Best FRANDs Forever? Standard-Setting Antitrust Enforcement in the United States and the European Union

BY CHRISTOPHER B. HOCKETT AND ROSANNA G. LIPSCOMB

ANTITRUST TREATMENT OF conduct in the standard-setting context has long been an important and controversial topic at the intersection of intellectual property and antitrust law. Recent developments in the United States and Europe highlight differences in the treatment of standard-setting conduct between these jurisdictions, particularly patent "hold ups," and suggest that new enforcement initiatives in this area are likely to emerge soon.

In the United States, conflicting appellate decisions relating to standards setting have clouded the law and raised uncertainty about the future course of both private and public enforcement. However, changes in leadership at both the Antitrust Division of the Department of Justice and the Federal Trade Commission are likely to result in increased actions to address hold-up behavior by owners of industry standard-essential patents. For example, although the FTC suffered a significant loss recently in *Rambus*, it is openly contemplating a more ambitious and expansive use of Section 5 of the FTC Act—decoupled from Sherman Act Section 2 allegations—to pursue claims against standard-setting abuses.

Across the Atlantic, the European Commission has taken up several antitrust matters in which standard-setting conduct plays a central role. Like recent U.S. cases, these matters focus primarily on hold-up behavior. One such matter involving Rambus—which raises claims similar to those that the D.C. Circuit dismissed under U.S. law—is on the verge of a settlement that would limit the royalties Rambus could charge for licenses to certain patents. The Commission's analysis and enforcement decisions in these matters—more of which are expected soon—will shed significant light on the future direction of EU law and its enforcement policies in this area.

Where is standard-setting antitrust law headed? Will U.S. and EU thinking about standard setting converge or diverge in the coming years? Whatever the answers to these questions, one thing is certain: because standard-setting activities—and the standards themselves—are increasingly global, practitioners and companies must pay greater attention to the laws and enforcement approaches that apply to them in different jurisdictions. This is true not only for those directly involved in the standard-setting process, but also for any potential licensees and licensors of intellectual property essential to standards.

In this article, we describe recent history and developments in the standard-setting area in the United States and the European Union, compare the laws of both jurisdictions, and conclude with some predictions about future enforcement directions and priorities in the two regimes.

Christopher B. Hockett is a partner, and Rosanna G. Lipscomb is an associate, in the Menlo Park office of Davis Polk & Wardwell.

The Antitrust Framework

Standard setting fosters innovation and enhances competition by ensuring that products from multiple manufacturers are compatible and interoperable. However, standard-setting activities can also raise anticompetitive concerns. According to former FTC Chairman Deborah Majoras, "[t]he most dangerous" of them "is the potential that a standard-setting effort will be used as a mechanism for competitors to fix prices, allocate markets, or boycott a competing firm or technology."[1] This type of collusive conduct may give rise to liability under Section 1 of the Sherman Act in the United States and Article 81 of the EC Treaty in the European Union.

Alleged collusion, however, has not been the primary focus of recent cases or enforcement proceedings. Instead, a different but related issue has dominated on both sides of the Atlantic—patent hold up. The classic hold-up scenario arises when a holder of intellectual property rights involved in a standard-setting process conceals or fails to disclose the existence of patents essential to a potential standard or misrepresents the terms on which it will license those patents. After the standard is adopted by the standards organization and widely implemented, the patent holder comes forward to demand exorbitant royalties.[2] To the extent that industry participants face high switching costs to a competing technology (which may have been bypassed in the standard-setting process), the patent owner's deceptive conduct creates market power and the ability to extract artificially high royalties.

Because hold-up conduct is generally unilateral, antitrust challenges to it have arisen primarily under Section 2 of the Sherman Act, Section 5 of the FTC Act, and Article 82 of the EC Treaty. Below we address specific elements of those claims, and some important differences between them.

Standard Setting Hold-Up Claims in the United States

In the United States, alleged patent hold ups (also called "patent ambushes") have been challenged recently both by private parties and the FTC, the federal enforcement agency most active in this area over the past decade. Private challenges to hold-up behavior have proceeded primarily under Section 2, and the FTC has brought claims under theories of liability predicated upon both Section 2 and Section 5 of the FTC Act.[3]

Monopolization Under Section 2 Theories of Liability.

