Antitrust and Standard Setting Introduction

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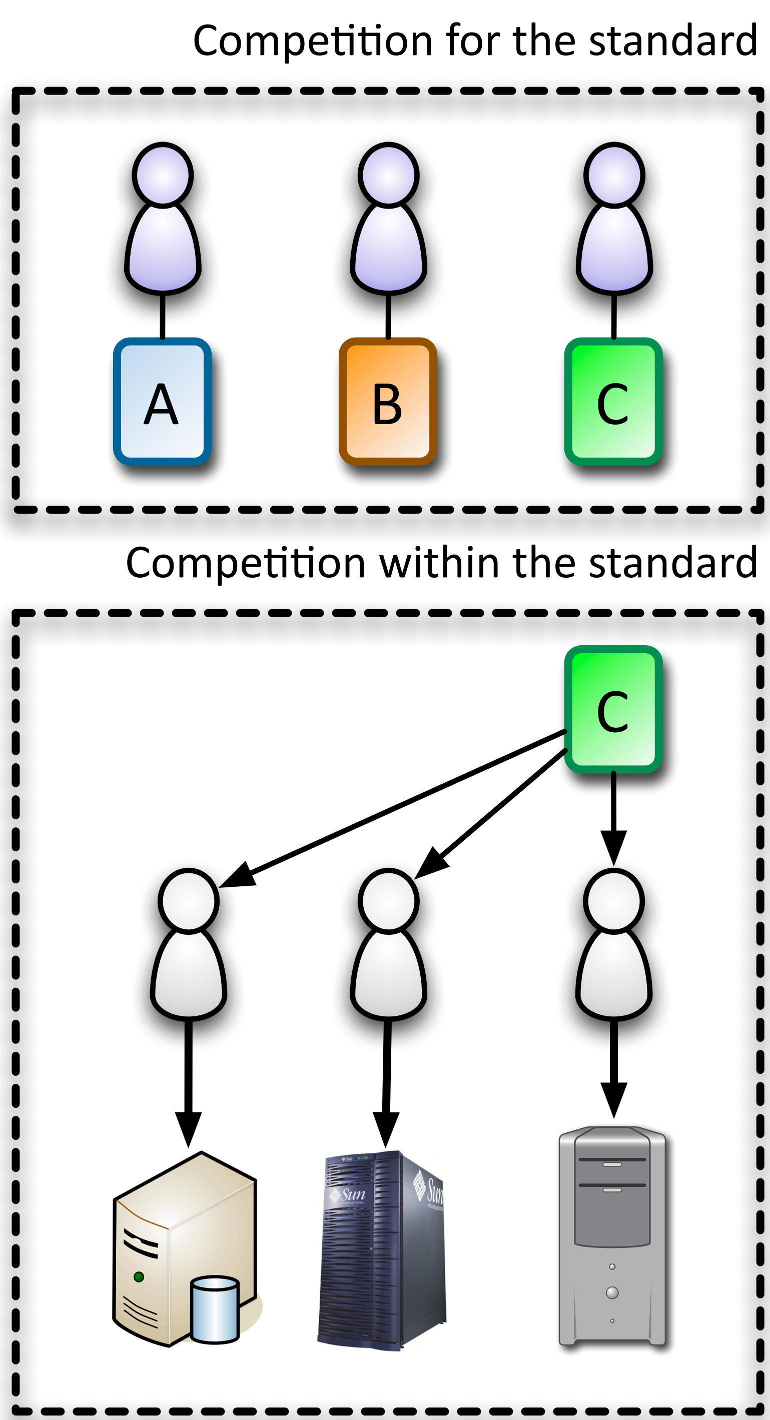
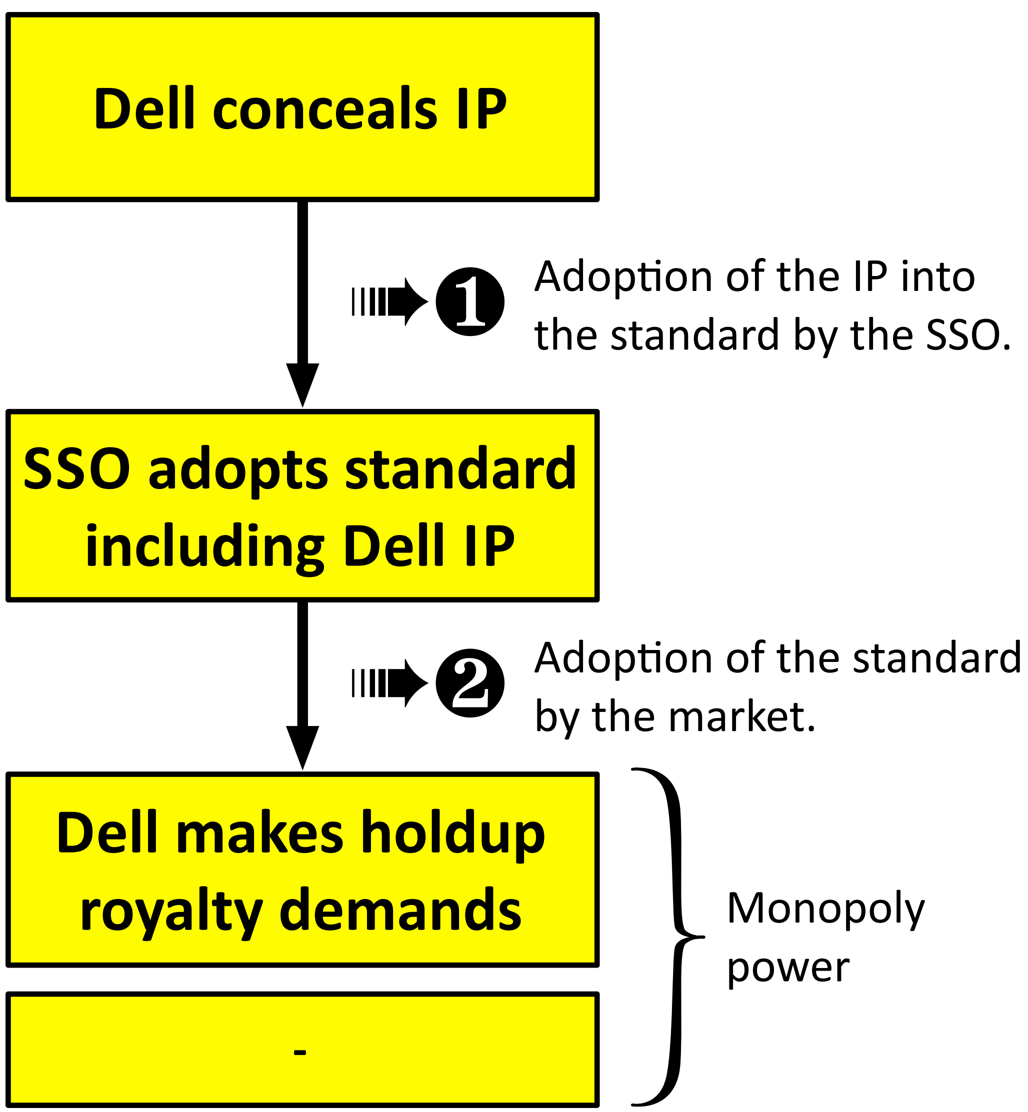
Antitrust enforcement in the SSO context is focused on patent holdups



- Standard setting organizations (SSOs) set up a two-step competitive process
  - Step 1: Upstream firms compete for inclusion of their IP in the standard (competition for the standard)
