Identifying Exclusionary Conduct: Manipulation of Standard Setting Processes

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Exclusionary Conduct

- Can Standards Be a Good Thing?
  - ensure cutting edge technology (at a point in time)
  - ensure consistency
  - enable development of related products/interoperability
- Can Standards Be a Bad Thing?
  - exclude competitors/new entrants
  - block new and better technology from market
  - lock in long term contracts and high prices

Improper Use of Standards

- Section 1 of the Sherman Act
  - e.g., group boycott
- Section 2 of the Sherman Act
  - e.g., using standards to drive competitors from market
- Section 5 of the FTC Act
  - undisclosed blocking patents
- Just Plain Fraud

Trade Associations

- Self Regulation
  - who is fined and why?
- Denial of Membership
  - who is denied access and what is the impact?
- Product Standards or Certification Programs
  - who determines and enforces?

Manipulation of Standard Setting

- Capture of an SSO and Subsequent Monopolization
- Failure to disclose key information
- Misrepresentation of key information

Manipulation of Government Process

- Anticompetitive Litigation
  - baseless claim or patern of suits for purposes of harming competitor
- Fraud on the PTO
  - misrepresentation of facts/prior art
- Fraud on Other Governmental Agencies (like FDA in drug cases)
  - misrepresentations of facts to block licenses

Defenses

- *Noerr* Immunity
  - lobbying to influence legislation
  - lawsuits
  - NO protection for lobbying private organizations
  - Sham exception/bribery/conspiracy
- State Action Doctrine
  - clear articulation and affirmatively expressed state policy
  - actively supervised by state

Recent Cases

- *Rambus, Inc.*
  - private standard setting body
  - failure to disclose blocking patent
- *Union Oil Company of California (UNOCAL)*
  - lobbying for regulations that track undisclosed patents
  - misrepresentations to industry groups