Unocal. In March 2003, the FTC voted unanimously to issue an administrative complaint charging Unocal with wrongful acquisition of monopoly power, attempted monopolization, and unreasonable restraint of trade. The FTC's complaint alleged that Unocal manipulated the standard-setting process of the California Air Resources Board by persuading it to adopt certain standards for summertime reformulated gasoline while surreptitiously pursuing and eventually obtaining patents that substantially overlapped with those standards. The FTC sought injunctive relief preventing Unocal from enforcing its patents. In 2005, as a condition to its proposed merger with Chevron Corporation, Unocal entered into a consent order agreeing not to enforce the patents at issue.[4]

Rambus. The Supreme Court's recent denial of certiorari in *Rambus, Inc. v. FTC*[5] was, for the FTC, a disappointing end to a case that it had pursued for more than five years. In 2006, the FTC found Rambus liable under Section 2 of the Sherman Act (as embraced by Section 5 of the FTC Act), for failing to disclose pending patent applications to members of a standard-setting organization (SSO), as part of an alleged course of conduct intended to monopolize markets for computer memory technologies included in the standard.[6] The D.C. Circuit reversed on appeal, finding that Rambus did not violate Section 2. The FTC and the D.C. Circuit took different views on the proper causation standard. The FTC found that if Rambus had not engaged in deceptive conduct before the SSO, then one of two scenarios would have played out: (1) the SSO would have selected an alternative nonproprietary technology instead of a solution that embodied Rambus's patents; or (2) the SSO would still have chosen Rambus's technology (presumably because it was superior to the alternatives), but the SSO would have obtained a commitment from Rambus to license its technology on reasonable and nondiscriminatory (RAND) terms. In the FTC's view, Rambus could be held liable in either scenario. In the D.C. Circuit's view, Rambus could only be held liable in the first scenario. The D.C. Circuit held that, because the FTC could not prove that the SSO would have chosen a technology not covered by Rambus's patents in the absence of the alleged deception, Rambus could not be held liable under Section 2.[7] However, the court left open at least the theoretical possibility that Rambus's conduct violated Section 5.[8]

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Qualcomm. The FTC's complaint in *Rambus* alleged a deception or failure to disclose an essential patent and patent applications. Section 2 liability, however, may also arise where patents are disclosed but the patent holder fails to meet an express obligation to license on reasonable terms. *Broadcom v. Qualcomm*[9] is the most important recent decision on this subject. In *Qualcomm*, Broadcom alleged that an SSO incorporated Qualcomm's patented technology into a mobile telecommunications standard in reliance on Qualcomm's commitment to license that technology on fair, reasonable, and nondiscriminatory (FRAND) terms, but that Qualcomm subsequently demanded royalties in excess of FRAND from its competitors and from customers using chipsets not manufactured by Qualcomm. On appeal, the Third Circuit found that Broadcom's allegations stated a claim for unlawful monopolization under Section 2.

In *Rambus*, the D.C. Circuit attempted to distinguish the Third Circuit's decision in *Qualcomm*, which addressed similar facts on a motion to dismiss. The D.C. Circuit noted that, "[t]o the extent that the [*Qualcomm*] ruling . . . rested on the argument that deceit lured the SSO away" from alternative technologies, it was based on cognizable competitive harm.[10] However, the D.C. Circuit also noted that, to the extent that *Qualcomm* rested on alleged deceit that had the effect merely of raising a monopolist's prices, the decision was inconsistent with controlling Supreme Court precedent.[11] Thus, there appears to be some tension between the positions of the Third and D.C. Circuits on this issue.

Private plaintiffs will certainly cite *Qualcomm* as a counterpoint to *Rambus* to support antitrust claims in patent hold-up cases. However, *Qualcomm* may not help the FTC. As a practical matter, parties found liable by the FTC in hold-up cases will likely choose to appeal to the D.C. Circuit because of *Rambus*. Therefore, unless and until the Supreme Court takes up the issue of patent hold ups, *Rambus* seems likely to constrain the FTC's ability to use Section 2 of the Sherman Act to address such cases. Indeed, as noted recently by FTC Chairman Jon Leibowitz, it is often "very difficult—and *Rambus* is a perfect example of this—to win unilateral conduct cases even when the evidence is strong."[12] Accordingly, Chairman Leibowitz has recently advocated using the FTC's powers under Section 5, which, in his words, go "beyond the antitrust laws," to curb hold-up behavior.[13]

