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STANDARD SETTING AND EXCLUSIONARY CONDUCT:

The Role of Antitrust in Policing Unilateral Abuses of Standard-Setting Processes

BY M. SEAN ROYALL

INDUSTRY STANDARDS ARE PERVASIVE throughout our economy and provide a powerful engine for change and progress in many markets. By and large, it would appear that the power of industry standards has been directed to productive and efficient ends, with enormous benefits flowing to consumers. Among other things, industry standards have

- dramatically increased the extent of product compatibility and interchangeability;
- facilitated the globalization of markets;
- sped the development and worldwide implementation of new technologies;
- opened up markets to the potential for new entry, often on a smaller scale than might be necessary absent widely adopted industry standards; and
- helped to cultivate intense price competition and, in turn, intense efforts to maximize efficiency and lower costs.

Although this is not always the case, industry standards are often set through the collaborative efforts of multiple market participants working under the auspices of a standard-setting organization or consortium. Broad participation in such a consortium can add tremendous value to the standard-setting enterprise. The collective nature of industry standard-setting activities can also raise antitrust issues, however.

The potential for standard-setting activities to give way to anticompetitive agreements and jointly imposed market restraints is not a new concern. Over the past several decades, a number of courts have had occasion to apply Section 1 of the Sherman Act in the context of industry standard-setting, resulting in a fairly well-developed body of case law.[1] Yet Section 1 of the Sherman Act is not the only provision of antitrust law with potential relevance to industry standard setting. As is evidenced by the Federal Trade Commission's pending suits against Rambus Inc.[2] and Union Oil Comapny of California (Unocal),[3] standard-setting activities may also implicate Section 2 of the Sherman Act.[4]

Broadly speaking, both the *Rambus* and *Unocal* cases allege that a single company, through unilateral, deceptive actions, skewed the outcome of a standardization process, culminating in the adoption of widely used industry standards that are subject to that company's private patent claims. There is an important factual distinction in the *Rambus* and *Unocal* cases—namely, *Rambus* involves standards set by a private standard-setting body, whereas *Unocal* involves standards set by a governmental agency, based in part on input from private firms.[5] The theories of the two cases are quite similar, however. Though both cases technically arise under Section 5 of the FTC Act, the underlying theory of liability in each case is rooted, at least in substantial part, in Section 2 principles of monopolization and attempted monopolization.[6]

The *Rambus* and *Unocal* cases are not the first of their kind. Roughly eight years ago, the FTC issued a complaint against Dell Computer Corporation, challenging Dell's unilateral conduct in failing to disclose certain patent-related information to a standard-setting organization.[7] The Commission issued fairly detailed statements in support of a negotiated consent order in *Dell*,[8] but the case was never actually litigated. Nor to the author's knowledge are there other litigated decisions in such cases. Hence, while the allegations in *Rambus* and *Unocal* are not entirely novel, both cases have the potential to shed considerable light on the application of Section 2 principles in this context.

One of many interesting questions that arises in cases such as *Rambus*, *Unocal*, and *Dell* is the extent to which unilateral conduct affecting a standardization process may properly be regarded as "exclusionary" and hence actionable through a claim of monopolization or attempted monopolization. Resolving this issue poses some challenges, not only because of the lack of prior Section 2 precedent directly on point, but also because, at the present time, a debate is being waged within the courts and the antitrust community regarding the proper scope and definition of exclusionary conduct.[9] Indeed, the prior issue of ANTITRUST was largely devoted to this very topic.[10]

The goal of this article is not to advocate any specific conclusions, but rather to draw out some of the legal arguments and subsidiary factual questions that may be relevant to assessing when, and under what circumstances, allegedly

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deceptive, unilateral conduct affecting a standard-setting process can be the basis for antitrust liability. Thus, using a short synopsis of the factual allegations in the FTC's pending suit against Rambus[11] as a platform for discussion, this article will address various arguments that could be made for and against the proposition that such conduct should be considered exclusionary.

