



New Jersey federal court holds Qualcomm's unFRANDly acts no antitrust violation

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..... In the last few months, two federal tribunals have reached opposite results in determining whether alleged playing fast and loose with the operations of a standard-setting organization (SSO) violates the antitrust laws. First, in the long saga of Rambus' alleged standardization skullduggery, the Federal Trade Commission (FTC) has now held that Rambus committed unfair and deceptive practices by duping the JEDEC SSO into adopting Rambus technology in its DRAM standard. (For previous Micro Law columns on this topic, see the sidebar, "Earlier episodes of standardization skullduggery.") Second, a New Jersey federal district court recently threw out Broadcom's antitrust suit against Qualcomm, in which Broadcom charged that Qualcomm's renegeing on promises to make its technology available to standard adopters on "fair, reasonable, and non-discriminatory" (FRAND) terms constituted a violation of antitrust laws. (For an earlier discussion of this case, see "Standardization skullduggery update: UMTS standard," *IEEE Micro*, Jul.-Aug. 2005). Let's consider the unFRANDliness case first, and save the FTC's case against Rambus for a subsequent Micro Law column.

Case background

In the New Jersey case, Broadcom Corp., a manufacturer of chipsets for communications applications, sued Qualcomm Inc., another chipset manufacturer and the owner of patents essential to complying with the Universal Mobile Telephone Sys-

tem (UMTS) standard. Broadcom charged that Qualcomm deceived US and international SSOs into incorporating Qualcomm's patented technology into the UMTS standard by making intentionally false representations that it would license its patents on FRAND terms. (Broadcom used the term FRAND; others use the term RAND.) Once these organizations adopted a standard embodying Qualcomm's patented technology, Broadcom alleges, Qualcomm proceeded to demand unfair, unreasonable, and discriminatory terms—unFRAND terms—for patent licenses. Qualcomm's purpose, Broadcom says, was to gain monopoly power over the sale of chipsets for mobile telephones conforming to the UMTS standard, which is now dominant in the mobile telephone market.

While prior standardization skullduggery cases typically involved a nondisclosure or false representation about patent coverage, here Qualcomm allegedly disclosed its patents and promised FRAND terms for users. The skullduggery was that, after the standard was adopted using Qualcomm technology, Qualcomm allegedly insisted on unFRAND terms. The court concluded that the case therefore raised novel issues for the court. As it turned out, however, the court was unwilling to address them.

The court looked at Qualcomm's conduct in light of its rights as a competitor and patent owner, the relationship between patent and antitrust law as the court perceived it, and the societal role of SSOs. The Qualcomm conduct that Broadcom chal-

lenged, in the view of the court, boiled down to "a refusal to deal fairly." While leaving open the possibility that this conduct was a breach of contract under state law, the court held that "it does not give rise to antitrust liability." (The court's 47-page opinion is available at http://www.qualcomm.com/press/PDF/broadcom_opinion.pdf.)

Monopoly was inevitable

According to the court, taking Broadcom's allegations at face value and drawing inferences from them in Broadcom's favor, Qualcomm acquired monopoly power by falsely committing to license UMTS standard users on FRAND terms if the SSO adopted Qualcomm's technology. The court recognized that Qualcomm deserved a bad report card for not playing nicely with others, but it considered this naughtiness in the marketplace to fall short of being an antitrust violation. Why? Because in this case, the court thought, there was going to be a technology monopoly no matter what happened—"It is the natural consequence of the standard-setting process." Any standard-setting agreement "promotes interoperability, but at the expense of competition." It was just a question of who would have the monopoly. The other monopoly might have been a lower-priced one, but nonetheless a monopoly. Therefore, what's the difference?

That seems a weird notion. Charles Q. Thug is arraigned in court for mugging John Q. Citizen on Shady Lane one Satur-
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day night. His defense: “Your Honor, there was lots of other thugs on Shady Lane that night, like every Saturday night. If I didn’t mug that citizen, some other yegg would’ve, a couple of minutes later.” What kind of legal defense is that?

What is monopolization?

