

Intellectual Property Committee ABA Section of Antitrust Law

Resources Relating to Antitrust and Standards Setting

(Revised July 21, 2003)

Standards that facilitate interoperability are critical in high tech industries and increasingly raise antitrust issues, whether set through a standard setting organization, by ad hoc groups of competitors, or by a single dominant firm. Key areas of controversy relate to the nature and extent of any disclosure obligation to the members of the standard setting organization and the terms under which patents covering a standard are licensed. With increasing frequency, this is a topic of interest to the antitrust enforcement agencies. The FTC and the DOJ have explored these issues in their hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy (for dates and list of participants see <http://www.usdoj.gov/atr/hearingp.htm>). Specifically, on April 18, 2002 hearings were held on Standard Setting Practices: Competition, Innovation and Consumer Welfare (transcript available at <http://www.ftc.gov/opp/intellect/020418trans.pdf>). (See James Murray, "Excerpts From Selected Papers Regarding Hearing on Standards Setting Activities (April 18, 2002).") and on November 6, 2002 hearings were held on Standard Setting Organizations: Evaluating the Anticompetitive Risks Of Negotiating IP Licensing Terms and Conditions Before A Standard Is Set (transcript available at <http://www.ftc.gov/opp/intellect/021106ftctrans.pdf>). On June 10, 2003, the House passed HR 1086, the "Standards Development Organization Advancement Act," by voice vote. The Bill seeks to encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations. For text and status information on the bill, see: <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.01086>. The proposed legislation has been forwarded to the Senate Judiciary Committee.

In May 2001, the Intellectual Property Committee of the Antitrust Section of the ABA started preparing a list of resources relevant to antitrust and standard setting. The effort started when Suzanne T. Michel identified some key articles. Since then, the list expanded with valuable contributions from a number of people, including: James Atwood, David A. Balto, Edward Biester, Peter Breckheimer, Dana Robert Colarulli, Michael Cowie, Frank Fine, Danielle S. Fitzpatrick, Brian Grube, Sean P. Gates, John Martin, James B. Kobak, Joseph

Kattan, Christopher J. Kelly, Joseph P. Lavelle, Michael Lawrence, Mark Lemley, Michael Lindsay, Suzanne T. Michel, Bruce McDonald, Michael McNeely, M. Howard Morse, James Murray, Patrick O'Connor, Daniel Prywes, Bilal Sayyed, Carl W. Schwarz, David R. Steinman, Henry Su, Richard H. Stern, George T. Willingmyre, Lisa Wood and William R. Vigdor.

The initial list was reworked by Michael McNeely and Patrick O'Connor, and then by Bruce McDonald for the IP Committee's September 24, 2001 standards setting program in Houston, Texas. Howard Morse, then Chair of the Intellectual Property Committee, supplemented the list of resources for the Antitrust Section's Fall program and then again for the Section's June 6-7, 2002 program on "Antitrust & Intellectual Property: Competition and Innovation in High-Tech Industries. Ed Biester, John Martin, and Joe Lavelle provided explanatory notes on a number of the cases. Michael Lawrence then included hyperlinks to some of the material submitted in connection with the DOJ/FTC hearings on Competition and Intellectual Property Law and Policy in the Knowledge Based Economy along with hyperlinks to some of the cases. Danielle S. Fitzpatrick and Peter Breckheimer prepared summaries of the business review letters from the Antitrust Division of the Department of Justice and Advisory Letters from the Federal Trade Commission relating to standard setting and patent pool arrangements. Carl Schwartz helped identify some of the business review letters. Most recently, Howard Morse has added a section to this resource on the "Standards Development Organization Advancement Act," and Chris Kelly has edited some of the summaries.

The list, of course, could also include more general boycott cases, certification mark cases and a number of related cases, but we have tried to keep the list fairly narrowly focused on standard setting and IP subject matter.

The current version of the list will be available on the Intellectual Property Committee's webpage under "Hot Topics."

Since my term as a Vice Chair of the Intellectual Property Committee is nearing an end, please forward any comments or suggestions to Ed Biester (Duane Morris LLP, One Liberty Place Philadelphia, PA 19103-7396 Phone: 215.979.1162 Fax: 215.979.1020 E-mail: egbiester@duanemorris.com), who will be assuming my responsibilities as Vice Chair of the Intellectual Property Committee.

