the way of protecting broader interests. In addition, if the cost of litigation prevents those implementing a standard from defending their

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four trial days to antitrust issues. *See* Initial Decision at 4, Rambus Inc., No. 9302, 2004 WL 390647 (F.T.C.) (Feb. 23, 2004).

[245] Merges & Kuhn, *supra* note 241, at 4, 14 ("Antitrust law should only be a backstop to other mechanisms for preventing strategic behavior; patent law must police many harmful patent abuses on its own.").

[246] The issue here is somewhat analogous to the problem of pollution, in that the polluter imposes an externality on others. In many cases, transaction costs would prevent the achievement of the "optimal" level of pollution. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-16 (1960). This can be solved by the imposition of a tax by the government. *Id.* at 1; *id.* at 35 ("Most modern economists would suggest that the [polluter] should be taxed."). The FTC Act provides an appropriate means to address externalities caused by patent hold-up in standard setting. *See* Nat'l Petroleum Refiners Ass'n. v. FTC, 482 F.2d 672, 689 n.17 (D.C. Cir. 1973) ("'The delays and expense incident to obtaining redress for such wrongs in the courts have made adequate relief to litigants almost unattainable in these cases and, in the public mind there has been growing up a belief, which to some extent may be justified, that the courts were not efficient, because of the usual delay and expense in providing early, adequate, and inexpensive relief from oppressions.'" (quoting 51 CONG. REC. 11593 (1914) (statement of Sen. Saulsbury))). While perhaps not true at various points in the past, during the past decade, the FTC has put in place significant rule changes expediting proceedings to the courts. *See, e.g.*, FTC Rules of Practice, 74 Fed. Reg. 1804 (Jan. 13, 2009) (to be codified at 16 C.F.R. pt. 3, 4).

[247] Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984).

interests, then the costs to consumers will typically increase. Indeed, there is concern that in the standard-setting situation, those implementing the standard will have little incentive to litigate.[248] The concern about consumer harm is less important outside the SSO context, where the costs are internalized, and competitive alternatives are more readily available. Section 5 is flexible enough to fill in the gaps.

b. *Section 5 Should Incorporate Patent Defense Principles and Trade-Offs*

Patent defenses reduce returns to innovation, yet that concept is more readily accepted in patent law than in antitrust law. For example, under the doctrine of inequitable conduct, a patent holder can lose the right to enforce a patent even if the patent would have issued had the conduct not occurred. In other words, it does not matter whether the particular patent monopoly would have existed in the "but for" world. The absence of a causation requirement reflects the importance of candor to the Patent and Trademark Office. This willingness to terminate patent rights is accepted to protect more important goals. Similarly, delay in enforcement can result in a significant penalty to the patent holder – including many years of lost royalties. In some cases, that could theoretically bar all recovery. Notably, a "patentee who is negligently or willfully oblivious to [conspicuous activities of infringement] cannot later claim his lack of knowledge as justification for escaping the application of laches."[249]

The rules governing laches are informative in the SSO context. Ex ante disclosure, like laches, avoids lost documentary evidence and dulling of memories – both forms of "[e]vidently, or 'defense' prejudice."[250] Laches also protects potential infringers from economic harm due to the tardiness of the patent holder. "Economic prejudice may arise where a defendant and

[248] Professor Wright argues to the contrary that a host of "state and federal remedies" are superior to the "heavy hammer of antitrust law." Wright, *supra* note 100, at 15. As an initial matter, Professor Wright's discussion of "antitrust law" explicitly relies on the disincentive effects of treble damages, but fails to acknowledge that the FTC Act does not provide for treble damages. *Id.* at 13-15. Professor Wright, like others, sees equitable estoppel and breach of contract as sufficient remedies, but acknowledges that these remedies do not generally apply to those outside the SSO. *Id.* at 12-13. Finally, Professor Wright ignores the cost, as well as the lack of incentive, to use these remedies. *Id.* at 12-16; *see also* Farrell et al, *supra* note 94, at 659.

[249] Wanlass v. Gen. Elec. Co., 148 F.3d 1334, 1338 (Fed. Cir. 1998).

