[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistanc0 TD(te)Tj8.6400 0.ate a0000 1.00q12.000120.0000 0.0000 cm0.0000120.0093ec

[2] Dell Computer Corp., 121 F.T.C. 616 (1996).

[7] *Id.* at 468.

[8] *Id.* (quoting and citing Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081,

wheras the Commission found that Rambus's acquisition of that power was unlawful. Moreover, the court's latter observation seems to conflict with the views of the framers of Section 2 respecting the merits and demerits of monopoly power.

Yet the court's holding was not based on the first of these two concerns. Nor can it be said that it was based exclusively on the second concern or the reasoning of the district court in the *Qualcomm* case where the judge there held that deceptive conduct in a standard setting context could not injure competition as a matter of law.[12] No, the clearest key to understanding the appellate decision is causation.

The Commission carefully analyzed the link between the exclusionary conduct and the creation of Rambus's monopoly power. In *Rambus*, there were two links in the causal chain – the first was the adoption of the standard by the standard setting organization and the second was the adoption of the standard by the marketplace. The Commission found that Rambus's conduct caused JEDEC to unknowingly adopt standards that read on Rambus's patents. That in turn led the Commission to conclude "that a properly informed JEDEC may have selected a substitute technology

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[12] Broadcom Corp. v. Qualcomm Inc., 2006 U.S. Dist. LEXIS 62090 (D.N.J. 2006) rev'd 501 F.3d 297 (3d Cir. 2007). It is far from clear, however, that the D.C. Circuit's decision did not create a circuit split. It certainly can be read that way.

[13] Commission Liability Op. at 77.

[14] *Id.* at 77-79.

monopoly power accrued to Rambus only after the manufacturers had fully bought into the standard and begun to implement it.

In these cases, it is often difficult to definitively say what the world would have looked like "but for" the bad acts. The *Rambus* case was no different. The Commission in its liability decision, at the outset of its causation discussion, identified two possible outcomes in a hypothetical world free from Rambus's deceptive conduct: "JEDEC either would have excluded Rambus's patented technologies from the JEDEC DRAM standards, or would have demanded RAND assurances, with an opportunity for *ex ante* licensing negotiations."[15] The Commission did not opine which outcome was more likely. On the one hand, as I say, it did hold that the standardization of Rambus's technologies was not inevitable.[16] On the other hand, the Commission did not rule out the *possibility* that JEDEC may have sta.00 0.000 0.0000 TD0000 0.00000 0.000er

[15] Commission Liability Op. at 74; *see also* In re Rambus, FTC Dkt. No. 9302, Commission Remedy Op. at 12 (Feb. 5, 2007) *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf.

[16] Commission Liability Op. at 81-96 (Rambus had argued that JEDEC would have adopted its technologies even had full disclosure been made because its technologies were superior to alternatives.).

[17] Rambus, 522 F.3d at 463 ("the Commission expressly left open the likelihood that JEDEC would have standardized Rambus's technologies even if Rambus had disclosed its intellectual property.").

monopoly power. It would have also signaled the marketplace that JEDEC's standard required a licensing agreement from Rambus. Manufacturers and others practicing JEDEC's standards would have had to decide whether they would implement a standard that required such a license. At the time the first JEDEC DRAM standard was published it was not the only alternative, and one cannot say that the market would have inevitably adopted JEDEC's standard if it was subject to a Rambus license. JEDEC's standards enjoyed widespread acceptance in part because the market believed they were relatively costless in terms of licensing. Like I said, I think the court got it wrong in its analysis of this question, but more importantly I think the question is beside the point.

Let me explain. Assume for the sake of argument that the court was right and that "JEDEC's loss of an opportunity to seek favorable licensing terms is not . . . an antitrust harm."[18] That means the court was confronted with two possible scenarios – one in which it was willing to assume was an antitrust violation, and another, in which the court concluded there would not be an antitrust violation. As I said, in its liability decision the Commission did not say which scenario or outcome was more likely. Nor do I think the law required the Commission to make that determination. To understand the Commission's analysis, one must first look to *Microsoft,* for that decision served as our touchstone.

The link between anticompetitive conduct on the one hand and the creation or acquisition of monopoly power as a basis for Section 2 liability is little explored in the case law and commentary. *Microsoft* is one of the few cases to analy

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[18] *Id.* at 467.

[19] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

I'm sure you remember, the monopoly maintenance claim rested on the theory that Microsoft sought to destroy Netscape and Java because they posed a potential threat to its operating system monopoly. However, the threat was nascent, and the theory that Netscape and Java would mature into a competitive alternative to Windows was fairly speculative. In its appeal, Microsoft argued that the government had failed to demonstrate that Microsoft's campaign to destroy Netscape and Java had caused it to maintain its operating system monopoly.[20] The D.C. Circuit, sitting en banc, rejected Microsoft's argument. It was willing to infer a causal connection between Microsoft's exclusionary conduct and its continuing monopoly position in the operating system market.

The D.C. Circuit in *Microsoft* refused to require the government "to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct."[21] Instead, it was willing to "infer causation" if exclusionary conduct "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power."[22] The court explained that it drew this inference because "to some degree the defendant is made to suffer the uncertain

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[20] *See* Brief for Defendant-Appellant at 115, United States v. Microsoft, Nos. 00-5212, 00-5213 (D.C. Cir. 2001) ("plaintiffs relied on a speculative chain of causation consisting of at least three steps: (i) Netscape would successfully develop Navigator into a platform that exposed enough high quality APIs to allow ISVs to write full-fledged applications; (ii) large numbers of ISVs would write applications that relied solely on APIs exposed by Navigator (or other middleware like Sun's Java technologies) without making calls to the underlying operating system, thus eliminating the 'applications barrier to entry'; and (iii) the business of providing Intel-compatible PC operating systems that provide low-level support for this middleware—essentially an operating system kernel—would be sufficiently attractive commercially to entice new entrants into the market, even though the principal value of an operating system would have been usurped by the middleware layer.").