J. Anthony Chavez
Intellectual Property Committee
Vice Chair

Cases

Addamax Corp. v. Open Software Found., 888 F. Supp. 274 (D. Mass. 1995), *later proceeding*, 964 F. Supp. 549 (D. Mass. 1997), *aff'd*, 152 F.3d 48 (1st Cir. 1998). Unsuccessful security software company sued computer manufacturers' joint venture, which had chosen another security software product as component of its jointly-developed operating system. On summary judgment, the court (1) found plaintiff to have adequately alleged antitrust injury, "as a seller to a collusive monopsony," *id.* at 280, and (2) rejected the concept that the joint venture's conduct was by definition unilateral and thus insulated from section 1 liability, *id.* at 281. The court rejected *per se* treatment, and applied the rule of reason. The court found triable issues as to market power, because of the group's alleged ability to affect industry standards, *id.* at 284, and anticompetitive effect, based on evidence of the joint venture's "structure, purpose and strategy" to "'bully the market' into adopting certain standards for computer products," *id.* at 285. Ultimately, defendants prevailed at trial, after plaintiff failed to prove injury in fact. 964 F.Supp. 549. In affirming, the First Circuit assumed that Section 1 could be properly applied to the joint venture's conduct: "How far this theory can be pressed in the case of a truly integrated enterprise, whose 'owners' were no more than stockholders, is a matter we need not pursue." 152 F.3d at 52.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). Efforts to affect product standard setting process of private association were not protected by *Noerr-Pennington* even though the code for the design and installation of electrical wiring systems was widely proffered for adoption and adopted into local laws. No damages were imposed for the incorporation of that code by any government. Where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr-Pennington* immunity from any antitrust liability flowing from the effect that the standard has of its own force in the marketplace.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982). Standard setting organization responsible for acts of agents acting with apparent authority that violate antitrust law despite substantial agency law defenses which, the court holds, are inconsistent with the policy of vigorous enforcement. Antitrust laws apply to nonprofit professional standard setting organizations.

In the Matter of Am. Soc'y of Sanitary Eng., 106 F.T.C. 324, 1985 FTC LEXIS 20 (1985) (Brought by T.J. Muris as Bureau Director). FTC Complaint alleged that American Society of Sanitary Engineering ("ASSE") violated section 5 of the

FTC Act by refusing to consider certification that alternative, patented, toilet tank flush valves which offered improvements to existing devices specified by its standard, were also compliant with ASSE standards, which were adopted into many local codes and compliance with which was alleged to be “essential for manufacturers of plumbing products to do business in many markets.” ASSE entered into a consent order prohibiting ASSE from excluding from standards a product which is patented or produced only by one manufacturer or a limited number of manufacturers, where ASSE has issued standards for competing products, the applicant has reasonably established that the product adequately meets the implicit or explicit performance goals required by the existing standard covering competing products, and ASSE does not rely upon a justification meeting reasonable standard setting criteria, i.e., “criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product.”

See discussion in Timothy J. Muris, “Competition and Intellectual Property Policy: The Way Ahead,” *Prepared Remarks Before Antitrust Section Fall Forum* (Nov. 15, 2001).

Bond Crown & Cork Co. v. Federal Trade Comm’n, 176 F.2d 974 (4th Cir. 1949).

Brant v. United States Polo Assoc., 631 F. Supp. 71 (S.D. Fla. 1986). Polo player in the process of starting rival league is suspended from long-standing league for arguing with umpires. Applying *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), court rejects plaintiff’s per se group boycott analysis. Under rule of reason, court denies preliminary injunction because conduct-based suspension is not anticompetitive.

Brookins v. Int’l Motor Contest Assoc., 219 F.3d 849 (8th Cir. 2000). Race sanctioning body set standard for transmissions that excluded plaintiff. Summary judgment granted because no market power and no concerted action.

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

Consolidated Metal Prods., Inc. v. Am. Petroleum Institute, 846 F.2d 284 (5th Cir. 1988). On summary judgment, court refuses to treat as a per se unlawful group boycott a trade association decision which has no compulsory effect on others. Applying rule of reason, court finds no unlawful conduct because evidence shows that decision was a good-faith attempt to apply appropriate standards with no anticompetitive intent.

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999).