[250] *See* A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992) ("Evidentiary, or 'defense' prejudice, may arise by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts.").

possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit."[251]

The patent defenses attempt to assure that the system works.[252] The fact that these defenses might discourage some R&D is acceptable and accepted. In like manner, Section 5 can be used even though it might have a marginal negative impact on positive incentives, because of the potential for substantial consumer benefit.

c. *Patent Defenses and Efficiency*

Though equitable estoppel and laches have been codified as patent law defenses, these defenses are not unique to patent law. They pre-exist patent law, coming from the common law. This ancestry might provide a basis to conclude that patent law defenses are efficient. Interestingly, the argument in favor of Section 5 enforcement depends on the existence, not the efficiency, of the patent law defenses.

(i) Common Law Basis of Defenses

Aukerman relies on the common law principles of equitable estoppel.[253] The court also cites Supreme Court precedent on estoppel outside the patent area.[254] One popular presumption is that the common law produces efficient outcomes.[255] This "efficiency of the common law hypothesis" was originally developed by Ronald Coase "and later systemized and greatly extended by [Richard] Posner."[256] This hypothesis asserts that "common law rules attempt to allocate resources efficiently . . . and enjoy a comparative advantage over legislation in fulfilling this task because of the evolutionary selection of common law rules through adjudication and the gradual accretion of

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[251] *Id*. Accepted excuses include negotiations with the accused infringer; litigation with other parties; limitations resulting from either financial or other circumstances, such as illness of the patentee; disputes over patent ownership; and the extent of infringement. *Id.*

[252] *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816 (1945) ("[A] patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, 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.").

[253] *Aukerman*, 960 F.2d at 1041 (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.3, at 42 (1973) and RESTATEMENT (SECOND) OF TORTS § 894(1) (1979)).

[254] *Id.* at 1042 (citing Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 59 (1984)). Ironically, *Heckler* stands for the proposition that estoppel is not available against the government where the only detriment was the inability to retain money that petitioner should never have received in the first place. *Heckler*, 467 U.S. at 61-62.

[255] THE ENCYCLOPEDIA OF PUBLIC CHOICE 95 (Charles K. Rowley & Friedrich Schneider eds., 2004).

[256] *Id.*

precedent."[257] Given their common law lineage, if one credits Posner and others, the patent defenses are likely efficiency enhancing.

(ii) Efficiency of Patent Law Not a Necessary Condition

The argument about the efficiency of the common law is somewhat of a red herring for the current analysis. The primary arguments against use of Section 5 in the standard-setting arena are that (a) private remedies already exist and (b) Section 5 enforcement will overly deter participation in standard setting.[258] Even if the defenses are inefficient, they nonetheless create the underlying incentive structure whether or not the FTC intervenes. Further, FTC enforcement would require additional elements that relate to market-wide harm. Therefore, even if the underlying defense were inefficient, FTC enforcement could still result in efficient outcomes.

There is some fear that firms may not participate in SSOs because of fear of post hoc analysis of the firm's conduct. But because there is no likelihood of treble damages, the patent holders are faced with the same post hoc analysis whenever a patent defense is raised. The Commission is not operating in a vacuum nor on a blank slate (*tabula rasa*).[259]

d. *Efficiency Considerations Weigh in Favor of Use of Section 5 Enforcement, but Not Sherman Act*

Critics might argue that Section 5 enforcement has resulted in at least one firm leaving a standard-setting organization. Rambus's counsel advised Rambus of the risks of equitable estoppel well before the *Dell* decision, yet Rambus continued to participate in JEDEC.[260] It was very soon after *Dell* that Rambus withdrew from JEDEC.[261] Thus, if the FTC enforces equitable estoppel principles, a firm with an intent to engage in "bad" conduct may leave.[262] But this is not an undesirable thing – particularly in the case of

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[257] *Id.*

[258] *See, e.g.*, Dell Computer Corp., 121 F.T.C. 616, 625-26 (1996).

[259] The use of the equitable estoppel-type standard would not prevent the Commission from reaching a different decision on this issue from a district court. *See supra* note 236 (discussing how the Commission can devote substantially greater time and resources to their investigation than a district court does in a typical trial).

[260] Complaint at 2-3, Rambus, Inc., No. 9302 (Fed. Trade Comm'n July 31, 2006), http://www.ftc.gov/os/adjpro/d9302/050810ccmosanctions.pdf.

[261] *Id.* at 3-4.