Allegations in *FTC v. Rambus*

The FTC's administrative complaint against Rambus, which was issued in June 2002, is one of the longest, most detailed complaints in the Commission's history. Distilled to its essence, the complaint basically alleges the following:

In or around 1990, Rambus developed and sought to patent a proprietary architecture for the next generation of dynamic random access memory, or "DRAM." Rambus's business model entailed licensing this intellectual property for royalties, as opposed to producing the actual memory devices themselves. Early on, Rambus had limited success in obtaining licenses for its Rambus DRAM, or "RDRAM," technology. One competitive obstacle to Rambus's success was an open standard-setting process overseen by an organization known as JEDEC, which was developing its own next-generation memory standards, through the collaborative work of the entire memory industry and many users of memory.

In late 1991, Rambus joined JEDEC, and it soon discovered that JEDEC's work on next-generation memory standards implicated technologies that it believed could be covered through amendments to its own pending patent applications. Rambus then proceeded to work with its lawyers to make such amendments, with an apparent intent to enforce patents—and collect royalties—over DRAM devices built in compliance with JEDEC standards. Yet Rambus never disclosed to JEDEC what it was doing, thereby violating JEDEC's rules.

Rambus's own lawyers—who had cautioned the company concerning the legal risks associated with misleading JEDEC about patents—finally demanded that the company withdraw from JEDEC in late 1995 or early 1996. Interestingly, the precipitating cause for this legal advice was the issuance of the FTC's draft consent order in the *Dell* matter, which became public in December 1995. That consent order made it clear that misleading nondisclosure of patents to a standard-setting organization not only could undermine the patentholder's ability to later enforce the patents, but also could violate the antitrust laws, when such conduct resulted in or threatened harm to competition.

After leaving JEDEC, Rambus continued to conceal information about the extent to which it possessed, or was working to obtain, patent rights over aspects of JEDEC's standards. Starting in the mid-1990s and continuing thereafter, the worldwide memory industry adopted and implemented JEDEC's standards. Then, in early 2000, Rambus began enforcing patents—and demanding royalties—over JEDEC-compliant memory devices.

Rambus's alleged failure to comply with its obligations to disclose relevant patent-related information to JEDEC, the FTC's complaint claims, materially affected the outcome of JEDEC's process, in the sense that alternative technologies were available and likely would have been selected had JEDEC known that Rambus possessed or was seeking to obtain relevant patents. The complaint further alleges that JEDEC and its members are today "locked in" to the relevant standards and hence no longer have the ability to shift with ease to an alternative specification.

Assessing the Exclusionary Nature of Rambus's Alleged Conduct

Does conduct of the sort alleged by the FTC in the *Rambus* case qualify as "exclusionary?" Stated differently, is this the sort of conduct that, when it results in acquisition of monopoly power, should be subject to attack under the antitrust laws? Given the absence of prior precedent directly on point, the answers to such questions must be discerned from basic antitrust principles or analogies to other, arguably similar, types of conduct that have been deemed exclusionary. Arguments in favor of finding such conduct to be exclusionary might include the following:

- the conduct reflects an attempt to exclude rivals on some basis other than efficiency;
- the conduct is by nature misleading;
- the conduct violated a duty to disclose (and possibly other rules) imposed by the standard-setting organization; and
- even if not literally violating the express rules of the standards organization, the conduct constituted a conscious effort to subvert such rules, with the purpose of restricting competition.

By contrast, one might argue that such conduct does not warrant being treated as exclusionary either because the conduct involves no sacrifice of short-term profits or because there are legitimate business reasons for concealing patent-related information from a standard-setting organization.

Assessing the Arguments

The Conduct Excludes Competition on a Basis Other than Efficiency. In the *Aspen Skiing* case, the Supreme Court commented that, "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[12] This standard might provide at least a starting point in considering whether conduct of the sort challenged by the FTC's *Rambus* complaint qualifies as exclusionary.