Affirms dismissal of complaint alleging that effect of trade association guidelines harmed plaintiff's business and caused owners to sell at a loss. Court rejects "implausible conclusory allegation" of conspiracy to "adopt faulty standard where main effect would be to raise costs" for certain competitors in the industry.

ECOS Elecs. Corp. v. Underwriters Labs., Inc., 743 F.2d 498 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985).

Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126 (6th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980).

ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292 (N.D. Cal. Nov. 2, 1999) (order granting in part and denying in part defendant's motion to dismiss). Plaintiff alleged that it cannot produce modems that comply with International Telecommunication Union ("ITU") standards without infringing defendant's patents, and that defendant refuses to license its patents on fair and reasonable terms. Court dismissed the plaintiff's Sherman Act §2 claim and related state unfair competition claim for failure to allege antitrust injury. Plaintiff also asserted a claim for specific performance, arguing that it was a third-party beneficiary to defendant's agreement with ITU to license on fair and reasonable terms. Court rejected defendant's argument that its agreement with the standard-setting organization was too vague to support a claim for specific performance.

ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292 (N.D. Cal. July 3, 2000) (order denying defendant's motion to dismiss). Plaintiff alleged that defendant refused to license its patents on fair and reasonable terms after representing to a standard-setting organization that it would do so. Defendant argued that a patent holder may unilaterally refuse to license its patents without being subject to antitrust liability. Court denied defendant's motion to dismiss plaintiff's antitrust, patent misuse, and state unfair competition claims, stating that defendant's "alleged acts amount to more than just legitimately exercising a right to refuse to license patented technology."

Fashion Originators' Guild of Am., Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941).

Foundation for Interior Design Educ. Research v. Savannah College of Art & Design, 244 F.3d 521 (6th Cir. 2001). Analyzed refusal to accredit under rule of reason, no antitrust injury.

Hyundai Elecs. Indus. Co. v. Rambus, Inc., C 00-20905 (N.D. Cal. Jan. 19, 2001) (order granting in part and denying in part defendant's motion to dismiss). Court dismissed plaintiff's claim under section 1 of the Sherman Act, holding that it is insufficient to allege unilateral conduct in a collaborative

standard-setting process. Court concluded that plaintiff stated a claim under section 2 of the Sherman Act and section 17200 of the California Business and Professions Code.

In re: Dell Computer Corp., 121 F.T.C. 616, 1996 FTC LEXIS 291, 1996 WL 350997 (May 20, 1996). Dell had certified that it did not have intellectual property rights interfering with a "VL-bus" standard for the bus between a computer's CPU and peripheral devices. The Video Electronics Standards Association (VESA) adopted the standard. After the standard was adopted and implemented, Dell sought to assert a patent interfering with the standard. Where VESA arguably would not have adopted the standard if it had been aware of the Dell patent, the FTC asserted that Dell's conduct violated section 5 of the FTC Act, and Dell entered into a Consent Judgment precluding its assertion of the patent against use in compliance with the standard. See FTC Press Release.

In the Matter of Rambus Incorporated, FTC Docket 9302

FTC Press Release

Administrative Complaint (filed June 18, 2002 and available at <http://www.ftc.gov/os/caselist/d9302.htm>) (allegations that the failure to license on reasonable and non-discriminatory terms following a failure to disclose existing intellectual property violated Section 5 of the FTC Act and Section 2 of the Sherman Act).

See David T. Beddow and Gregg H. Vicinanza, "FTC Charges Rambus With Abuse of Standard Setting Process," AT-IP Report (June 21, 2002).

See David A. Balto, "FTC v. Rambus: Time to Reexamine Standard Setting Rules," AT-IP Report (September 25, 2002).

See Statement of M. Sean Royall, Deputy Director FTC Bureau of Competition and Trial Counsel, In the Matter of Rambus Incorporated (January 29, 2003)

In re: Union Oil Co., Docket 9305 (complaint filed Mar. 4, 2003) (allegations that enforcement of patents incorporated into regulatory standard as a result of a false statement to regulator violated Section 5 of the FTC Act and Section 2 of the Sherman Act) (available at <http://www.ftc.gov/os/2003/03/unocalcmp.htm>).

Intel Corp. v. VIA Techs., Inc., 2001 WL 777085 (N.D. Cal. 2001). Denies motion to dismiss antitrust counterclaim in patent infringement action. Holds that

allegation of sham patent litigation is properly pleaded where a license was allegedly given to practice some of patents in suit and fraud on PTO alleged for another. Court declines to decide whether *Noerr-Pennington* applies where good-faith claims are mixed with sham claims in a single suit.