[262] Ironically, *Rambus* may be the one instance where Commission enforcement helped create a monopoly. Had the Commission not announced *Dell*, Rambus likely would have stayed in JEDEC. If Rambus had stayed longer, many of its patents would have issued while it was a member of JEDEC, removing Rambus's defense that applications were not required to be disclosed and leaving less basis for the Federal Circuit reversal of the district court verdict in Virginia.

Rambus, which gained valuable information during SSO deliberations but provided none.

Section 5 enforcement might increase the likelihood that potential hold-up victims participate in standard setting. Enforcement would encourage "innocent" firms to participate because they would be less likely to suffer from opportunistic behavior. The net would be an increase in standard setting.

Conversely, finding the negligent IP holder liable for treble damages under Section 2 could significantly deter firms from participating in standard setting or cause overinvestment in patent tracking. Treble damages for negligence (over and above an injunction) will generally exceed any patent law remedy.

If treble damages were available, unintentional conduct could be penalized significantly more than under laches. Rather than risking treble damages in addition to the loss of IP, firms might choose not to participate in standard setting.

In summary, monopoly gained through conduct that is within the control of the monopolist and not on the merits resembles monopolization, as the term is used by courts and in common parlance, rather than historic accident or luck. Such conduct is proscribed by patent law defenses and other external norms. Where external norms already exist, the incentive to engage in that conduct is already affected. The existence of a patent law defense, in conjunction with relief that is similar in nature to the patent law defense, mitigates any risk of harm to incentives. Using these defenses as one potential limiting principle ensures that no skill, foresight, or business acumen is involved. The deadweight social welfare loss associated with monopoly can be eliminated with minimal concern for false positives. The use of Section 5 in this way is consistent with Supreme Court precedent.[263]

e. *Argument Not Available for All Social Norms*

It is not enough that conduct violates an external norm; rather, it is important that the remedy under Section 5 closely parallel that available under the external norm. For example, if a misrepresentation before the patent office resulted in jail time, but not loss of patent rights, there would not necessarily be a Section 5 violation. In this manner, this Article proposes a framework that differs from that proffered by Neil Averitt in an important contribution to Section 5 jurisprudence.[264] Averitt concluded that Congress authorized the FTC "to determine and enforce recognized standards of fair competitive behavior, whether these have been declared by statute or have emerged as the generally accepted ethical norms of the community. This is primarily true (and

[263] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 129, 137 (1998) (using "'unfair competition' laws, business tort laws, or regulatory laws [to] provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality,'" rather than permitting treble damages per se).

[264] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 231-37 (1980).

perhaps exclusively true) where violation of those standards confers a competitive advantage."[265] The analysis in this Article recognizes that ethical norms do not necessarily, or even generally, equate to economic disincentives.

While noting the shared role of patent law and antitrust in fostering innovation, the FTC IP report offered many recommendations to the IP world on how to improve the patent process.[266] This learning process should be reciprocal. The analysis here suggests that patent law principles can and should be incorporated into Section 5 enforcement.

Other norms, such as tort law and contract law, can also inform Section 5 enforcement.[267] Where the Commission remedy would not extend far beyond the civil remedies, the disincentives to investment are not materially affected. Therefore, as long as there is a connection to consumer welfare in the antitrust sense between the violation and the external norm, Commission action could be justified.

Further, when these external norms have been violated, the conduct meets the Second Circuit's standard: "at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."[268] In the case of equitable estoppel, laches, inequitable conduct, contract breach, and other norms, there has already been a determination that the conduct lacks a legitimate independent business justification.

After *N-Data*, some expressed the fear that use of external norms will lead the Commission to intervene whenever there is a contract breach, tort, or patent dispute.[269] They claim support for a limited Section 5 from the Supreme Court's admonition that

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[265] *Id*. at 274.

[266] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 12, at 1; *see also* ANTITRUST MODERNIZATION COMM'N, *supra* note 91, at 38-39.

[267] Courts have allowed the alleged infringer to defend based on breach of contract and a contractual duty of good faith and fair dealing claims arising out of failure to disclose patents in the standard-setting context. *See, e.g.*, Agere Sys. Guardian Corp. v. Proxim, Inc., 190 F. Supp. 2d 726, 738-39 (D. Del. 2002); ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292, 1999 WL 33520483, at *3-4 (N.D. Cal. Nov. 2, 1999) (allowing contract remedy of specific performance in a case involving an antitrust violation).

[268] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984).