  - Step 2: Downstream firms compete for implementations of the standard (competition within the standard)
- Common antitrust concerns
  - Licensor cartel ("We won't license our essential IP for less than $x")
  - Licensee cartel ("We won't license your IP for more than $x")
  - Manipulation of the SSO process to disadvantage competitors ("No plastic conduits for fire safety reasons")
  - **Patent holdup ("Deception, adoption, infringement litigation")**

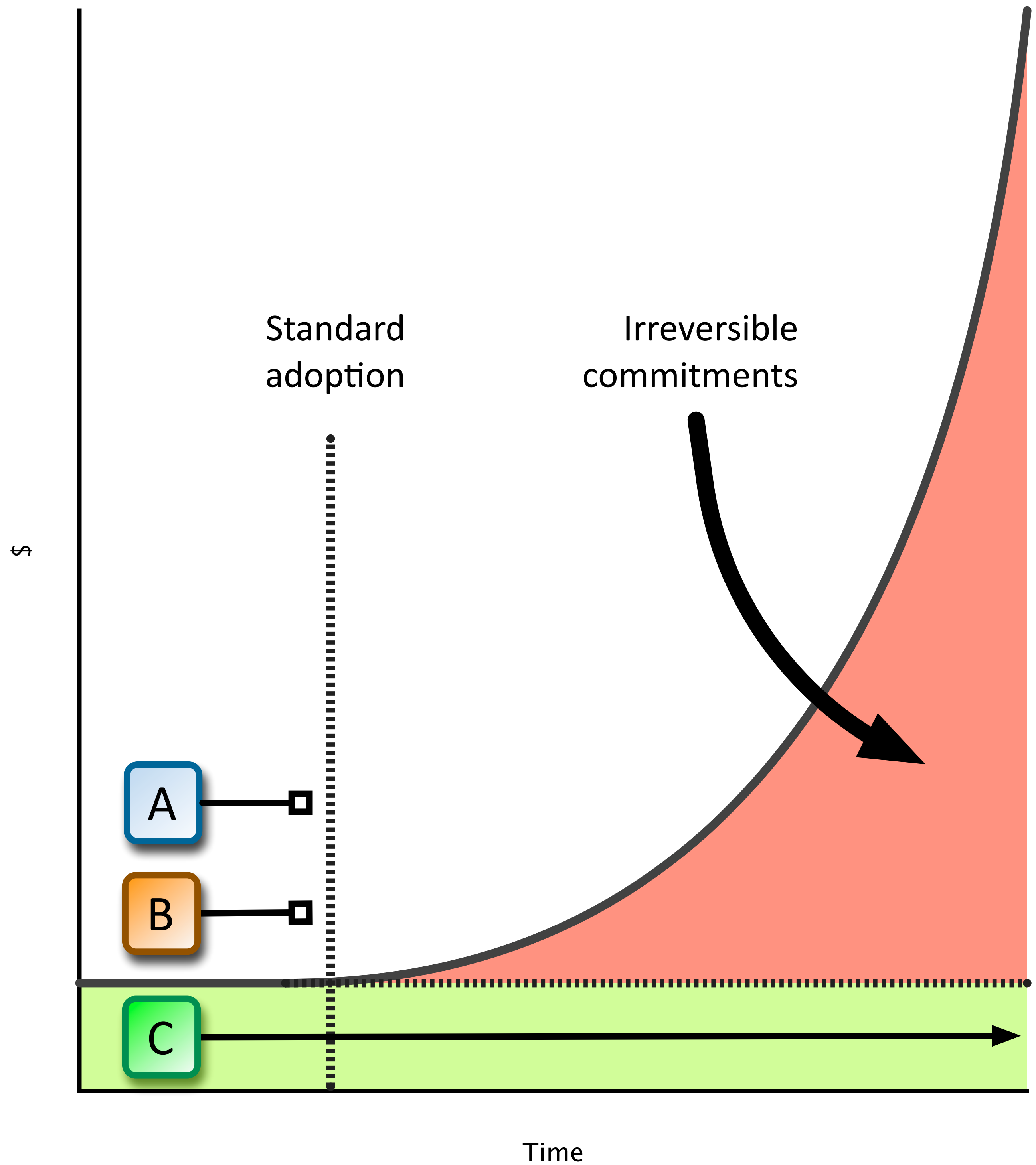
The holdup paradigm: *FTC v. Dell* (1996)



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

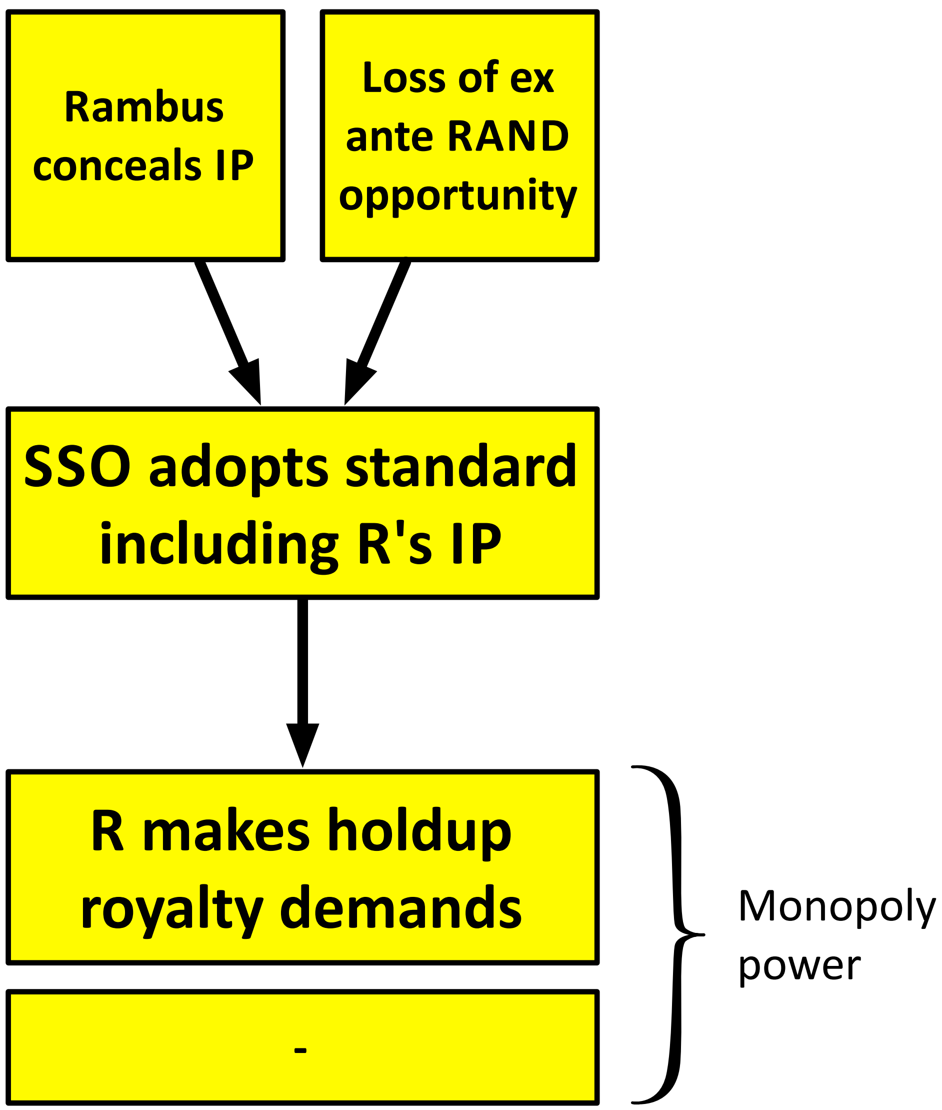
- Patent holdups have been challenged under §2, §5 FTC Act, and Art. 82
  - Unilateral conduct, requires (1) dominant position; (2) exclusionary conduct (here, deception)
  - Note that §2 has a two-step causation requirement: the deception must result in exclusion, and the exclusion in incremental market power
- Dell held patents for VL bus technology, which it did not disclose to the SSO (**conduct**). The SSO adopted a standard that included Dell's patented technology (**adoption**). Post-adoption, Dell demanded holdup royalties from manufacturers (**incremental market power**).