One might argue, for instance, that by concealing material information about its patents from JEDEC, Rambus was seeking to hide the true costs of its technologies (i.e., technologies believed to be covered by its patents) and to avoid exposing such technologies to competition on the merits. Conduct of this sort arguably serves to exclude rivals, given that, with the benefit of more complete information, alternative technologies might be deemed to be superior on a cost-

performance basis. On the other hand, it would be difficult to fault a firm for concealing patent-related information from a standards organization unless the organization's rules or procedures required disclosure of such information or, at a minimum, created reasonable expectations that such information will be disclosed. This suggests that the more meaningful question is not simply whether material information was concealed, but rather whether concealment of such information has the potential to skew or distort the outcome of the standards process by causing participants to infer (from the absence of disclosure) that no potential patent issues exist. Hence, the exclusionary potential of such conduct depends both on the nature of the information that was concealed and the nature of what participants in the standards process reasonably expect to be disclosed by fellow participants.

The Conduct Is Misleading. The core allegation in the *Rambus* case is that Rambus sought to deceive JEDEC by concealing patent-related information it was required to disclose and that fellow JEDEC members reasonably expected would be disclosed. Assuming these allegations are true, does the fact that conduct is deceptive or misleading render such conduct "exclusionary" for purposes of Section 2?

There is certainly some support for the notion that misleading or deceptive conduct can be a proper foundation for liability under Section 2[13]—two notable, and recent, examples being *United States v. Microsoft, Inc.*[14] and *Conwood Co. v. United States Tobacco Co.*[15] On the other hand, Section 2 cases predicated on such theories can be open to question. As the Supreme Court and other courts have cautioned, the antitrust laws were not designed to condemn competitive practices merely because they may be "thought to be offensive to proper standards of business morality."[16] Nor are the antitrust laws designed to create a federal common law for business torts.[17] At a minimum, a Section 2 claim rooted in allegations of deceptive conduct would need to establish harm to the "competitive process" flowing from the challenged behavior, not merely harm to a competitor.[18]

One might reasonably question whether it is a good idea for courts to assess antitrust liability based in part on subjective determinations about whether the conduct in question is deceptive. One might further question whether it is appropriate to impose antitrust liability for allegedly deceptive conduct in circumstances in which the same conduct might not be independently actionable as fraud.[19] Nonetheless, as discussed above, there is precedent for imposing antitrust liability for deceptive acts that cause harm to the competitive process. Moreover, in such cases courts typically have not required a showing of actual fraud,[20] the one exception being "*Walker Process*" claims involving allegations of fraud on the patent office, where proof of actual fraud has been required.[21]

In evaluating the merits of imposing antitrust liability for deceptive conduct occurring within a standard-setting context, the *Walker Process* line of cases provides an interesting reference point. Long before fraud on the patent office became a theory for imposing antitrust liability, it was accepted as a basis upon which to establish an "inequitable conduct" defense to claims of patent infringement.[22] The Supreme Court in *Walker Process* essentially took what had theretofore been recognized as a defense to patent infringement and converted it into an affirmative antitrust cause of action. In other words, the Court said that when a patentee obtains a monopoly through "knowing and willful fraud"[23]—conduct that would provide an inequitable conduct defense to patent infringement—that monopoly will be subject to challenge under the antitrust laws.[24]

The *Rambus* case reflects a similar effort to import into antitrust law a theory initially developed to support a patent law defense—in this case, the defense of "equitable estoppel." By contrast to the lack of antitrust precedent in this area, there are a number of decided cases standing for the proposition that a patent owner that misleads a standard-setting organization about the extent to which it possesses relevant patents may later be barred—or equitably estopped—from enforcing such patents against companies utilizing the affected standards.[25] In fact, courts have held that equitable estoppel may apply even if the patent holder, as opposed to affirmatively misrepresenting facts about its patents to the standards organization, merely conceals relevant patent-related information, provided it can be shown that the patent holder had a duty to disclose such information.[26]