Theories of Liability Unique to Section 5 of the FTC Act. ***Dell.*** *Dell Computer Corp.*[14] marked one of the first instances of the FTC's willingness to use its broad powers under Section 5 to condemn anticompetitive behavior in the standard-setting context. In that case, the FTC alleged that Dell had certified to an SSO that it had no patent rights in the design standard for a VL-bus, a mechanism that transfers data from a computer's central processing unit to its peripheral components. Following the SSO's adoption of the standard, Dell sought to enforce a patent that it owned for a key design feature of the standard against firms planning to follow the standard. In its complaint, the FTC explicitly alleged only unfair competition under Section 5, but in its decision (issued upon entering into a settlement agreement), it also suggested that Dell may have obtained monopoly power through this conduct. Then-Commissioner Mary Azcuenaga took issue with the majority's failure to clearly articulate whether its case against Dell was based on a Section 2 monopolization theory or a broader unfair-competition claim under Section 5.[15]

N-Data. *Negotiated Data Solutions, LLC*[16] is the most recent example of FTC enforcement in this area and represents the most expansive use of Section 5 to date. In *N-Data*, the FTC alleged that the National Semiconductor Corporation agreed, as a member of an SSO working group, to license its technology to any party for the purpose of making and using products implementing a new standard for Fast Ethernet technology. The license price was nominal: a one-time fee of $1,000. National thereafter assigned the relevant patents to a third party who, in turn, assigned them to N-Data. N-Data then allegedly reneged on National's commitment to license the relevant patents for $1,000, and threatened litigation against those who refused to pay N-Data's higher royalty demands.

The FTC brought a complaint (contemporaneously resolved by a settlement decree) against N-Data under Section 5.[17] Unlike in the prior actions against Dell, Unocal, and Rambus, the FTC did not claim that anyone involved had engaged in deceptive conduct during the standard-setting process. Nor did the FTC claim that N-Data's conduct constituted a violation of Section 2 or was otherwise exclusionary. The Commission vote in *N-Data* was split 3–2, with then-Commissioner Leibowitz and Commissioners Rosch and Harbour in the majority. Then-Chairman Majoras and Commissioner Kovacic both dissented. The decision to proceed with a Section 5 claim that was not tethered to a Sherman Act violation proved to be controversial.[18]

Collectively, *Dell*, *N-Data*, *Unocal*, *Rambus*, and *Qualcomm* raise at least two important questions that are relevant to a substantive comparison of the U.S. and EU approaches to hold up. The first question is whether deception before an SSO during the standard-setting process is required to establish liability. The second question is whether the exclusion of competitors is required under Section 5 and, more generally, whether Section 5 can be used to address conduct outside the scope of Section 2.

As to the first question, after *N-Data* it appears, at least in the view of the FTC, that deception before an SSO is not required to establish liability for patent hold up under Section 5. Indeed, participation in the standard-setting process may not even be required. In the sharply divided decision in *N-Data*, then-Chairman Majoras argued in her dissent that, unlike the defendants in *Dell*, *Unocal*, and *Rambus*, neither N-Data nor its predecessors engaged in any deceptive conduct. Nonetheless, the majority found that N-Data had violated Section 5.

Moreover, scholarly commentary by Carl Shapiro and Joseph Farrell—who have been named to head the economics branches of the DOJ and the FTC, respectively—suggests that "the pure economics" of a hold-up scenario "are largely unaffected by whether or not guile is involved . . . ."[19] Thus, "the [Shapiro and Farrell] scholarly commentary and the *N-Data* Majority Statement favor a rule that would represent an important deviation from prior patent hold up enforcement actions like *Dell*, *Unocal*, and *Rambus*, and the Third Circuit's decision in *Broadcom*, each of which required deception as a precondition for antitrust liability."[20]

In partial response to the second question as to whether exclusion is (or should be) required, Shapiro and Farrell also note that deception is not necessarily harmless even where the technology at issue is superior to the alternatives and might have been incorporated into the standard in the absence of deception. First, they argue that "deception undermines the process of technology competition as a means of selecting the best technology at a competitive price and, thus, is antithetical to antitrust policy, even if, after the market test is subverted, there are other reasons to hope that the best technology was adopted."[21] Second, they claim that "deception typically enriches the deceptive party at the expense of others, even if it does not alter the technology that is selected for the standard."[22] Given the prominent roles that Shapiro and Farrell have recently assumed at the DOJ and the FTC, their views on deceptive conduct before an SSO may well influence future enforcement trends,[23] although such claims would likely be based solely on Section 5.