[269] *See, e.g.*, SIMS, DÉJÀ VU, *supra* note 126, at 1-4; Jonathan Gleklen, *The Emerging Antitrust Philosophy of FTC Commissioner Rosch*, 23 ANTITRUST, Spring 2009, at 46, 48-49 (arguing that Commissioner Rosch's rationale for intervening in *N-Data*, despite lack of a Section 2 claim, is too broad). Gleklen acknowledges that the N-Data breach of its RAND commitment "does not fit comfortably within Section 2." *Id.* at 48. To support his argument that the Commission overstepped, Gleklen then asked, "How was N-Data's conduct any more 'oppressive' or 'coercive' than any other breach of contract by a firm?" *Id.* at 49. And he also asks, "[W]ould a landlord's breach of a lease agreement also be an 'unfair method of competition'?" *Id.*

> Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."[270]

But the Court was merely stating the obvious: not "all" torts, nor "all" contract breaches will suffice to establish an antitrust or Section 5 violation.

In fact, the Court's discussion shows that the same concerns arise in the context of Sherman Act cases, where, for example, the courts have found a means to determine when a contract dispute or tort may give rise to antitrust liability.[271] Institutionally, the FTC is at least as capable at making these distinctions as courts.

Since 1995, the Commission has initiated complaints in four standard-setting cases: *Dell*, *Rambus*, *Unocal*, and *N-Data*. Each case, including *N-Data*, is marked by a plausible story of market-wide anticompetitive effects. While it is correct that many contract breaches stem from opportunism based on some form of lock-in, there is a reasonably clear line that the Commission could draw. This would involve looking at the potential competitive effects in the marketplace *before* the conduct has occurred, and require that there be potential anticompetitive effects in the antitrust sense. Thus, for example, contract breaches between Pizza Hut and their franchisees would not raise concerns, but the Commission could act where a contract breach could be reasonably seen to result in market harm (e.g., breach of a RAND commitment where market power could be expected). *N-Data* fits within this framework. Just as the courts have framed the issues under Section 2, the Commission can reject prosecuting "private" breaches while still pursuing breaches with potential consumer harm.

The risk from pursuing *N-Data*-type cases is small. Because a potential private contract remedy for N-Data's conduct would be to require it to perform according to its original commitment – the effects on incentives to participate

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[270] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945)).

[271] *See, e.g.*, Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 438 (3d Cir. 1997) ("Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws."); *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176 (1965) (holding that fraudulently procuring a patent can violate the Clayton Act if coupled with monopolistic actions which violate antitrust laws); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002) ("Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer."); Maris Distrib. Co. v. Anheuser-Busch, 302 F.3d 1207, 1219 (11th Cir. 2002) ("[T]he mere existence and exercise of contract power does not show that a defendant had market power.").

in standard setting exist to a large degree whether or not the FTC intervenes. Further, the rescission of a RAND commitment typically has little procompetitive value, and even if there is a false positive, the SSO can take steps to make it easier to rescind. The risk from permitting such behavior is far greater.[272]

C. *Other Gaps for Section 5 to Fill*

The following Sections address gaps in the Section 2 of the Sherman Act with respect to market power, causation,[273] and harm.

1. Monopoly Power

Section 2 requires monopoly power or a dangerous probability of gaining market power.[274] Typically, for an attempt case, this would require at least a fifty-percent share. What about where unilateral conduct falls short of this market share? Section 2 generally does not proscribe conduct resulting in anticompetitive effects from unilateral conduct where there is no dangerous probability of monopolization.

Anticompetitive effects can arise even where a firm is likely to achieve the share required for monopolization or attempted monopolization.[275] As a result, the Antitrust Treatise states that with regard to market power, "less elaborate developments of the power requirement are necessary in cases presenting both

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[272] Some of the world's most significant patent holders and participants in standard setting supported the *N-Data* decision. For example, IBM, Sun Microsystems, Cisco, and Oracle wrote to the Commission, stating:

> There is a fundamental public interest at stake under that set of circumstances in light of the following kinds of threatened harm: exorbitant royalties that increase product prices to consumers; exclusion of some or many firms from the market altogether; loss of confidence in and diminished support for standards development processes generally. In short, the act of repudiation under the conditions involved in this matter undermines the whole open standard effort by enabling the new owner to obtain monopoly power over what would otherwise be a robustly competitive standardized market.