This, of course, is the principal allegation of the *Rambus* case.[27] The Commission's complaint alleges that Rambus engaged in deception by concealing patent-related information relevant to JEDEC's work—information that JEDEC's members reasonably would have expected to be disclosed, and that JEDEC's rules *required* to be disclosed. Thus, in the *Rambus* case the FTC does more than allege deception in some abstract sense. The FTC's allegations of wrongful conduct are very closely tied to allegations concerning the nature of what JEDEC's rules require.

The Conduct Violates a Private Duty. The precise nature of what JEDEC's rules require, in terms of patent-related disclosures, and whether Rambus's conduct in fact violated such rules, are both hotly disputed in the *Rambus* case. Yet assuming it could be shown that Rambus's conduct constituted a violation of JEDEC's rules, would that in itself qualify as proof of exclusionary conduct?

This question touches on an issue that is very much in dispute at the present time. Traditionally, courts have held that conduct may be deemed predatory or exclusionary if it is improper for reasons extrinsic to the antitrust laws, for example, conduct that violates a regulatory requirement.[28] In support of this approach, one might argue that it is fine, as the Supreme Court has said, to achieve a monopoly through "a superior product, business acumen, or historic accident,"[29] but monopolies achieved through demonstrably wrongful or improper means should be subject to challenge.

This line of reasoning, while fairly well entrenched in antitrust case law, has come under attack. Indeed, in *Verizon*

Communications, Inc. v. Trinko—a case recently decided by the Supreme Court[30]—the Court was asked to rule that Section 2 liability cannot be predicated upon conduct that is wrongful only insofar as it violates a regulatory duty, in this case a duty arising under the federal communications laws. Rather, the petitioner in *Trinko* (Verizon) contended, under Section 2 of the Sherman Act liability should attach only in circumstances in which the defendant acted contrary to a duty directly rooted in principles of antitrust law. While limiting its holding to the specific context of unilateral refusals to deal, the Supreme Court's recent *Trinko* decision appears to have accepted this proposition.

One might argue that, for reasons similar to those discussed in *Trinko*, it would be improper to predicate antitrust liability solely upon the fact that the conduct in question violated the rules of a private standards organization. On the other hand, this is not really a fair characterization of what the FTC seeks to do in the *Rambus* case. While the Commission's case clearly is predicated in part on the allegation that Rambus's conduct violated JEDEC's rules, the FTC does not appear to contend that Rambus's conduct was improper solely for this reason. Consistent with the equitable estoppel cases mentioned above, the FTC's allegations in this regard serve at least in part to establish that Rambus had an affirmative duty to disclose relevant patents, which in turn provides a factual predicate for claiming that Rambus's alleged concealment of relevant patent-related information was misleading.

The Conduct Subverts the Rules or Purposes of the Standards Organization. While the FTC's complaint plainly alleges that Rambus violated specific rules and procedures established by JEDEC, the complaint also alleges that Rambus acted in bad faith and that its conduct served to undermine the broader purposes of JEDEC's standard-setting process. This aspect of the Commission's complaint has been amplified through post-complaint arguments by Complaint Counsel. Even if it could be shown that Rambus technically complied with JEDEC's rules, Complaint Counsel has argued, it would nonetheless be appropriate to impose liability against Rambus considering that it acquired a monopoly by engaging in conduct designed to subvert the purposes of JEDEC's standardization process, with the goal of eliminating competition. If such allegations were proven true, would this qualify as exclusionary conduct?