The FTC appears to be moving toward finding liability absent exclusion under Section 5. In *Rambus*, then-Commissioner Leibowitz made the case for an expansive use of the FTC's Section 5 powers in the standard-setting context. He maintained that conduct may violate Section 5 even if the FTC does not show actual competitive harm (an essential element under Section 2) so long as the FTC shows "sufficient anticompetitive attributes" such as "oppressiveness, lack of an independent business justification, anticompetitive intent, predation, collusion, deceit, a tendency to impair competition."[24] He also urged that future FTC enforcement efforts consider that "the framers of the FTC Act gave the Agency a mandate—one unique to the Commission—to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional 'penumbra' around them."[25]

Similarly, Commissioner Rosch has expressly indicated that he did not see an "exclusionary act or practice" under the facts of *N-Data*.[26] Commissioner Rosch nonetheless voted in favor of finding N-Data liable under Section 5, as did Commissioner Pamela Jones Harbour. Commissioner Rosch has also stated that standard setting is a context in which Section 5-only claims may be especially appropriate.[27]

On balance, the FTC Commissioners, with Chairman Leibowitz leading the charge, appear to be moving toward an expansion of Section 5 enforcement against hold-up conduct that may be beyond the traditional reach of the Sherman Act.[28] If so, it will be interesting to see how the FTC attempts to overcome or distinguish the series of 1980s appellate decisions that rejected the FTC's invocation of Section 5 claims outside the context of a Sherman Act violation.[29] The forthcoming report on the FTC's Section 5 hearings may provide the most useful guidance on the future of enforcement proceedings by the FTC.[30]

Standard Setting Hold-Up Claims in the EU

The European Commission has yet to decide formally whether patent hold up constitutes an infringement of EU competition law. Nor is there any European court jurisprudence directly on point. However, the EC is currently in the midst of several investigations involving hold up. The bedrock for the analysis of these claims is Article 82, which has thus far been the primary, though not exclusive, vehicle for addressing hold-up cases in the European Union.

Article 82. Article 82 prohibits the "abuse by one or more undertakings of a dominant position."[31] A firm is considered to hold a dominant position if it has sufficient economic strength "to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[32] In the European Union, as in the United States, the existence of an intellectual property right, such as a patent, does not automatically render the patent holder dominant.[33] Moreover, a dominant position, alone, and efforts undertaken by firms to acquire a dominant position, are also not proscribed by Article 82.[34] The prohibitions of Article 82 are triggered only after a firm's dominance within a relevant market is established.

Article 82 proscribes two types of conduct by dominant firms—"exploitative" abuses and "exclusionary" abuses. While the two sometimes go hand in hand, "exploitative" abuses, such as excessive pricing, may be deemed to violate Article 82 even in the absence of exclusionary conduct.[35] In the specific context of a patent hold up, claims of abusive behavior under Article 82 are likely to pertain to excessive royalties, unfair licensing conditions, or refusals to license.

Enforcement by the European Commission.

Rambus. In August 2007, the EC confirmed that it had sent a Statement of Objections to Rambus based on a preliminary finding that it had breached Article 82 by seeking unreasonable royalties for use of certain patents related to computer memory chips.[36] The EC stated that, in the first instance, "by not disclosing the existence of the patents which it later claimed were relevant to the adopted standard," Rambus may have committed a form of "patent ambush."[37] These allegations closely track those at issue in the D.C. Circuit's decision in *Rambus*. The European complaint, however, alleged further that, "by *subsequently* claiming unreasonable royalties for the use of those relevant patents," Rambus may have breached Article 82.[38] Rambus recently announced that it has reached a tentative settlement with European regulators in connection with these allegations. Under the terms of the proposed settlement, Rambus agreed that it will stop charging royalties on licenses for technology from the 1990s and will cap its royalty rates on licenses for more recent technologies. In exchange, Rambus would not pay a fine and the EC would not find it liable for any wrongdoing.[39]

Broadcom. In 2005, Broadcom, Ericsson, NEC, Nokia, Panasonic Mobile Communications, and Texas Instruments each lodged complaints with the EC against Qualcomm which holds certain essential patents in the standard for mobile telephones. The complaints allege that Qualcomm breached Article 82 by refusing to license its patents to competing chipset manufacturers in the downstream market on FRAND terms in contravention of its obligations to an international standard-setting body.[40] The complaints further allege that Qualcomm has offered "lower royalty rates to handset customers who buy chipsets exclusively from Qualcomm."[41] In October 2007, the EC opened a formal antitrust proceeding against Qualcomm.[42]

Robert Bosch GmbH. A separate action implicating Robert Bosch GmbH and Nokia is also presently unfolding before the EC. The issue arose in December 2006 when Nokia filed an action in Mannheim, Germany, for a declaration that Robert Bosch GmbH was obligated to honor its agreement to grant Nokia a license on FRAND terms.[43] Bosch's patent portfolio was sold to IPCom, and IPCom was joined to the action.[44] After a series of related counterclaims and countersuits, Nokia filed a formal complaint with the EC against IPCom for its purported anticompetitive conduct under Article 82.[45] The EC is considering whether to launch a formal investigation.