Public Comments of IBM, Oracle, Sun Microsystems, and Cisco, Negotiated Data Solutions LLC at 2-3, No. C-4234, (Fed. Trade Comm'n Apr. 14, 2008), http://www.ftc.gov/os/comments/negotiateddatasol/534241-00012.pdf. These firms support the use of Section 5: "The circumstances alleged in the N-Data complaint and accompanying documents exemplify how there may well be abuse of this kind that threatens serious injury to SDO participants and to the consuming public but that may be difficult to reach under established Sherman Act standards." *Id.* at 3. This type of support should not be ignored when considering the legitimacy of FTC use of Section 5.

[273] Causation was previously discussed with respect to *Rambus*. *See supra* notes 59-65 and accompanying text.

[274] Sherman Antitrust Act, 15 U.S.C. § 2 (2006).

[275] *Cf. Brooke Grp.*, 509 U.S. at 229 ("A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly.").

(a) socially harmful conduct; and (b) limitations in the remedy sought to prospective relief."[276]

We have already seen the Commission's use of Section 5 with invitations to collude where there is no allegation of monopoly power.[277] Academic authority generally supports this use.[278] There is no apparent reason why monopoly power is relevant to whether or not intervention is justified.

Consider, for example, a three-firm industry in which market share is equally divided. Consider further that one of the firms attempts to prevent or slow down new entry by engaging in fraud or sham petitioning before the patent office, but that there is no dangerous likelihood that the firm will obtain a monopoly.[279] In such a scenario, there is no invitation to collude – there is no offer to form a monopoly for the other firms to accept under an *American Airlines* type analysis. The firm is not guilty of monopolization or attempted monopolization because its share is too low. Nonetheless, it is not clear why that conduct should be immune from antitrust scrutiny. The monopoly power test does not seem to provide a useful screen in these circumstances. Economists understand market power, and that it certainly does not require fifty percent or more market share. While accommodation for a lessened market power requirement may not easily fit within Section 2, it would seem to fit nicely within a Section 5 unfair method of competition theory.[280]

2. Causation – *Rambus*

In *Rambus*, the Commission lost on the issue of causation.[281] "Courts require a causal link between the conduct under scrutiny and the existence, extension, or protection of monopoly power before a violation of Section 2 can be established."[282] Section 5 might have a lesser causation requirement than Section 2. Although the Commission inferred causation in its *Rambus* decision, the Commission did not shift the burden to Rambus on the question of whether Rambus's technology would have been adopted if Rambus had

[276] 3B AREEDA & HOVENKAMP, *supra* note 65, ¶ 807d.

[277] *See supra* notes 170-175 and accompanying text (discussing *Mead Johnson*).

[278] *See supra* note 193 and accompanying text.

[279] *Cf.* Caribbean Broad. Sys. v. Cable & Wireless, 148 F.3d 1080, 1088 (D.C. Cir. 1998) (affirming that "27% ownership interest in [one of CBS's competitors] did not make C&W itself a competitor of CBS" because "one company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws").

[280] *See* Michael Antalics, Remarks at FTC Workshop, *supra* note 124, at 113 ("If the hypothetical is truly sham petitioning where you're raising their costs and keeping them out of the market so that you can return the market to an oligopoly, I think there's some likelihood of harm there.").

[281] Rambus Inc. v. F.T.C., 522 F.3d 456, 466 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1318 (2009).

[282] Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 694 (2000).

disclosed.[283] Had the Commission required Rambus to prove that it would have offered a RAND commitment and that it would have been accepted, and then found that Rambus failed to meet that burden on either prong, then the Commission likely would have avoided the causation and *NYNEX* issues raised by the D.C. Circuit.[284]

The FTC could have adopted this burden shift in its Section 2 analysis. Having declined to adopt such an analysis in the Section 2 context, the Commission could still do so under a Section 5 analysis. Again, the prospect of treble damages in Section 2 actions might argue for a stricter causation standard than where such remedies are not available.