Interestingly, this is a question on which there is prior antitrust authority. The relevant case is *Indian Head, Inc. v. Allied Tube & Conduit Corporation*.[31] In that case, a PVC pipe manufacturer whose product had been rejected by the majority vote of a standard-setting organization complained that the defendant, a steel pipe manufacturer, had enlisted other steel pipe makers in a concerted effort to block the proposed PVC-based standard by, in essence, stuffing the ballot box. The plaintiff challenged this conduct as a restraint of trade in violation of Section 1 of the Sherman Act, and on appeal the Second Circuit agreed that such conduct constituted an antitrust violation, notwithstanding the fact that no organization rule had been violated. In the court's words, the defendant, "while acting within the letter of the . . . rules," nevertheless "circumvented" the rules, "violated the integrity of the [organization's] procedures," and "subverted" the overall process by which the organization sought to define standards, all "for the sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace."[32] Encapsulating its holding, the Second Circuit stated, "We refuse to permit a defendant to use its *literal compliance* with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability."[33]

Considering that it was a Section 1 case, *Allied Tube* does not directly speak to the proper bounds of exclusionary conduct from the vantage point of Section 2. Yet one could argue that the case provides broad support for condemning deliberate efforts to manipulate a standard-setting process for an anticompetitive purpose, through either unilateral or concerted action, independent of any violation of an organizational rule. As the Supreme Court's decision in *Allied Tube* emphasizes, industry standard-setting activities, while possessing great potential to benefit consumers, also possess great potential to harm competition, and the key to ensuring this does not happen is to "prevent the standard-setting process from being biased," or misdirected, "by members with economic interests in restraining competition."[34] Where a standard-setting process has become subject to anticompetitive bias—whether owing to the conduct of one firm acting alone or multiple firms acting in concert—*Allied Tube* might be read to suggest both that the "antitrust validity" of such conduct should be questioned, and that it cannot be judged solely by "compliance with the rules."[35]

Putting aside how broadly *Allied Tube* can be read, one might question the appropriateness of imposing antitrust liability where the defendant's conduct complies fully with the rules of the relevant standards organization. Doing so, one might argue, could have the effect of discouraging or "chilling" participation in standard-setting activities. The counterargument would be that allowing participants to exploit loopholes in the rules of a standard-setting process in a way that subverts the broader purposes of the activity could also chill participation, perhaps even more severely.[36]

The Conduct Does Not Involve a Sacrifice of Short-Term Profits. Up to this point, we have been scrutinizing arguments in favor of the conclusion that conduct of the sort alleged by the FTC in *Rambus* is exclusionary. We now turn to an argument against reaching such a conclusion—namely, the argument that competitive behavior should not be deemed exclusionary except in circumstances in which the conduct involves a sacrifice of short-term profits in order to reap long-term benefits through the exclusion of competition. This is a recognized test for identifying exclusionary conduct that was first developed in the context of predatory pricing claims and has since extended to non-price predation claims as well.[37] But does it make sense to apply this test as a

limit to the scope of exclusionary conduct in the context of alleged unilateral abuses of a standard-setting process?

This again touches on a debatable issue of law. In its briefs to the Supreme Court in *Trinko*, Verizon argued that as a "general principle" unilateral conduct should not be condemned as exclusionary unless it makes no business sense apart from the monopoly returns it may make possible through the elimination of competition.[38] In an amicus brief filed in support of the merits of Verizon's appeal, the federal antitrust enforcement agencies agreed that this principle should apply in the context of unilateral refusals to deal but stopped short of suggesting that it should apply in all cases.[39] Indeed, the agencies' brief specifically acknowledged that there are some contexts—standard setting being one—in which conduct not satisfying this test may nonetheless be deemed exclusionary, particularly where the conduct "is also improper for reasons extrinsic to the antitrust laws."[40]

The issue could be argued both ways. One might contend, for instance, that application of the "sacrifice of profits" test is particularly useful and important when dealing with types of conduct that are inherently ambiguous in terms of discerning their competitive versus anticompetitive character—conduct like low pricing. And one could perhaps say that the withholding of patent-related information from a standard-setting group falls within this category, in that it is to be expected that firms would jealously guard the secrecy of non-public information about their proprietary intellectual property. On the other hand, one might counter that the "sacrifice of profits" test is really designed to address situations in which the challenged conduct has occurred in the open field of battle between competitive rivals, an environment in which aggressive competition is to be expected and encouraged and mistaken inferences about anticompetitive behavior could be very costly.[41] The argument would be that standard-setting is a distinctly different environment, one in which the law should seek to encourage mutual trust and good faith as opposed to mutual distrust and opportunism.