U.S. and EU Approaches Under Section 2 and Article 82

Competition jurisprudence in the standard-setting context in the European Union is still developing. However, critical differences in the U.S. and EU approaches under Section 2 and Article 82 are likely to emerge because of the unique ways that each statute operates.

Excessive Pricing by a Monopolist—The Exclusion Requirement. Under Article 82(a), a dominant firm that simply imposes "unfair purchase or selling prices or other unfair trading conditions" may be subject to liability.[46] This provision could be used to regulate the level of royalties charged by essential patent holders—even in the absence of exclusionary conduct by the patent holder.[47] In its public statements regarding the *Qualcomm* matter, for instance, the EC noted that "[i]n the context of standardization, a finding of exploitative practices by Qualcomm in the WCDMA licensing market contrary to Article 82 of the EC Treaty may depend on whether the licensing terms imposed by Qualcomm are in breach of its FRAND commitment."[48] In short, excessive royalty demands by a dominant firm may be deemed to contravene Article 82 in the absence of the exclusion of rivals.

By contrast, merely demanding "excessive" royalty payments for a standards-essential patent license would not constitute a violation of Section 2 absent some form of exclusionary conduct. As the court held in *Rambus*, "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."[49] Without some kind of "exclusion," no liability under Section 2 will lie.[50]

Deceptive Conduct in the Standard-Setting Process—Acquisition of Monopoly Power. Deceptive conduct by a non-dominant firm during the standard-setting process that merely allows a patent holder to obtain market power is not likely actionable under Article 82. This conduct may, however, contravene Section 2 if it is deemed exclusionary. Magdalena Brenning, a representative of the European Commission's DG Competition, noted to an American Bar Association International Roundtable:

> As for Article 82, one must recall that unlike U.S. law, liability arises only for abuse of dominance, not anticompetitive creation thereof. Showing abuse may be problematic in a patent ambush context . . . . To demonstrate this point: where a non-dominant SSO member intentionally conceals a patent that reads on the ultimate standard, and thereby becomes dominant as a result, [it] is difficult to say liability arises under Article 82. Similarly, the subsequent assertion of IP rights against other members of the SSO may not constitute abuse of dominance, since the patent itself was properly granted in the first place. The only apparent area for Article 82 liability might arise if the IP holder applies unfair license terms, engages in excessive pricing or refuses to license in order to monopolize a downstream market.[51]

This reading of Article 82 is consistent with the Statement of Objections that the Commission sent to Rambus. In its Statement of Objections, the Commission did not purport to condemn Rambus for its deception before the SSO. Instead, it stated that "by *subsequently* [i.e., after the patent ambush] claiming unreasonable royalties for the use of those relevant patents," Rambus may have breached Article 82.[52]

Under Section 2, however, deceptive conduct in the standard-setting process may give rise to liability because, unlike Article 82, Section 2 is concerned with the unlawful *acquisition* of monopoly power. The D.C. Circuit's decision in *Rambus* acknowledges that deceptive conduct by a patent holder during the standard-setting process, in the form of failure to disclose patents, could lead to liability under Section 2 if it has the tendency to exclude rivals. Similarly, *Qualcomm* teaches that deception in the form of a false promise to an SSO also may give rise to liability under Section 2 if the conduct is deemed exclusionary—although, as noted, it is unclear whether a false promise leading to higher prices without exclusion is sufficient to state a Section 2 claim.