Intel Corp. v. VIA Technologies, Inc., 174 F. Supp. 2d 1038 (N.D. Cal. 2001). Denies motion for summary judgment.

See Richard S. Taffet and Sophia Fix, *Intel Corporation v. VIA Technologies, Inc.*, AT-IP Report (February 1, 2002).

Massachusetts School of Law at Andover v. Am. Bar Assoc., 937 F. Supp. 435 (E.D. Pa. 1996), *aff'd*, 107 F.3d 1026 (3d. Cir. 1997), *cert. denied*, 522 U.S. 907 (1997). Granting defendant's motion for summary judgment on *Noerr-Pennington*/state action defense on grounds that alleged damages were caused by state laws, rather than directly by allegedly anticompetitive standard setting activity in the accreditation of law schools. (See also **U.S. v. Am. Bar Assoc.**, below.)

Milk and Ice Cream Can Institute v. Federal Trade Comm'n, 152 F.2d 478 (7th Cir. 1946). Affirms FTC cease-and-desist order which found that standard setting organization engaged in price fixing.

Moore v. Boating Indus. Assocs., 754 F.2d 698 (7th Cir. 1985), *vacated*, 474 U.S. 895 (1985), *later proceeding*, 819 F.2d 693 (7th Cir. 1987), *cert. denied*, 484 U.S. 854 (1987).

Motorola, Inc. v. Rockwell Int'l Corp., No. 95-575 (D. Del. 1995).

Multivideo Labs, Inc. v. Intel Corp., 2000-1 Trade Cas. (CCH) ¶ 72,777, 2000 U.S. Dist. LEXIS 110 (S.D.N.Y. Jan. 7, 2000). After Intel made statements that plaintiff's personal computer peripheral device did not comply with standards that it had promoted, plaintiff sued for monopolization and attempted monopolization. Court granted summary judgment for Intel because, regardless of market power in CPU's, Intel did not compete with the plaintiff in the market for the products at issue. Holds that claim of "monopoly leveraging requires a threshold showing a threat of higher price or reduced output in the secondary market."

National Assoc. of Review Appraisers & Mortgage Underwriters v. Appraisal Found., 64 F.3d 1130 (8th Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996).

National Camp Assoc. Inc. v. Am. Camping Assoc. Inc., 2000-1 Trade Cas. (CCH) ¶ 73,130, 2000 U.S. Dist LEXIS 18194 (S.D.N.Y. Dec. 18, 2000).

National Macaroni Mfrs. Assoc. v. Federal Trade Comm'n, 345 F.2d 421 (7th Cir. 1965). Affirms FTC order finding that standards set by Macaroni/Spaghetti Trade Association calling for blended, rather than pure, form of durum wheat

had effect of depressing price of that input to below market levels.

Nat'l Camp Ass'n Inc. v. Am. Camping Ass'n Inc., S.D.N.Y. No. 99 Civ. 11853 (Dec. 15, 2000). Applying rule of reason to refusal to accredit claim, no market power, no evidence of concerted action.

NDC Health/IMS Health, Case COMP D3/38.044, European Commission's Decision of July 3 2001. The IMS decision, now the subject matter of an appeal by IMS to the Court of First Instance, was subsequently suspended by an ex parte order of the President of the Court of First Instance in *IMS Health v. Commission* (Case T-184/01R [2001] ECR II-2349), then suspended by the same judge following a hearing of both parties (Case T-184/01R2 [2001] ECR II-3193 2002). The President of the Court affirmed the latter order in *NDC Health Corp. v. IMS Health Inc* (Case C-481-01PR 1 [2002] ECR I-3401). In parallel copyright litigation before the Frankfurt trial court ("Landgericht"), the latter court suspended main proceedings against NDC pending a preliminary ruling from the European Court on issues of both copyright and the applicability of Article 82 in *IMS Health GmbH v. NDC Health GmbH*, Case C-418/01.

Potter Instrument Co. v. Storage Tech. Corp., 207 U.S.P.Q. (BNA) 763, 1980 U.S. Dist. LEXIS 14348 (E.D. Va. Mar. 25, 1980), *aff'd*, 641 F.2d 190 (4th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981).