The rebuttable presumption of causation is particularly warranted in the SSO context. Clearly, a firm that misrepresented its patent interests must believe that it would gain from the deception.[285] Why else deceive in the first place if the choice of its technology was a foregone conclusion? That implicit (or explicit) belief by the monopolist should be sufficient to justify at least a rebuttable presumption that the technology would not be chosen – giving the defendant the burden of showing the absence of viable alternatives. Burden-shifting in cases involving omissions has been well-accepted in the securities area,[286] other areas of the law,[287] and in FTC unfair acts and practices cases.[288]

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[283] In its Section 2 analysis, the Commission did utilize a burden shift, requiring Rambus to show that adoption of its technology was inevitable. Rambus, Inc., No. 9302, at 81-82, 2006-2 Trade Cas. (CCH) ¶ 75,364 (Fed. Trade Comm'n July 31, 2006).

[284] *See Rambus*, 522 F.3d at 464-67.

[285] HOVENKAMP ET AL., *supra* note 21, § 35.5a, at 35-40 ("Proof of manipulation of the process towards an anticompetitive end . . . should incline a court to doubt the technical superiority of the standard ultimately adopted.").

[286] Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-54 (1972) ("Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision. *This obligation to disclose and the withholding of a material fact establish the requisite causation in fact*." (citations omitted) (emphasis added)).

[287] *See, e.g.*, Apte v. Romesh Japrah, M.D., F.A.C.C., Inc. (*In re* Apte), 96 F.3d 1319, 1323 (9th Cir. 1996) (applying reasoning of *Affiliated Ute* to fraud in bankruptcy context and finding that materiality of withheld information sufficient to establish reliance and causation).

[288] Courts have generally interpreted the *Affiliated Ute* doctrine as giving rise to a rebuttable presumption of reliance where a material omission has been proven. *E.g.*, Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008) (finding a rebuttable presumption of reliance "if there is an omission of a material fact by one with a duty to disclose" to an investor). The non-disclosing party may overcome this presumption by proving by a preponderance of the evidence that "even if the material facts had been disclosed, plaintiff's decision . . . would not have been different than it was." Rochez Bros., Inc. v. Rhoades, 491 F.2d 402, 410 (1973). In *International Diamond Corp*., for example, the court extended the reach of the burden-shifting to encompass affirmative misrepresentations, as well as omissions. FTC v. Int'l. Diamond Corp., No. C-82-0878,

The Commission's expertise could be drawn upon for findings that disclosure was expected in the SSO precisely to avoid unmerited monopolies resulting from having to reconstruct the "but for" world many years later. After all, memories fade and documents disappear or get reinterpreted. Thus, if there are viable alternatives, the respondent must show that its technology would have been chosen. If Section 2 requires more, and a "but for" test is required, then there is room for Section 5 to fill the "gap" created by such an interpretation. A Section 5 theory is particularly appealing here, where the conduct at issue has little or no efficiency justifications and the risk due to false positives is small.

In sum, just as a failure to disclose should not be excused simply because the firm is unlikely to achieve a monopoly, the Commission should not have the burden of proving the exact nature of the "but for" world. This standard would be somewhat analogous to finding the conduct "inherently suspect"; the respondent could win, for example by justifying the conduct, proving that there were no viable alternatives, or showing that the standard had no power.[289] Regardless of the terminology, there are distinct benefits in adopting a lesser standard than found under Section 2. Adopting a rebuttable causation standard under Section 5 has little downside and provides a bright line, easy to administer test: if there is a duty to disclose, then disclose. This standard is far superior to the current formulation: if there is a duty to disclose, consider your likelihood of monopolizing the relevant antitrust market had you disclosed.

3. Harm Under Section 5

The FTC could find that the harm under Section 5 is more broadly defined than under Section 2. In *Rambus*, for example, the D.C. Circuit interpreted *NYNEX* to mean that misrepresenting patent rights to an SSO did not establish antitrust harm if the "only" result was that Rambus received higher royalties.[290]

1983 WL 1911 at *6 (N.D. Cal. Nov. 8, 1983); *see also* F.T.C. v. Inv. Devs., Inc., No. 89-642, 1989 WL 62564, at *6, 9 (E.D. La. Jun. 8, 1989) (applying *Affiliated Ute* standard to case involving Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures Rule, 16 C.F.R. § 436 (1979)); FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985) (following *International Diamond* in holding that the "FTC need only prove that the alleged fraudulent practices were the type of misrepresentation on which a reasonably prudent person would rely, that they were widely disseminated, and that the injured consumers actually purchased the product").

[289] *Cf.* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 31 (D.C. Cir. 2005) ("Although the Commission uses the term 'inherently suspect' to describe those restraints that judicial experience and economic learning have shown to be likely to harm consumers, we note that, under the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." (citation omitted)).