[21] Microsoft, 253 F.3d at 79.

[22] *Id.*

consequences of its own undesirable conduct."[23] The court did not hold that in the hypothetical but for world that Navigator and Java would have evolved into a threat. It merely said that it was possible (and left unsaid that it was also possible that they would have simply fizzled out).[24] A lesson to be drawn from *Microsoft* is that uncertainty cuts against the defendant when it comes to causation . . . at least when it comes to liability.

Like *Microsoft*, the "but for" world in *Rambus* was uncertain. In both cases, one could reasonably find that the conduct may have caused the defendant to acquire or maintain its monopoly power. Of course, at the same time, it was also possible that the defendants in those cases would have acquired or maintained their monopoly power even absent the anticompetitive behavior. The question is who bears the brunt of that uncertainty. In *Microsoft*, the D.C. Circuit said it was the defendant. Seven years later, in *Rambus*, the same court said it was the government plaintiff.

So far I've limited my discussion to the Commission's liability decision. Let me take a moment to address the significance of the remedial opinions. The D.C. Circuit read the Commission majority's remedial decision to opine that a "RAND" outcome was more likely here, and that clinched its decision that a Section 2 violation could not be found.[25] However, its

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[23] *Id.*

[24] Indeed, the D.C. Circuit noted that the District Court explicitly did not adopt the position that Microsoft would have lost its position in the operating system market but for its anticompetitive behavior. United States v. Microsoft, 253 F.3d at 78 and 107 (citing the District Court's Findings of Fact ¶ 411, "There is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java . . . would have ignited genuine competition in the market for Intel-compatible PC operating systems.").

[25] Rambus, 522 F.3d at 464 ("the Commission made it clear in its remedial opinion that there was insufficient evidence that JEDEC would have standardized other technologies had it known the full scope of Rambus's intellectual property.").

[26] Microsoft, 253 F.3d at 80 ("Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, i.e., whether the court

on that finding, we would have imposed a royalty-free licensing remedy. If that had been the majority opinion, arguably the D.C. Circuit would have upheld the Commission's decision. But like I said earlier, I think the court missed the point in its analysis. The question, at least in terms of liability, is not whether a "but for" world with a RAND assurance was an antitrust violation. Based on the commentary and the D.C. Circuit's own landmark decision in *Microsoft*, the fact that the Commission found that at least one potential outcome in a "but for" world would have been a violation should have been sufficient. Nor should the analysis turn on the Commission majority's remedy decision as to which outcome was more likely. *Microsoft* made it clear that when the issue is whether or not a structural remedy is appropriate, the brunt of uncertainty is borne by the plaintiff, not the defendant, and there must be "special proof" of the causal link. The D.C. Circuit's decision in *Rambus* is a potentially dramatic shift away from *Microsoft* and towards a much more demanding standard in terms of establishing causation.

II. N-Data

Let me turn to another standard setting matter that has attracted a great deal of attention this year – N-Data. In a consent decree that was finalized ynr0000 0.00000 0.00000 1.00000 0.0000 0.0000 cm0

2007) *available at* http://www.ftc.gov/os/adjpro/d9302/070205roschstmnt.pdf.

NWay technology in the Ethernet standard. The decision was made, at least in part, because National offered to license its technology for a onetime paid-up royalty of $1000 per licensee to manufacturers and sellers of products that use the IEEE standard. Several years later, National transferred the patents to a third party for use in applications that did not implicate the IEEE Ethernet standard. The third party was fully aware of the licensing commitment and made no effort to enforce the patents against firms practicing the IEEE standard or change the terms of the licensing commitment. N-Data acquired the relevant patents in 2001. By that time, virtually every computer in the United States read on the IEEE Ethernet standard and the patents pate. The $1000 TDe125.0

[31] Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1989).

[32] Commissioner J. Thomas Rosch, "Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief," before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico at 5-12 (July 6, 2006) *available at*

http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (

The third limiting principle relates to the ability of the "victims" of the conduct to defend themselves. The commitment here extended not to a single firm, but rather to an industry-wide standard setting organization. Indeed, in the standard-setting context – with numerous, injured third parties, big and small, who lack privity with the patentee and with the mixed incentives generated when members must decide whether to pass on royalties that raise costs market-wide – contract remedies may prove ineffective, and Section 5 intervention may serve an unusually important role. Indeed, the SEC reporting requirements, which would require the biggest businesses to acknowledge that they were potential infringers, and hence subject to multiple damages and attorney fees if they planned to defend infringement claims by N-Data, tended to inhibit even those firms from defending themselves as easily they could if they faced mere breach of conduct claims.

The Commission did not allege that N-Data's conduct violated Section 2 of the Sherman Act. Speaking only for myself, I did not believe the facts supported a viable Section 2 claim. The facts in N-Data were different from those of the Commission's earlier standard setting cases. For example, unlike in *Rambus*, there were no allegations of misconduct or anti-competitive behavior at the time the standard was adopted by the IEEE. Nor were there any allegations of anticompetitive behavior that led the market to subsequently implement IEEE's standard. The conduct in the case – the breach of the l1c4TD(S0 0.0000 TD(y)Tj5.640ions of)Tjves as eexample3e

by National Semiconductor constituted an "exclusionary" act or practice. However, I doubted that the renege could be considered "exclusionary" in any meaningful sense of that term. It had nothing to do with the *ex ante* competition that occurred before the standard at issue was adopted, and it could not be said that there was any causal connection between that act or practice and the adoption of the standard (which allegedly produced monopoly power in the "autonegotiation technology market.") That act or practice occurred y