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). Complaint states a claim where it alleges arbitrary and capricious standards for approval of gas burners together with conspiracy between utilities and standard setting organization not to provide gas for use in unapproved burners.

Rambus, Inc. v. Infineon Techs. AG, 318 F.3d 1081 (Fed. Cir. 2003, vacating in part, reversing in part, affirming in part, and remanding 164 F. Supp. 2d 743 (E.D. Va. 2001) (SDRAM), and 155 F. Supp. 2d 668 (E.D. Va. 2001) (attorney fee award).

In patent infringement action, defendant counterclaimed alleging that plaintiff defrauded it by failing to disclose patent applications in meeting of standard setting body of which both were members and where standards covering the patented technology were developed. Court allowed jury verdict finding fraud in the SDRAM standard setting activity to stand.

The Federal Circuit reversed the trial court (1) on claim construction, thereby vacating the JMOL of noninfringement in Infineon's favor, and (2) on the denial of JMOL that allowed the jury verdict of fraud in connection with the SDRAM standard-setting process to stand.

Regarding the fraud issue, the Federal Circuit reviewed the evidence of

record and held that a reasonable jury would conclude that Rambus's duty of disclosure as a JEDEC participant (1) applies only to patents containing claims that might reasonably be necessary to practice the proposed standard, and (2) arises only when work formally begins on the proposed standard. It further held that the duty of disclosure did not cover a participant's future plans or intentions (i.e., to file or amend patent applications). The court criticized JEDEC's patent policy for its "staggering lack of defining details," thereby leaving members with "vaguely defined expectations as to what they believe the policy requires" in the way of a duty of disclosure. Having framed the duty of disclosure in the above terms, the court concluded that Rambus did not breach its duty as to the SDRAM standard because none of the claims in its patents and pending patent applications reads on that standard.

The Federal Circuit affirmed the grant of JMOL setting aside the verdict of fraud as to the DDR-SDRAM standard-setting process. Importantly, Rambus had withdrawn from participation before any proposals directed to the DDR-SDRAM standard had been submitted, and before formal consideration of the standard had begun. No duty of disclosure therefore had yet arisen.

See Veronica Lewis, "Rambus v. Infineon-The Latest Standard Setting Patent Disclosure Guidance," AT-IP Report (Sept. 24, 2001).

SanDisk Corp. v. Lexar Media, Inc., No. C 98-01115 (N.D. Cal. Oct. 17, 2000) (order granting in part and denying in part plaintiff's motion to dismiss and for summary judgment). Court denied plaintiff's motion for summary judgment on defendant's fraud claims, finding that there was a genuine dispute as to whether plaintiff had a duty to disclose a pending patent application arising from unwritten agreements among members of standard-setting organizations. Court also denied plaintiff's motion for summary judgment with respect to the unfair competition claim under California law, which proscribes conduct that is "unlawful," "unfair," or "fraudulent."

Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 1986-1 Trade Cas. ¶ 66,989 (C.D. Cal. 1986), *aff'd in part*, 827 F.2d 458 (9th Cir. 1987), *vacated*, 487 U.S. 1213 (1988); *judgment entered in favor of the plaintiff on remand*, 786 F. Supp. 1518 (C.D. Cal. 1991), *rev'd*, 17 F.3d 295 (9th Cir. 1994), *cert. denied*, 513 U.S. 813 (1994). In first appeal, 9th Circuit held that *Noerr-Pennington* immunity applies to lobbying of private model code association, but that there is an exception for "sham" conduct. Sham claims pleaded where standards were passed due to false representation made to standard setting body. On remand, deliberate misrepresentation is proved, but in subsequent appeal, 9th Circuit holds that *Noerr-Pennington* applies because harm results entirely from government conduct in enforcing model code and because no harm is alleged in jurisdictions where the model code was not enforced by the

government body.

Schachar v. Am. Academy of Ophthalmology, 870 F.2d 397 (7th Cir. 1989). In an appeal from jury instructions at trial where verdict was for defendant, Judge Posner rejects out of hand plaintiff's contention that labeling of certain ophthalmological treatment as experimental was an antitrust violation. Posner remarks that antitrust is about competition and not a code of medical ethics.

Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963). New York Stock Exchange requires disconnection of wire lines between member firms and nonmember firms. Court holds that this conduct presented a clear case of a per se unlawful group boycott, and that this conclusion was not altered by the duty of self-regulation imposed on such firms by the Securities Exchange Act.

Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 172 (D. Conn. 2001).

See John S. Martin, "An Update on the Soundview Litigation." AT-IP Report (Dec. 7, 2001).

Stambler v. Diebold, Inc., 11 U.S.P.Q.2d (BNA) 1709, 1988 U.S. Dist. LEXIS 10132 (E.D.N.Y. Sept. 2, 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1988). Patent case involving defense of laches and estoppel; eleven-year delay in bringing suit held unreasonable and summary judgment granted for defendant.

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912). Court affirms an injunction barring agreement between a group of defendants comprising 85% of the manufacturers of enameled iron ware from entering into agreements purportedly designed to permit widespread use of patented technology, but which also included fixing of prices through a pricing committee.

Sun Microsystems, Inc. v. Kingston Tech. Co., No. C 99-03610 (N.D. Cal. Feb. 7, 2000) (Kingston's Answer, Affirmative Defenses, and Counterclaims to First Amended Complaint for Patent Infringement). Defendant argued that the patent holder's infringement claims were barred by the doctrines of misuse and estoppel based on the patent holder's conduct in JEDEC standard-setting proceedings.

Townshend v. Rockwell Int'l Corp., 55 U.S.P.Q.2d (BNA) 1011, 2000 U.S. Dist. LEXIS 5070 (N.D. Cal. Mar. 28, 2000). In patent infringement suit, defendant argues that plaintiff patent holder and company to whom he had licensed technology unlawfully caused a trade association to adopt an industry standard which embodied the technology without disclosing trade secret litigation and prospective patent litigation. Court dismisses Section 1 claim for failure to plead sufficient injury to competition because conduct is a

lawful incident of the patent monopoly and because patent holder offered licenses on reasonable terms. Regarding section 2 claim, court finds that patent holder's conduct before trade association was not anticompetitive.

U.S. v. Am. Bar Assoc., Civil Action No. 95-1211 (CRR) (D. D.C. June 25, 1996)(consent decree). DOJ Antitrust Division challenged ABA's law-school accreditation process. Complaint charged that process had become the captive of one interested constituency, legal educators, inflating professional salaries among U.S. law schools, and discriminating against state-accredited law schools that did not comply with ABA standards. (See also **Massachusetts School of Law at Andover v. Am. Bar Assoc.**, above.)

Wang Labs., Inc., v. Mitsubishi Elecs. Am., Inc., 103 F.3d 1571 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 818 (1997). Rejects patent claim based on estoppel and implied license; others permitted to go forward.

Winbond Elecs. Corp. v. Int'l Trade Comm'n, 262 F.3d 1363 (Fed Cir. 2001). General discussion of inequitable conduct and implied license issues relating to inventorship issues.

X/Open Group, EC Comm'n Decision, IV.31.458 (Dec. 15, 1986), 1987 O.J. (L 035) 36.

Zaveletta v. Am. Bar Assoc., 721 F. Supp. 96 (E.D. Va. 1989).

Business Review Letters

A complete index of Business Review Letters from the Antitrust Division of the Department of Justice is available at <http://www.usdoj.gov/atr/public/busreview/letters.htm#other> and in particular the topical index for business review letters, <http://www.usdoj.gov/atr/public/busreview/12096a.htm>. GTW Associates has prepared summaries of some of the business review letters which are available at <http://www.gtwassociates.com/answers/DOJ.htm>.

Right to Engage in Joint Discussions, Letter from Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice, to Bennett M. Lincoff, Esq., Marvin L. Berenson, Esq., & Laurie Hughes, Esq. (July 21, 1995), available at <http://www.usdoj.gov/atr/public/busreview/ascapltr.htm>. Review of various musical rights societies' proposal to hold a series of meetings to discuss proposed legislation concerning the licensing practices of musical rights societies. Justice Department declined to challenge provided that societies do not discuss pricing and other competitively sensitive issues such as market allocation or service restrictions.

Electric Power Standard, Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Joseph C. Bell, Esq., & Mary Anne Mason, Esq., available at <http://www.usdoj.gov/atr/public/busreview/2497a.htm>. Review proposal of Western Systems Coordinating Council under which it would establish a system of electric power reliability standards to be enforced by financial sanctions. Justice Department declined to challenge because the standards are: open to all interested parties; provide for representation for all segments of the industry; do not give any segment a competitive advantage; and do not appear to raise significant risks to competition.