[290] Rambus Inc. v. F.T.C., 522 F.3d 456, 464 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1318 (2009).

Even if this interpretation is valid under Section 2,[291] the Commission could use different criteria under Section 5.

Although Section 2 harm might be limited to certain antitrust markets directly affected by the market, the complaints in *Dell*, *Unocal*, *Rambus*, and most recently *N-Data* all contained allegations of harm to the standard-setting process in general in addition to specific harm to the market at issue.[292] The *N-Data* majority statement discussed this harm, stating "The impact of Respondent's alleged actions, if not stopped, could be enormously harmful to standard setting. Conduct like N-Data's – which undermines standard setting – threatens to stall that engine to the detriment of all consumers."[293]

Harm to standard setting is tied to consumer welfare in a dynamic sense in that firms may be less likely to participate in standard setting if this type of opportunistic behavior is permitted. This harm to standard setting generally could violate Section 5 even if it does not violate Section 2. Notably, the underpinning for such an action would remain consumer welfare, and not "fairness."

This harm could be significantly greater than harm in any traditional Section 2 case, or even in other Section 5 contexts. Standard setting provides an underpinning for substantial economic growth. Opportunistic acts will be taken into account by firms in their decision whether or not to participate. The spillover effects could be substantial.

The FTC would have to distinguish *Official Airline Guides*, in which the Second Circuit reversed the Commission's decision that the Airline Guides violated Section 5 by not including commuter airlines in the guide.[294] The

[291] The Third Circuit has concluded that breach of a RAND commitment can constitute the requisite antitrust injury. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007).

[292] The *Dell* Complaint alleged four anticompetitive effects:

> (a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers delayed their use of the design standard until the patent issue was clarified.
>
> (b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would affect the VL-bus' success as an industry design standard.
>
> (c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the cost of developing competing bus designs.
>
> (d) Willingness to participate in industry standard-setting efforts have been chilled.

Dell Computer Corp., 121 F.T.C. 616, 618 (1996).

[293] Negotiated Data Solutions LLC, No. 0510094, at *1, 2008 WL 258308 (F.T.C.) (Jan. 22, 2008). The amici briefs submitted by non-party patent holders, participants in standard setting, and SSOs themselves, support the conclusion that unremedied opportunism may have broad implications. *See, e.g.*, Hewlett-Packard Brief, *supra* note 92, at 1-2; AMWA Brief, *supra* note 99, at 1-5.

[294] Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920, 928 (1980); *see also supra* notes 150-55 and accompanying text (discussing *Official Airline Guides*).

court explained, in part, that the alleged harm occurred in a separate market.[295] This case should be distinguishable under the framework of this Article. The choice of what firm to include in a guide is closely akin to the choosing with which firm to deal. That principle, more than the separate markets, may be the guiding principle from *Official Airline Guides*.

There does not seem to be an easy place to consider these types of spillover effects under the Sherman Act. Again, Section 5 could fill that gap.

D. *Policy Implications*

The proposals presented in this Article do not unduly expand FTC power. Looking back, the Commission's findings of liability in *Dell*, *Unocal*, *Rambus*, and *N-Data* would all have come out the same. The D.C. Circuit would have affirmed *Rambus* because of the "edentulous" causation standard under Section 5.

Looking forward, the FTC might find additional cases attractive. For example, if a firm would be subject to laches because of its long delay in enforcing a patent, the FTC could step in to protect consumer welfare and standard setting. Determining whether RAND commitments were honored could be addressed using modified patent law principles. For example, *Georgia Pacific* held that in a typical patent infringement case, reasonable royalties are based in part on alternatives at the time of infringement, which can easily occur after lock-in.[296] With little risk to competition, the *Georgia Pacific* rule could be modified in the SSO context to establish royalties as of the date the technology is chosen, which would be before lock-in.[297]

It should be noted that FTC enforcement could be considerably more active if harm to standard setting can state a sufficient basis for Section 5 liability. For example, if harm to standard setting alone is sufficient injury to competition under Section 5, then all patent hold-ups within SSOs might be subject to FTC scrutiny, whether or not there was a plausible theory of competitive harm in the market affected by the standard setting. More importantly, a broader harm standard not limited to the standard-setting arena could validate concerns that the FTC might wind up policing *all* opportunistic

[295] *Id.* at 925-26.