Liability for Negligent or Inadvertent Failure to Disclose—the Role of Intent. The extent to which negligent or inadvertent failure to disclose patents during the standard-setting process gives rise to liability under U.S. and EU law may be another source of potential divergence between the two regimes. The consent order issued in connection with *Dell*, for instance, elicited concerns that a firm could risk liability by negligently or inadvertently failing to disclose patents or patent applications before an SSO. Indeed, Commissioner Azcuenaga's dissent in *Dell* criticized the majority for proscribing Dell's conduct without indicating whether Dell engaged in any "knowing or intentional misrepresentation" in the standard-setting process.[53] In *Rambus*, the FTC laid these fears to rest (at least with respect to Section 2 liability) by confirming that only firms that act "willfully, as opposed to inadvertently or even negligently" may be held liable under Section 2.[54]

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It remains to be seen whether the intent of the patent holder will play a role in the EC's analysis of patent hold up under Article 82. From a theoretical perspective, however, it should be irrelevant to the analysis. Intent is not expressly a substantive element of an Article 82 violation.[55] But more fundamentally, as noted, the acquisition of a dominant position is not a violation of Article 82. The mental state of a patent holder during the negotiation of a standard implicating the patent holder's technology would seem relevant only in the context of the acquisition of dominance, and not in its exploitation or abuse. Accordingly, any inquiry into the intent of a party before an SSO is likely to be one step removed from the Article 82 analysis.

Convergence of Transatlantic Trends Through Section 5

In a recent interview, FTC Commissioner J. Thomas Rosch indicated that "convergence" of transatlantic trends in antitrust jurisprudence was "impossible in the immediate future."[56] Given the different cultures, histories, economic conditions, and antitrust statutes in the United States and the European Union, it comes as no surprise that Commissioner Rosch does not anticipate wholesale substantive convergence anytime soon. Nonetheless, the expansive use of Section 5 in the United States in recent hold-up cases may lay the framework for convergence with the European Union in certain areas of substantive competition analysis, as well as in enforcement trends.

Substantive Convergence. Exclusion of rivals is an express requirement to establish liability under Section 2. After *N-Data*, and given the recent pronouncements made by Chairman Leibowitz and Commissioner Rosch, however, it is unclear whether exclusion of rivals in a hold-up scenario will be required to establish liability under Section 5.[57] In the European Union, "exploitative" abuses likewise may not require a showing of exclusion. Practitioners should take heed: a firm may be held accountable under Article 82 in the European Union and under Section 5 in the United States for hold up even if its behavior does not have the effect of foreclosing rivals.

In addition, the FTC's pronouncements in *N-Data* indicate that deceptive conduct by a patent holder during the standard-setting process may not be necessary to establish liability under Section 5. Indeed, under *N-Data*, even parties who do not participate in the standard-setting process can be held accountable. Because Article 82 jurisprudence is unconcerned with the acquisition of a dominant position, the mental state of the patent holder is also likely irrelevant to the analysis. In sum, under both Article 82 and Section 5, deceptive conduct before an SSO may be unnecessary to establish liability.

Convergence in Enforcement Trends. The United States may move closer to the EU model as antitrust enforcement actions brought by the government in this area increase. In particular, we are likely to see more claims brought under Section 5 of the FTC Act, without Sherman Act violations accompanying them. Despite the FTC's setback in *Rambus*, Chairman Leibowitz vowed that the FTC "would continue to make standard-setting and monopolization cases a priority."[58] Moreover, Chairman Leibowitz has recently confirmed his willingness to use Section 5 of the FTC Act as a tool for curbing anticompetitive behavior in the standard-setting context for activities that would not otherwise violate the Sherman Act.[59]

Similarly, there may be an increase in private enforcement of competition laws in the European Union in a movement toward the U.S. model. In 2008, the EC released a White Paper signaling a commitment to fostering private enforcement of competition laws in Europe. The White Paper seeks to encourage private enforcement of damages actions for violations of Articles 81 and 82 in member states, without encouraging the perceived excesses of private litigation in the United States.[60] While the process towards formal legislative change is likely to be slow, these developments suggest that we are likely to see an increase in EU private enforcement actions in the standard-setting context in the years to come. ■

1 Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Remarks Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting 2 (Sept. 23, 2005), *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf; *see, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (noting potential "economic incentives" of restraining competition in this context); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) (same).

2 *See* Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 603, 607 (2007).

3 Private parties may not bring claims under Section 5 of the FTC Act, but may bring claims under the Sherman Act. *See* ABA Section of Antitrust Law, Antitrust Law Developments 690 (6th ed. 2007). Conversely, the FTC "may not directly enforce the Sherman Act," but it may bring claims under Section 5 for conduct that violates the Sherman Act. *Id.* at 647.

4 *See* Union Oil Co. of Cal., FTC Docket No. 9305, Decision and Order (Aug. 2, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf.