Actually, by placing focus on the presence or absence of monopoly in the long run, the court misunderstands the operation of section 2 of the Sherman Act (a violation of which Broadcom alleged). The statute forbids *not* monopoly, but “monopolization.” Monopolization is the acquisition (or maintenance) of monopoly by unlawful methods, not just the possession of a monopoly. Thus, monopoly can be gained by fair means—such as superior business acumen, or being first to enter a market, or giving customers better service. A monopoly so gained is not the product of monopolization, and it is perfectly lawful in itself. Lying, however, if that is what Qualcomm did, is not a fair means for gaining monopoly power. Various federal and state statutes prohibit commercial lying (section 43(a) of the federal Lanham Act, for example). Therefore, if it results in the liar’s acquisition of monopoly power, the conduct is monopolization. The fact that the conduct also violates a different federal or state law does not make section 2 of the Sherman Act inapplicable: It is possible to violate several different laws by the same action (for example, torching a building can involve malicious mischief, arson, and murder).

What’s more, even economists might give such conduct a bad name. As one commentator observed:

Qualcomm’s conduct distorted the SSO’s decision-making process, by giving the participants inaccurate information on costs and benefits when selecting a standard. That created an immediate efficiency cost to users, by possibly causing them to select a technology that they would not have chosen had its true costs been known. It also created a

Earlier episodes of standardization skullduggery

Richard Stern’s Micro Law columns in *IEEE Micro* have provided regular updates to the annals of standardization skullduggery:

- “FTC Turns Back Challenge on Patent Coverage,” July-Aug. 2004;
- “Unresolved Legal Questions about Patents and Standard Setting,” Sept.-Oct. 2003;
- “Weird Turn of Events in Continuing Rambus Saga,” Jan.-Feb. 2003;
- “Standardization and Competitive Advantage,” Nov.-Dec. 2002;
- “FTC Piles Onto Rambus’ Standardization Skullduggery,” Jul.-Aug. 2002;
- “An Update on Standardization Skullduggery,” Sept.-Oct. 2001;
- “More Standardization Skullduggery,” Jul.-Aug. 2001;
- “Preventing Abuse of IEEE Standards Policy,” May-June 2001.

longer-term efficiency cost, by imposing transactions costs from the opportunistic conduct that will likely result in future SSO activity—either employing more costly procedures to avoid this kind of behavior, or, in some cases, standardization not taking place at all when it would otherwise be efficient to have an SSO acting to establish a standard. Thus, Qualcomm’s conduct seems unambiguously inefficient.

It isn’t unFRANDliness that hurts competition, it’s standardization

The New Jersey court wrongly reasoned that to find Qualcomm guilty of monopolization here “would subject every firm with patents incorporated into an industry standard to antitrust liability, and thus eliminate the procompetitive benefits an SSO is designed to facilitate. When an SSO decides to incorporate one company’s patented technology into a standard, the company holding the incorporated patents will be in a position to control that technology’s distribution.” Therefore, said the court, Qualcomm’s monopoly power “derives from the rights it enjoys as a patent-holder.”

Yes, but the power derives from that source *plus* the effects that Qualcomm’s presumed lying had on the SSO. To be sure, the monopoly power derives from multiple sources (including, ultimately, that Marconi developed wireless radio and that Noyce and Kilby invented integrated circuits—the

world is full of multiple causes, all necessary but none sufficient). But that does not excuse the unlawful conduct that was also a substantial and material source of the monopoly power. Moreover, to find Qualcomm guilty would *not* subject to antitrust liability every firm with patents incorporated into an industry standard. It would so subject only those firms that engaged in unlawful conduct to get their patents incorporated into an industry standard, and then only such an industry standard that came to dominate a market (became essential to participation in a relevant market).

In the same vein, the court added that it considered Qualcomm no more an illegal monopolist than any other firm whose patents are incorporated into an industry standard: “Qualcomm stands on the same footing as the other companies with patents incorporated into the standard.” In other words, whatever antitrust effects are the result of Qualcomm’s renegeing on its FRAND promises are the fault of standardization, and therefore not the fault of Qualcomm. UnFRANDly terms, the court said, “cannot eliminate competition in a technology market that is devoid of competition by virtue of a standard.”