  - Causal link ❶: Deception ➠ Adoption
  - Causal link ❷: Adoption ➠ Market power
- Settlement: Royalty-free license

A holdup extracts rents above the value of the inventive contribution



- In a holdup, there are two values that depend on time and the extent of the irreversible investment
  - V1 = What Δ is willing to pay to π for a patent license before Δ made irreversible investments (depends on Δ's ex ante options)
  - V2 = What Δ is willing to pay to π for a patent license after Δ made irreversible investments (depends on Δ's ex post options)
- The holdup value is V2 – V1
  - V1 is the value of the inventive contribution
- Standards amplify the holdup problem
  - In a 1:1 holdup, π threatens Δ's irreversible investments. (V2 > V1)
  - In a 1:N standards holdup, π threatens the irreversible investments of *everyone* who is supporting the standard (V2*N > V1)

The D.C. Cir limits the reach of the Sherman Act for standard holdups: *Rambus v. FTC* (2008)



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  1. The SSO would not have included Rambus's IP in the standard; or
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Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008)

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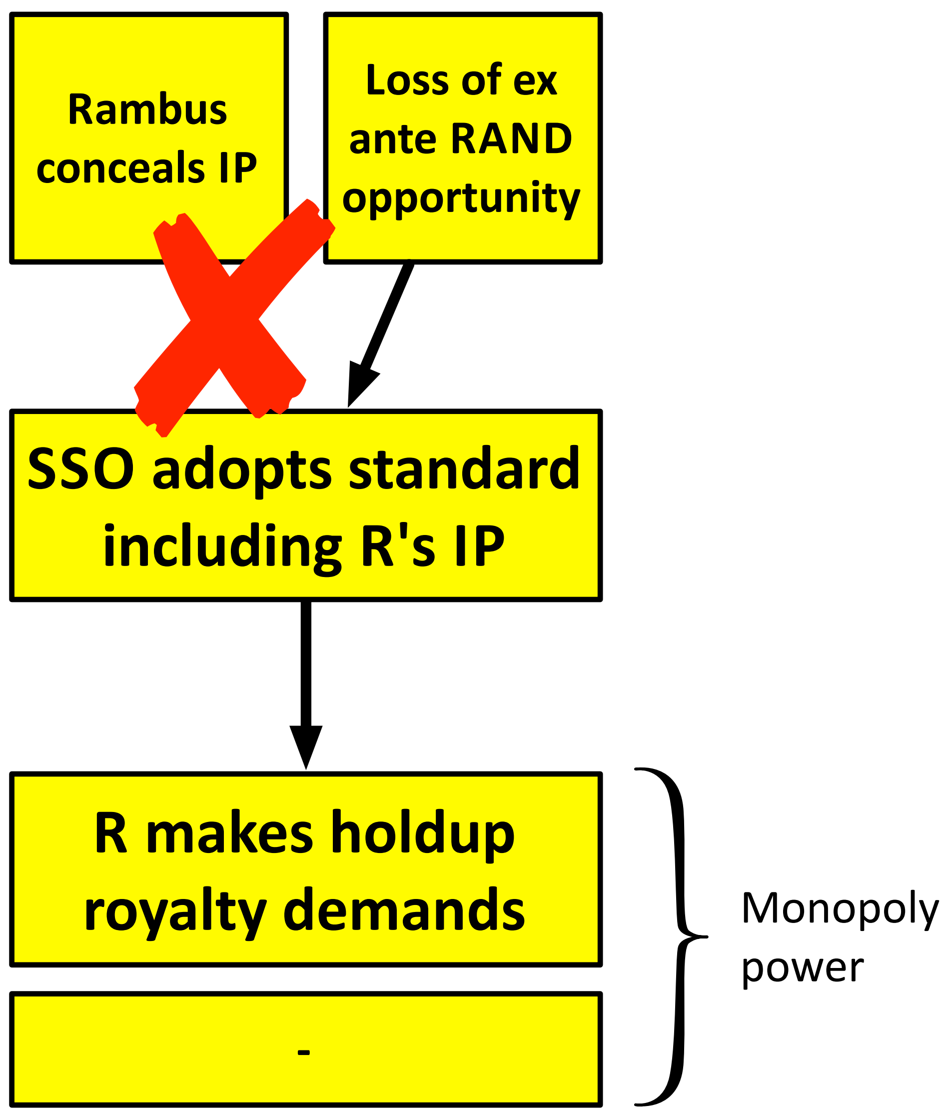

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- In 2008 the D.C. Cir. reversed and held