There Are Legitimate Business Purposes for the Conduct. The final point is one on which, from a legal standpoint, there is relatively little room for debate. It is fairly well settled that unilateral conduct should not be deemed to be exclusionary where the conduct is explained by one or more legitimate business rationales unrelated to any alleged effort to restrict or eliminate competition.[42] As noted above, in the context of a case, such as *Rambus*, one might contend that the withholding of non-public information about patents or patent applications is perfectly appropriate, particularly in a setting populated with competitors. To be persuasive, however, such arguments need to be squared with the overall factual landscape. If it is the case, for instance, that the standard-setting organization imposes duties upon member companies to disclose the very type of patent-related information that allegedly was concealed, generic arguments about the legitimacy of withholding such information from competitors are not likely to go far in overcoming an allegation of exclusionary behavior.

The Challenge

When it comes to policing unilateral conduct, the antitrust laws tread carefully, and for good reason. On the other hand, there are certain environments in which anticompetitive behavior on the part of even a single firm can pose a serious threat to consumers, and industry standard-setting may be one. Standards are frequently established through consortia involving many of the relevant players in a given industry, and considerable harm to competition can result when the work of such an industry group is misdirected to serve the private, anticompetitive purposes of a single company. The challenge for the courts and the Federal Trade Commission in resolving antitrust cases attacking unilateral conduct in this setting will be to define standards of conduct that deter truly abusive behavior without unduly discouraging broad participation in group standard-setting activities, which can both enhance the quality of industry standards and lead to swifter, wider adoption of such standards within the relevant marketplace. Existing case law provides some helpful guideposts, but precisely how the law in this area will develop remains to be seen. ■

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[1] *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

[2] Rambus Inc., FTC Docket No. 9302 (June 18, 2002) (Complaint), *available at* http://www.ftc.gov/os/2002/06/rambuscmp.htm.

[3] Union Oil Co. of Cal., FTC Docket No. 9305 (Mar. 4, 2003) (Complaint), *available at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[4] Although the *Rambus* and *Unocal* cases were each dismissed through Initial Decisions rendered by the presiding administrative law judges, both cases are now pending on appeal before the full Commission, which reviews administrative rulings on a de novo basis both as to the issues of fact and law. *See* D. Bruce Hoffman & M. Sean Royall, *FTC Administrative Litigation*, 70 ANTITRUST L.J. 319, 324 (2003).

[5] One consequence of governmental involvement in establishing standards is the prospect that efforts to influence the content of such standards, even with anticompetitive intent, may qualify as "petitioning" conduct and be deemed immune to antitrust liability under the *Noerr-Pennington* doctrine. In fact, the FTC's complaint against Unocal was dismissed by the Administrative Law Judge in part on *Noerr-Pennington* grounds. Union Oil Co. of Cal., FTC Docket No. 9305, opinion at 1 (Nov. 25, 2003), *available at* http://www.ftc.gov/os/2003/11/031126unionoil.pdf ("[T]here is no set of facts that Complaint Counsel could introduce in support of the violations of law that are alleged in the Complaint that would overcome *Noerr-Pennington* immunity with respect to Respondent's efforts to solicit government action."). That ruling is presently under review by the Commission.

[6] Under Section 5, the FTC has authority to prosecute as "unfair methods of competition" conduct that would constitute a violation of the Sherman Act or other antitrust statutes. 15 U.S.C. § 45(a). Moreover, the *Rambus* and *Unocal* complaints specifically allege that the respondents in both cases engaged in conduct that constituted actual or attempted monopolization. *See Rambus* Complaint, ¶¶ 122–123; *Unocal* Complaint, ¶ 1.