Does this sound like “It’s not guns that kill people...”? Here, it’s not the liars and cheaters, it’s the IEEE (and other SSOs)—for having the temerity to engage in standard setting.

Proximate cause

That is utter nonsense. In the court’s reasoning—if it may appropriately be so

termed—there is never causation and therefore never any responsibility. Causes are always multiple. So, the actor who generates any one cause cannot be held liable. And if that doesn't eliminate liability, there's always, "Some other yegg would have mugged him if I didn't." You cannot operate a legal system on that basis. Law is supposed to modify human conduct to discourage antisocial acts by imposing sanctions (here, damages—or at least an order not to do it any more) on actors whose acts are likely to cause harm. If there is no longer any theory of causation, the system cannot operate. Therefore, the law must—on some basis—assign responsibility for undesired results and impose measures to modify the behavior of those deemed responsible for the undesired results. The purpose is to decrease the probability of future occurrence of the undesired results. In engaging in this activity, the law must sort out—among the multiple necessary causes of every effect (and in particular of the undesired results that the law is trying to prevent)—those causes that it makes sense to try to regulate or, indeed, suppress. The concept or policy notion that the law uses is to designate the causes to be regulated as the "proximate causes" of the harms in question.

Not only are there multiple causal factors in the legal universe but multiple effects or results as well. Suppressing a given act may decrease the probability of future occurrence of one undesired result but increase the probability of future occurrence of another undesired result. Thus, it might be argued, suppression of lying about FRAND might decrease future lying about FRAND but also provide disincentives to standardization. Perhaps that was what the New Jersey court was concerned about, but if so its concern was misplaced. If we assume that *in fact* Qualcomm promised FRAND terms and then *simply unequivocally refused* to offer FRAND terms, there is no reasonable theory of how prohibiting participants in standard-setting from engaging in that conduct will chill the standard-setting process. To paint the case even blacker, we may assume that Qualcomm intentionally misled the

SSO by promising FRAND while planning to renege once the SSO adopted Qualcomm's technology. (The court said: "The Court recognizes that as alleged by Broadcom, Qualcomm agreed to license its patents on FRAND terms, and is now refusing to honor this promise." The case might be different for more complicated fact patterns.) Therefore, there would appear to be no risk of undesired consequences if that conduct is deemed the proximate cause of any resulting monopoly and adverse market effects.

The court did allude to a possible flaw in Broadcom's case. The court said that it was not clear what the size of the market affected by the conduct was, and whether it really was likely that Qualcomm would gain a monopoly in that market. Perhaps that means that it is not clear that the UMTS standard actually defines a relevant market. But it is questionable that detailed facts showing such things must be put into the complaint, as the court seemed to suggest, rather than left for later disclosure. The court may also have doubted that injury to competition occurred. The court indicated that Broadcom took the position that the facts of the case "provided a basis, under traditional antitrust principles for recognizing a new type of anticompetitive conduct." Probably, that means that Broadcom argued that, because intentional lying in the marketplace is without redeeming social value, it is proper to condemn the resulting occurrence of monopoly power without any specific showing of anticompetitive harm.

A new type of anticompetitive conduct?

The court turned away the argument: "The Court declines the invitation to acknowledge the alleged conduct as a new type of anticompetitive conduct. The cost of false positives counsels against an undue expansion of § 2 liability." But the court did not list any elements of the supposed cost of false positives here. Such a list would have on it possible anticompetitive results of suppressing intentional lying in the marketplace, or possible other positive values that would be impaired by such

suppression. Is there any redeeming social value of intentional lying in the marketplace? At first blush, at least, there seems to be none.

However, the New Jersey court was wrong in thinking that it was called upon to acknowledge a new type of anticompetitive conduct. At least seven different federal appeals courts have previously addressed the issue of whether commercial lying can provide the basis for an antitrust violation.