5 Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, No. 08-694, 2009 WL 425102 (Feb. 23, 2009).

6 *See* Rambus, Inc., FTC Docket No. 9302, Opinion of the Commission (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

7 *See Rambus*, 522 F.3d at 466–67.

8 *See id.* at 467–69. On May 12, 2009, however, the FTC decided not to continue administrative litigation against Rambus under Section 5 and dismissed the complaint. *See* Rambus Inc., FTC Docket No. 9302, Order Returning Matter to Adjudication and Dismissing Complaint (May 12, 2009), *available at* http://www.ftc.gov/os/adjpro/d9302/090512orderdismisscomplaint.pdf.

9 Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007).

10 *Rambus*, 522 F.3d at 466.

11 *Id.* (citing NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)).

12 ABA Section of Antitrust Law Spring Meeting, *Roundtable Conference with Enforcement Officials*, Antitrust Source, Apr. 2009, at 13, http://www.abanet.org/antitrust/at-source/09/04/Apr09-EnforcerRT4-29f.pdf [hereinafter *Roundtable Conference with Enforcement Officials*].

13 *Id.* at 3.

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

15 *See id.* at 627 (Comm'r Azcuenaga, dissenting) ("The Complaint against Dell does not articulate a violation of Section 5 of the FTC Act under any established theory of law.").

16 *See* Negotiated Data Solutions LLC, FTC Docket No. C-4234, Complaint (Sept. 22, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf.

17 *See* Negotiated Data Solutions LLC, FTC File No. 0510094, Statement of the Federal Trade Commission (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

18 *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, One Retrospective View of the Commission's Activities, Remarks Before the Washington State Bar Association Antitrust and Consumer Annual CLE Meeting 6 (Nov. 6,

2008), *available at* http://www.ftc.gov/speeches/rosch/081106rosch-washingtonstatebarassoc.pdf (acknowledging that "[i]n short, it was a controversial decree").

19 *See* Farrell et al., *supra* note 2, at 604.

20 Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, J. Competition L. & Econ. (forthcoming 2009) (manuscript at 25), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1143602.

21 Farrell et al., *supra* note 2, at 657.

22 *Id.*

23 In addition, before joining the FTC, Joseph Farrell was retained by Hynix in connection with a private case against Rambus. *See* Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 (RMW), 2006 U.S. Dist. LEXIS 63140 (N.D. Cal. Aug. 22, 2006). Prior to joining the DOJ, Carl Shapiro testified on behalf of the FTC's complaint counsel in *Unocal*.

24 Rambus, Inc., FTC Docket. No. 9302, Concurring Opinion of Commissioner Jon Leibowitz at 18, 21 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

25 *Id.*

26 *Interview with J. Thomas Rosch, Federal Trade Commissioner*, Antitrust, Spring 2009, at 41.

27 *Id.* at 41–42; *see also* Rosch, *supra* note 18, at 4–5.

28 *See* Sean Gates, *Obama's Antitrust Enforcers: What Can We Expect?*, Antitrust Source, Apr. 2009, at 3, http://www.abanet.org/antitrust/at-source/09/04/Apr09-Gates4-28f.pdf; *see also Roundtable Conference with Enforcement Officials*, *supra* note 12, at 20 (quoting Chairman Leibowitz who noted that, even in "the post-*Rambus* era" the FTC is "going to stay very, very actively involved in this area, the area of holdup and anticompetitive behavior involving the intersection of patents and antitrust" by using Section 5).

29 *See, e.g.*, E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); *see also* Jonathan Leibowitz, Comm'r, Fed. Trad Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Remarks at Section 5 Workshop 3 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf.

30 *See* Workshop on Section 5 of the FTC Act As a Competition Statute (Oct. 17, 2008), *available at* http://htc01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#Oct17_08 (reviewing the history of Section 5, the FTC's enforcement of Section 5, the court's responses, whether Section 5 is coterminous with the Sherman Act, and the application of Section 5 to standard-setting issues).

31 Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 1 art. 82.

32 Case 27/76, United Brands Co. v. Comm'n, 1978 E.C.R. 207 ¶ 65.

33 *See* Cases C-241-242/91 P, Radio Telefis Eirann (RTE) v. Comm'n (Magill), 1995 E.C.R. I-743 ¶ 46; *accord* Ill. Tool Works v. Indep. Ink, 547 U.S. 28 (2006) (eliminating the presumption that a patent necessarily confers market power).