[7] *See* Dell Computer Corp., 121 F.T.C. 616 (1996).

[8] *See id.* at 623–26.

[9] *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003).

[10] *See* ANTITRUST, Fall 2003.

[11] The author, now in private practice, until recently served as Deputy Director of the FTC's Bureau of Competition and, in that capacity, was deeply involved in litigating the *Rambus* case on behalf of FTC Complaint Counsel.

[12] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (quoting ROBERT BORK, THE ANTITRUST PARADOX 138 (1978)).

[13] *See, e.g.*, Caribbean Broadcast. Sys. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (misrepresentations sufficient to state a claim under Section 2); Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988) (deceptive advertising used to perpetuate patent monopoly potentially violated Sherman Act); Int'l Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1264, 1270 (8th Cir. 1980) (deceptive advertising designed to eliminate a competitive threat violated the Sherman Act).

[14] 253 F.3d 34, 76–77 (D.C. Cir.) ("Microsoft offers no procompetitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of § 2 of the Sherman Act."), *cert. denied*, 534 U.S. 952 (2001).

[15] 290 F.3d 768 (6th Cir. 2002) (upholding a finding of a Section 2 violation by a snuff manufacturer that hindered competitors by, *inter alia*, providing misleading information to retailers), *cert. denied*, 123 S. Ct. 876 (2003).

[16] NYNEX Corp.v. Discon, Inc., 525 U.S. 128, 137 (1998) (quoting 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651d, at 78 (1996)). *See also, e.g.*, Taylor Publishing Co. v. Jostens, Inc., 216 F.3d 465, 476 (5th Cir. 2000) ("Antitrust law is rife with . . . examples of what competitors find to be disreputable business practices that do not qualify as predatory behavior.").

[17] *See, e.g.*, Abcor Corp. v. AM International, Inc., 916 F.2d 924, 931 (4th Cir. 1990) ("'[C]ourts should be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to 'create a federal common law of unfair competition' which was not the intent of the antitrust laws.'"); Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1193 (5th Cir. 1985) ("Congress has repeatedly declined to create a private federal law of unfair competition."); Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986) (antitrust liability not determined by common law tort rules).

[18] Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1182 (1st Cir. 1994) ("We label as improper that conduct which harms the competitive process and not conduct which simply harms competitors."). *See also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) ("[A] practice is not 'anticompetitive simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' only if it harms the competitive process.").

[19] Before the FTC initiated its suit against Rambus, Rambus was already engaged in private litigation with several JEDEC member companies against which Rambus sought to enforce its JEDEC-related patents. In the only one of these cases to reach trial to date—a case between Rambus and Infineon Technologies, AG, an affiliate of the German company Siemens—Rambus was found liable for fraud. *See* Rambus v. Infineon Technologies AG, 164 F. Supp. 2d 743, 750–65 (E.D. Va. 2001). Yet the Federal Circuit later reversed this ruling, finding that the trial record contained inadequate proof that Rambus had concealed patent-related information it was duty-bound to disclose. *See* Rambus v. Infineon Technologies AG, 318 F.3d 1081, 1104–06 (Fed. Cir.), *cert. denied*, 124 S. Ct. 227 (2003).

[20] *See* FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976). The presiding FTC administrative law judge in the *Rambus* case seems also to have concluded that proof of actual fraud is not essential to establishing antitrust liability. *See Rambus*, Order on Reconsideration of Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters for which Respondent Asserts Privilege at 11–12 (May 13, 2003), *available* at http://www.ftc.gov/os/adjpro/d9302/030513aljordccreconmotocompel.pdf.