In one case, the federal appeals court for the Midwest west of the Mississippi River held that a conspiracy between the defendants to use false statements to eliminate a new type of travel service violated both section 1 and section 2 of the Sherman Act when it resulted in substantial anticompetitive market effects.

In *United States v. Microsoft Corp.*, the federal appeals court for the District of Columbia held that Microsoft committed monopolization by a pattern of conduct that included intentionally lying to software developers. Microsoft deceived them into believing that Microsoft's version of Java was compatible with other versions, which functioned with both Windows and other operating systems. In fact, Microsoft had written its version of Java so that applications written with Microsoft Java were incompatible with other Javas and with any operating system except Windows. Microsoft sought, the court found, to perpetuate its Windows monopoly in the operating system market by causing Java applications to be unusable with any other operating system. Microsoft's intentional lying had the purpose of eliminating a threat to Microsoft's monopoly power in the market for operating systems, and therefore was part of a pattern of monopolization.

The federal appeals court in New York held that a claim under section 2 of the Sherman Act could be based entirely on the defendant's dissemination to retailers of a false and deceptive letter about the plaintiff's product, provided that the plaintiff could show substantial, rather than merely minimal, anticompetitive effect. The court recognized that there is "no

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redeeming virtue" in deception, but added that because litigation involves administrative costs, the plaintiff must show substantial anticompetitive effect to warrant judicial intervention under section 2 of the Sherman Act.

Finally, the Cincinnati federal appeals court held that a jury was entitled to find a snuff manufacturer guilty of monopolization where it engaged in commercial lying. The purpose of the lying was to dupe retailers into believing that the defendant's snuff products were better selling, so that retailers would carry the defendant's products and discontinue carrying the products of a rival manufacturer, the plaintiff.

On the other hand, three federal appeals courts have said the opposite. The New Orleans federal appeals court rejected an antitrust claim based on a bridge manufacturer's persuading municipalities to specify its type of bridges by lying about their technological superiority over the type that the plaintiff manufactured. "All of these arguments made to potential customers may have been wrong or misleading," the court said, but "they are all arguments on the merits." It then added, "To the extent that a competitor loses out in such a debate, the natural remedy would seem to be an increase in the losing party's sales efforts on future potential bids, not an antitrust suit."

The Chicago federal appeals court, in two successive decisions, has held, "Commercial speech is not actionable under the antitrust laws." The court said that, if "statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas." Such tactics, the court opined, were just part of the "[w]arfare among their suppliers and different producers." Commercial lying "is not even the beginning of an antitrust case."

The federal appeals court in Philadelphia, which will hear any appeal from the New Jersey court's ruling in the Broadcom-Qualcomm case, sides with the New Orleans and Chicago federal appeals courts. In a case in which the defendant, a manufacturer of toilet partitions, spread

lies that a rival manufacturer's products were fire hazards, the court held that the campaign of lies was irrelevant because "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."

The better view, in this debate among different federal appeals courts, would seem to be that of those courts that hold that intentionally lying in the marketplace can be an element of an antitrust violation, if the effects are significantly anticompetitive. This view is consistent with one of the Supreme Court's few opinions involving standard setting—*American Society of Mechanical Engineers v. Hydrolevel Corp.* In that case, the ASME was held liable under the antitrust laws because it permitted one of its manufacturer members to act as its agent to issue an interpretation of the organization's code on boiler safety that falsely said that the product of a competitor of the member was unsafe. The issue was not whether commercial lying could be part of an antitrust violation, however, for that was assumed. The issue was whether the ASME was financially liable for letting its member use it as a tool to harm competition. Nonetheless, the assumption behind the opinion is that injuring competition through intentional deception or falsehood is something that the antitrust laws will act against.

Regardless of the actual merits of Broadcom's charges against Qualcomm, which remain undecided and thus unknown, the New Jersey court got it wrong when it ruled that the antitrust laws are not concerned with intentionally lying to a SSO. The worst of the court's arguments, surely, is that it's not lying to an SSO that causes monopoly, it's the SSO that causes monopoly by engaging in standard setting.

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