MPEG-2 Patent Pool, Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Garrard R. Beeney, Esq. (June 26, 1997), available at <http://www.usdoj.gov/atr/public/busreview/1170.htm>. Review various licensors' proposal for MPEG-LA to pool patents which are essential for compliance with the video and/or systems parts of the MPEG-2 standard. Justice Department declined to challenge stating that pooling is likely to provide significant cost savings to licensors and licensees alike, and features in the proposal mitigate potential anticompetitive dangers.

Information Sharing for Wireless Communication Antenna Sites, Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to John B. Wyss, Esq. (March 25, 1998), available at <http://www.usdoj.gov/atr/public/busreview/1613.htm>. Review of proposal by trade association Personal Communications Industry Association to create an information exchange system to identify opportunities for the joint acquisition, construction and/or operation of wireless communications antenna sites. Justice Department declined to challenge due to the limited nature of the information exchanged through the proposed system, and the fact that PCIA will not be involved in any specific discussions or negotiations between carriers which reduces the risk of anticompetitive exchanges of information.

DVD Patent Pools, Letters from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Garrard R. Beeney, Esq. (December 16, 1998), available at <http://www.usdoj.gov/atr/public/busreview/2121.htm>, and Carey R. Ramos, Esq. (June 10, 1999), available at <http://www.usdoj.gov/atr/public/busreview/2485.htm>. Letters review separate proposals whereby Philips (12/16/98 letter) and Toshiba ((6/10/99 letter) will grant licenses on behalf of themselves and other owners of patents essential to compliance with DVD-ROM and DVD-V standards, and distribute royalty income among licensors. Justice Department declined to challenge either pool, stating that the pools appear likely to combine complementary patent rights, lowering manufacturers' costs, and did not appear likely to impede competition in

markets for downstream products for DVDs and DVD players or for the licensing or development of DVD technology.

Robotic Welding Standard, Letter from Charles A. James, Assistant Attorney General, Antitrust Division, Department of Justice, to Douglas W. Macdonald, Esq. (October 7, 2002), available at <http://www.usdoj.gov/atr/public/busreview/200310.htm>. Review proposal of American Welding Society to adopt a standard that include specifications for assuring the interoperability of various devices that make up a robotic welding cell. Justice Department declined to challenge, indicating that the society and its varied membership have likely determined the standard that best serves consumer interests, but cautioned that it does not enough information to determine the net anticompetitive effect of the standard.

3G Licensing Regime, Letter from Charles A. James, Assistant Attorney General, Antitrust Division, Department of Justice, to Ky P. Ewing, Esq. (November 12, 2002), available at <http://www.usdoj.gov/atr/public/busreview/200455.htm>. Review of a licensing regime for third generation mobile communications systems ("3G"), whereby licenses would be facilitated by a 3G Platform comprising five distinct entities, one for each of the alternative 3G radio interface technologies. Justice Department declined to challenge, indicating that, as modified in response to Justice Department concerns, the proposed regime was likely to facilitate availability of complementary patent rights related to each of the five 3G standards, and therefore lower search and transaction costs for manufacturers and service providers.

Right to Create Industry Database, Letter from R. Hewitt Pate, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to William Jibilian, Esq. (May 13, 2003), available at <http://www.usdoj.gov/atr/public/busreview/201017.htm>. Review of chemical company BroChem's proposed creation of a Chemical Information System searchable computer database to provide chemical wholesalers with information from chemical producers for a fee. Justice Department declined to challenge because BroChem ensures that sensitive pricing information is not accessible to competitors or others who should not have access to it.

FTC Advisory Opinions

GTW Associates has prepared summaries of some of the Advisory Opinions from the Federal Trade Commission, which are available at <http://www.gtwassociates.com/answers/FTCOpinions.htm>.

American National Standards Institute Legality of Proposed Certification System, Letter from Commissioner Weinberger, Federal Trade Commission, to William H.

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The House Report is at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr125.108.pdf (vol 1) and

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr125p2.108.pdf (vol 2)

or if those do not work, you can follow the links from

[http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(hr125\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(hr125)):

The transcript of the April 9 Judiciary hearing on HR1086 is available at

<http://www.house.gov/judiciary/86408.pdf> OR

http://commdocs.house.gov/committees/judiciary/hju86408.000/hju86408_of.htm

The bills are at:

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