34 *See* Alison Jones Et Al., EC Competition Law 346 (3d ed. 2007) (requiring the "abuse" of a dominant position).

35 *See* Damien Geradin, *Abusive Pricing in an IP Licensing Context: An EC Competition Law Analysis*, *in* European Competition Law Annual 2007: A Reformed Approach to Article 82 EC at 14 (Claus-Dieter Ehlermann & Mel Marquis eds., 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996491.

36 Press Release, MEMO/07/330, Commission Confirms Sending a Statement of Objections to Rambus (Aug. 23, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&form [hereinafter Commission Press Release—Rambus].

37 *Id.*

38 *Id.* (emphasis added).

39 *See* Rambus Reaches Tentative Settlement with European Commission (June 11, 2009), *available at* http://www.rambus.com/us/news/press.release/2009/090611.html.

40 *See* Joint Press Release of the Complainants (Oct. 28, 2005), *available at* http://www.broadcom.com/press/release.php?id=774809&industry_id=4.

41 *Id.*

42 Press Release, MEMO/07/389, Commission Initiates Formal Proceedings Against Qualcomm (Oct. 1, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/389&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter Commission Press Release—Qualcomm]. Two significant developments have altered the course of the investigation since the EC launched its inquiry in 2007. In July 2008, Nokia withdrew its complaint as part of a new fifteen-year license agreement between the companies, eliminating Nokia from the case. *See* Press Release, Nokia and Qualcomm Enter into a New Agreement (June 24, 2008), *available at* http://www.nokia.com/A4136002?newsid=1238093. And, in late April 2009, Qualcomm agreed to pay Broadcom $891 million in cash over four years to end their global dispute. *See* Press Release, Nokia and Qualcomm Enter into a New Agreement (June 24, 2008), *available at* http://www.nokia.com/A4136002?newsid=1238093.

43 Nokia Corp. Annual Report (Form 20-F), at 125 (Mar. 20, 2008), *available at* http://sec.edgar-online.com/nokia-corp/20-f-annual-and-transition-report-foreign-private issuer/2008/03/20/Section15.aspx.

44 *Id.*

45 *Id.*

46 EC Treaty, Article 82(a); *see also* Neelie Kroes, European Competition Commissioner, SPEECH/05/537, Preliminary Thoughts on Policy Review of Article 82 (Sept. 23, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537.

47 Geradin, *supra* note 35, at 14.

48 Commission Press Release—Qualcomm, *supra* note 42.

49 *See* Rambus, Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008) (citing NYNEX Corp. v. Discon, Inc. 525 U.S. 128 (1998)).

50 Herbert J. Hovenkamp, *Patent Continuations, Patent Deception, and Standard Setting: The* Rambus *and* Broadcom *Decisions* 28 (U. of Iowa Legal Studies Research Paper No. 08-25, May 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138002.

51 Magdalena Brenning, European Comm'n DG Competition Representative, Electronic Newsletter of the Intellectual Property Committee, ABA Section of Antitrust Law (July 3, 2002), http://www.abanet.org/antitrust/committees/intell_property/july3.html.

52 Commission Press Release—Rambus, *supra* note 36 (emphasis added).

53 121 F.T.C. at 628 (Comm'r Azcuenaga, dissenting).

54 Rambus Inc., FTC Docket No. 9302, Opinion of the Commission (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

55 *See* Piotr Staniszewski, *The Interplay Between IP Rights and Competition Law in the Context of Standardization*, 2 J. Intell. Prop. L. & Prac. 666, 671 n.52 (2007) ("In contrast to US law, Art 81 and 82 EC do not require an element of intention to prove anticompetitive conduct.").

56 *Interview with J. Thomas Rosch*, supra note 26, at 45; *see generally* William E. Kovacic, Comm'r, Fed. Trade Comm'n, Competition Policy in the European Union and the United States: Convergence or Divergence? Remarks Before Public-Private Sector Research Center, IESE, Barcelona (Nov. 19–20, 2007), *available at* http://www.iese.edu/en/files/6_34526.

57 *See supra* notes 24–28 and accompanying text.

58 Sean Gates & Matthew Sikes, *The FTC's New Enforcer*, S.F. Daily J., Apr. 1, 2009, at 7.

59 *Roundtable Conference with Enforcement Officials*, *supra* note 12, at 3, 13–14, 20–21; *see also* Tales from the Crypt, *supra* note 29, at 5.

60 Comm'n of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules (Apr. 2, 2008), *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.