[296] Ga.-Pac. Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified sub nom.* Ga.-Pac. Corp. v. U.S. Plywood-Champion Papers Inc., 446 F.2d 295 (2d Cir. 1971).

[297] *Cf.* Cowie & Lavelle, *supra* note 207, at 147-48 ("The manner in which the Federal Circuit applies the *Georgia-Pacific* test has some potential to overcompensate the patent holder. In the typical case, the infringement does not begin until after the standard is adopted or perhaps even later when the patent issues. At this point, if the standard is successful, the patent holder has some appreciable market power, as its patent controls a necessary technological input to the practice of the standard. Hence there is some risk that a willing buyer-willing seller test would overcompensate the patent holder, as its rate might reflect the market power conferred on it by the adoption and success of the standard.").

conduct. This would be a significant expansion beyond current enforcement and should require additional thought.

CONCLUSION

Section 5 can play and has played a central role in gap filling and upholding the spirit of the antitrust laws. This is particularly true where the conduct at issue does not involve transactional necessities or core competitive values and where the conduct is already condemned under external norms. Under these circumstances, the FTC can craft a clear standard, and there is little risk of chilling procompetitive conduct.

The Section 5 cases discussed in this article also easily fit within the limiting principles suggested in recent speeches by FTC officials as well as recent cases.[298] The scope for Section 5 discussed here is not meant to set an outer boundary or universal standard for Section 5. Rather, the discussion here centers around what one might call the low-hanging fruit that the Sherman Act does not grab.

Notably, since 1992, the FTC has issued numerous complaints and consent agreements based on Section 5 as a gap-filling statute. During the period between *Dell* and *N-Data*, there has been little uproar in the antitrust or business community. Some will answer that those were only consent agreements. But antitrust counseling takes into account consent agreements. And of course, *Dell* and *N-Data* themselves were consent agreements. Indeed, many fear that antitrust and other substantive law is made primarily by consent. So to denigrate the pure Section 5 actions between *Dell* and *N-Data* as consent agreements would be disingenuous.

The hostility toward Section 5 is often phrased in terms of the horrible effects on innovation from vague standards.[299] But Section 2 is subject to this same criticism,[300] as are equitable estoppel and other patent defenses. In short,

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[298] Leibowitz *Rambus* Concurrence, *supra* note 40, at 15 ("The first [element of a Section 5 violation] is that the respondent must have engaged in identifiable, culpable conduct. The second is evidence of actual or incipient injury to competition."); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Section 2 and Standard Setting: *Rambus*, *N-Data* & The Role of Causation 1-3 (Oct. 2, 2008) (transcript available at http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf). After the Brodley Conference, the FTC issued a complaint against Intel that included Section 5 allegations. Complaint *passim*, Intel Corp., No. 9341, 2009 WL 4999728 (F.T.C.) (Dec. 16, 2009). I have not included analysis of this important case in this Article because it is still pending before the FTC. *See* Order Withdrawing Matter From Adjudication For The Purpose Of Considering A Proposed Consent Agreement, *Intel*, 2010 WL 2544426 (F.T.C.) (June 21, 2010).

[299] *See, e.g.*, Ethyl Corp., 101 F.T.C. 425, 668 (Chairman Miller dissenting) ("At worst, [the majority's decision] would actually deter beneficial, procompetitive behavior, for fear of triggering a Section 5 violation for unknown and unknowable reasons.").

[300] The admonition expressed in *Ethyl* about the need for clear guidance to business has been expressed at least as often in Section 2 cases. *See, e.g.*, Pac. Bell Tel. Co. v. Linkline

that claim can be, and likely has been, made with respect to any private or public action that could potentially diminish the incentive to innovate. In the ranking of potential harms to innovation, Section 5 should likely be relatively low.

The acceptance of the post-1980s FTC consent agreements is more likely due to the fact that the underlying conduct has not involved transactional necessities or core competition components. For this same reason, these consent agreements would have stood a far better chance in the courts of appeals than the litigated cases of the 1980s. The post-1980s consent agreements are based on sound economic principles and avoid the pitfalls of prior cases. The sky did not fall, and Section 2 and Section 5 have peacefully coexisted.

Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009) (observing that antitrust rules "must be clear enough for lawyers to explain them to clients" (quoting Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990))).