[21] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174–77 (1965) (requiring proof of fraud against the Patent Office to show the relevant Sherman Act violations); Bard v. M3 Systems, 157 F.3d 1340, 1364–65 (Fed. Cir. 1998) ("[A]ntitrust liability under section 2 of the Sherman Act may arise when a patent has been procured by knowing and willful fraud.").

[22] *See* Precision Instr. Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 816 (1945) ("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."); Mas v. Coca-Cola Co., 163 F.2d 505, 510 (4th Cir. 1947). For a recent Supreme Court case drawing on these ideas, see Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 343 (1971).

[23] *Walker Process*, 382 U.S. at 179 (Harlan, J., concurring).

[24] As emphasized by Justice Harlan's concurrence in *Walker Process*, the Court did not go so far as to say that any circumstances that might give rise to a claim of inequitable conduct would provide grounds for a private antitrust suit. Out of concern that a lesser standard of antitrust liability might "chill the disclosure of inventions through the obtaining of a patent," the Court limited its holding to cases of "knowing and willful fraud." *Id. See also* Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1069 (Fed. Cir. 1998) (noting that "inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim").

[25] *See, e.g.*, Stambler v. Diebold, 11 U.S.P.Q. 2d 1709 (E.D.N.Y. 1988) (holding that estoppel precluded plaintiff from succeeding on a patent infringement claim brought ten years after it sat on an ANSI standards committee without disclosing its patent interests); Potter Instrument Co. v. Storage Technology Corp., 207 U.S.P.Q. 763 (E.D. Va. 1980) (holding that plaintiff was estopped from succeeding in its patent infringement claims when it had failed to disclose its patents to the ANSI standards committee on which it sat).

[26] *See, e.g., Stambler*, 11 U.S.P.Q. 2d 1709; *Potter*, 207 U.S.P.Q. 763.

[27] It is not the sole allegation, however. FTC Complaint Counsel have consistently maintained that the "pattern" of allegedly deceptive conduct challenged by their case also encompasses various affirmatively misleading statements and actions on the part of Rambus. *See, e.g., Rambus*, Complaint Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision at 2–5 (Mar. 25, 2003), *available at* http://www.ftc.gov/os/adjpro/d9302/030409ccoppsumdec.pdf.

[28] *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 249 (5th ed. 2002).

[29] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[30] 124 S. Ct. 872 (2004).

[31] 817 F.2d 938 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988).

[32] 817 F.2d at 947.

[33] *Id.* (emphasis added).

[34] 486 U.S. at 509.

[35] *Id.*

[36] For this argument to be persuasive in the context of the *Rambus* case, the facts at a minimum would need to support a finding that JEDEC's members reasonably expected that patent-related information of the sort that Rambus concealed would be disclosed in such circumstances. Such a finding need not be based solely on the organization's rules, however. Commonly followed procedures, customary practices, and oral admonitions by JEDEC leadership would also be relevant to consider.

[37] *See* Mark R. Patterson, *The Sacrifice of Profits in Non-Price Predation*, ANTITRUST, Fall 2003, at 37.

[38] Brief for Petitioner at 20–27, Verizon Communications Inc. v. Trinko, 124 S. Ct. 872 (2004) (No. 02-682); Reply Brief for Petitioner at 8–10, Verizon Communications Inc. v. Trinko, 124 S. Ct. 872 (2004) (No. 02-682).

[39] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 14–20, Verizon Communications Inc. v. Trinko, 124 S. Ct. 872 (2004) (No. 02-682).

[40] *Id.* at 12 n.3 (citations omitted).

[41] Elhauge considers the sacrifice of profits test inadequate even for these contexts. *See* Elhauge, *supra* note 9, at 268–94.

[42] *See, e.g.*, Illinois v. Panhandle E. Pipeline Co., 935 F.2d 1469, 1481–82 (7th Cir. 1991) ("Conduct that tends to exclude competitors may therefore survive anti-trust scrutiny if the exclusion is the product of a 'normal business purpose,' [ ] for the presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process.").