  - The loss of a RAND negotiation opportunity by itself does not constitute a **cause of action**; and
  - The FTC didn't prove that the deception was a **"but for"** cause of inclusion of Rambus's IP in the standard
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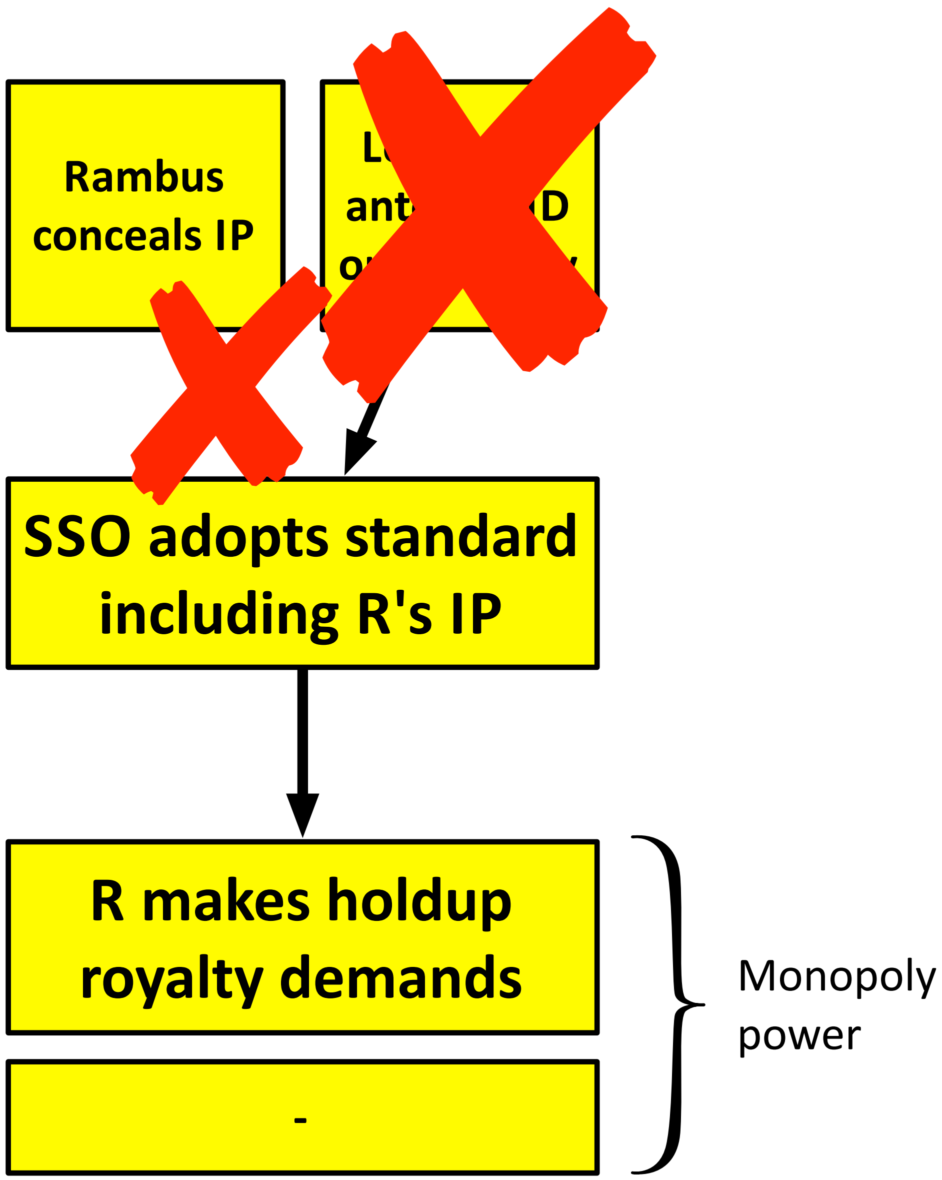

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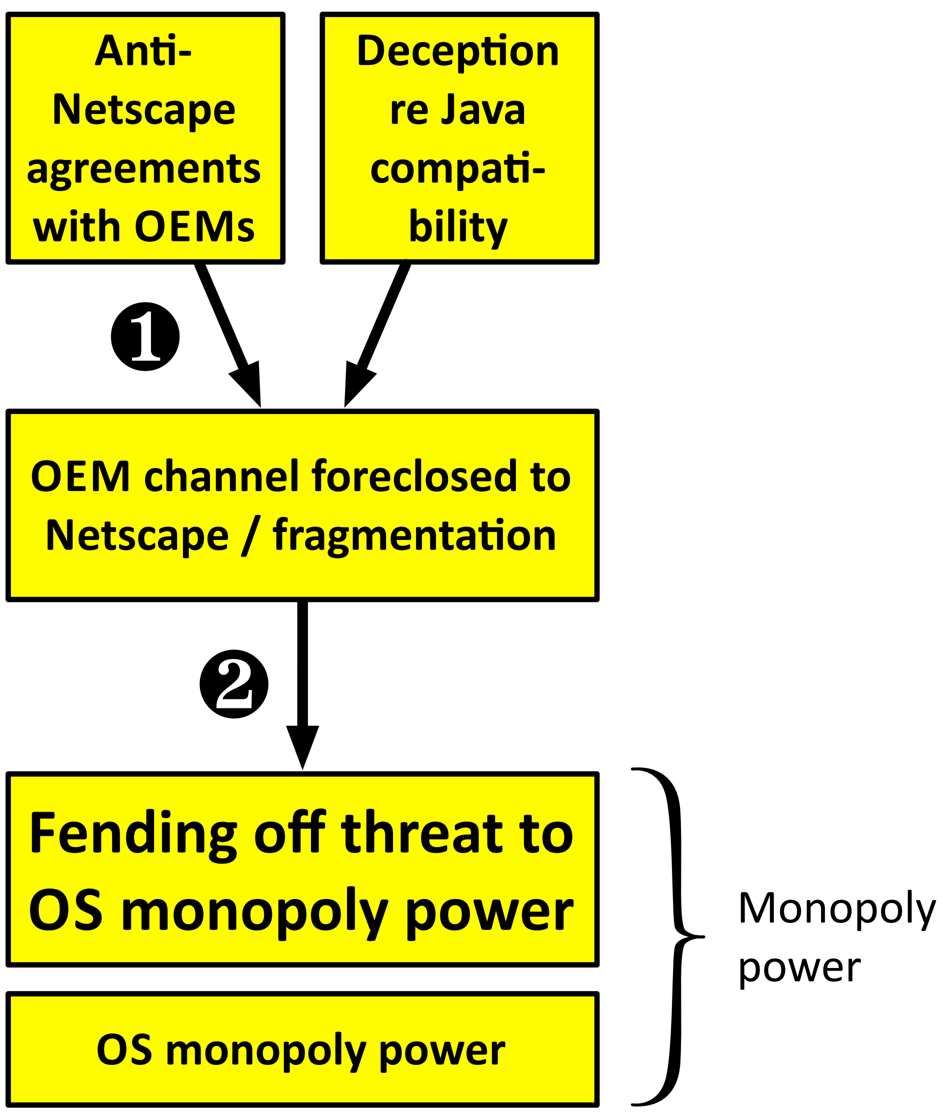
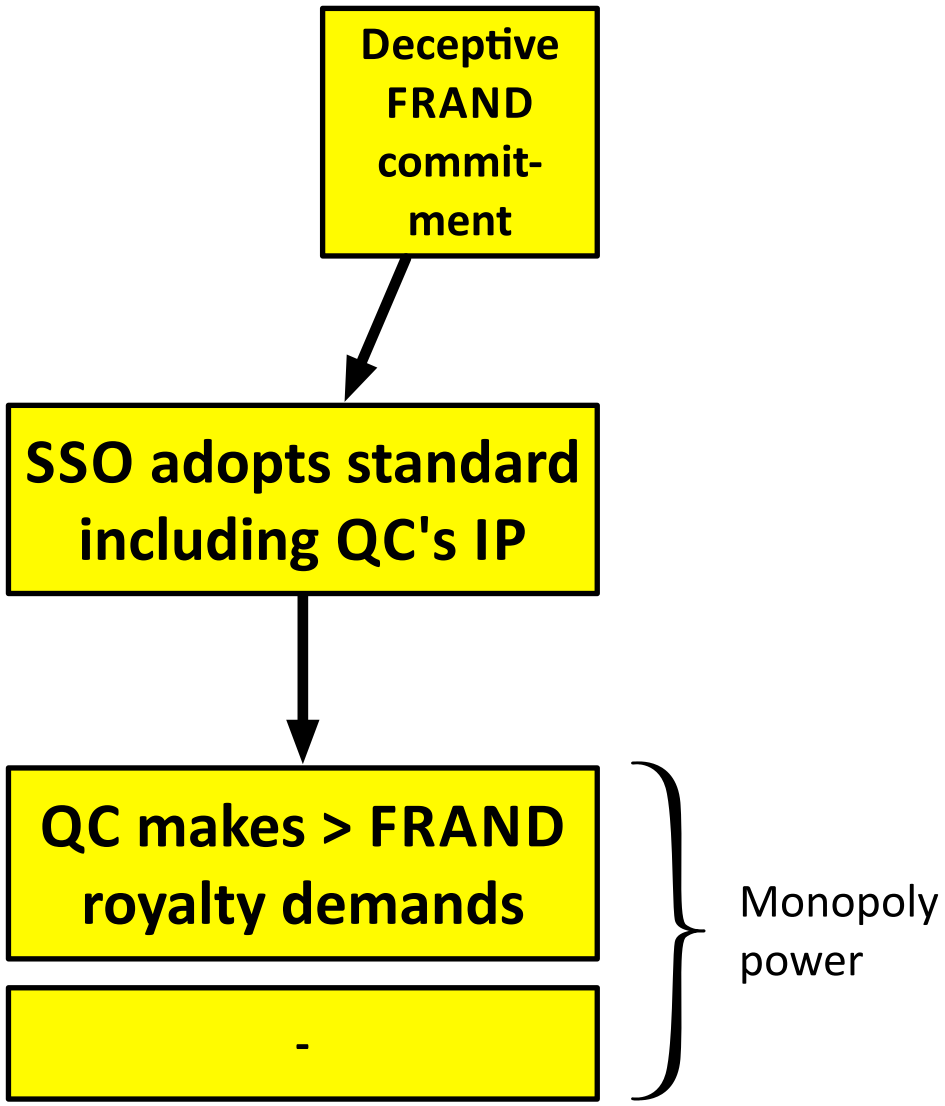
Causation: Tensions between *Rambus* and *Microsoft* (both D.C. Cir.)



U.S. v. Microsoft, 253 F.3d 34 (D.C.Cir. 2001)

- The D.C. Cir relies on two *prima facie* contradictory causation requirements
  - *Microsoft's weak contributing factor causation standard*: §2 causation requires conduct "reasonably capable of contributing significantly to Δ's continued monopoly power." (Id., 79)
  - *Rambus's strong but-for causation standard*: It is **not** enough for §2 causation "that Rambus's nondisclosure made the adoption of its technologies somewhat more likely than broad disclosure would have." (*Id.*, at 463-64). Citing Hovenkamp, et al. for "but-for" causation requirement. (Id., 466)
  - "Dramatic shift away from *Microsoft*." (Rosch)
- A possible solution to the puzzle
  - The *Rambus* standard applies to ❶
  - The *Microsoft* standard applies to ❷
- In any event, *Rambus* makes it harder for πs to challenge certain holdups

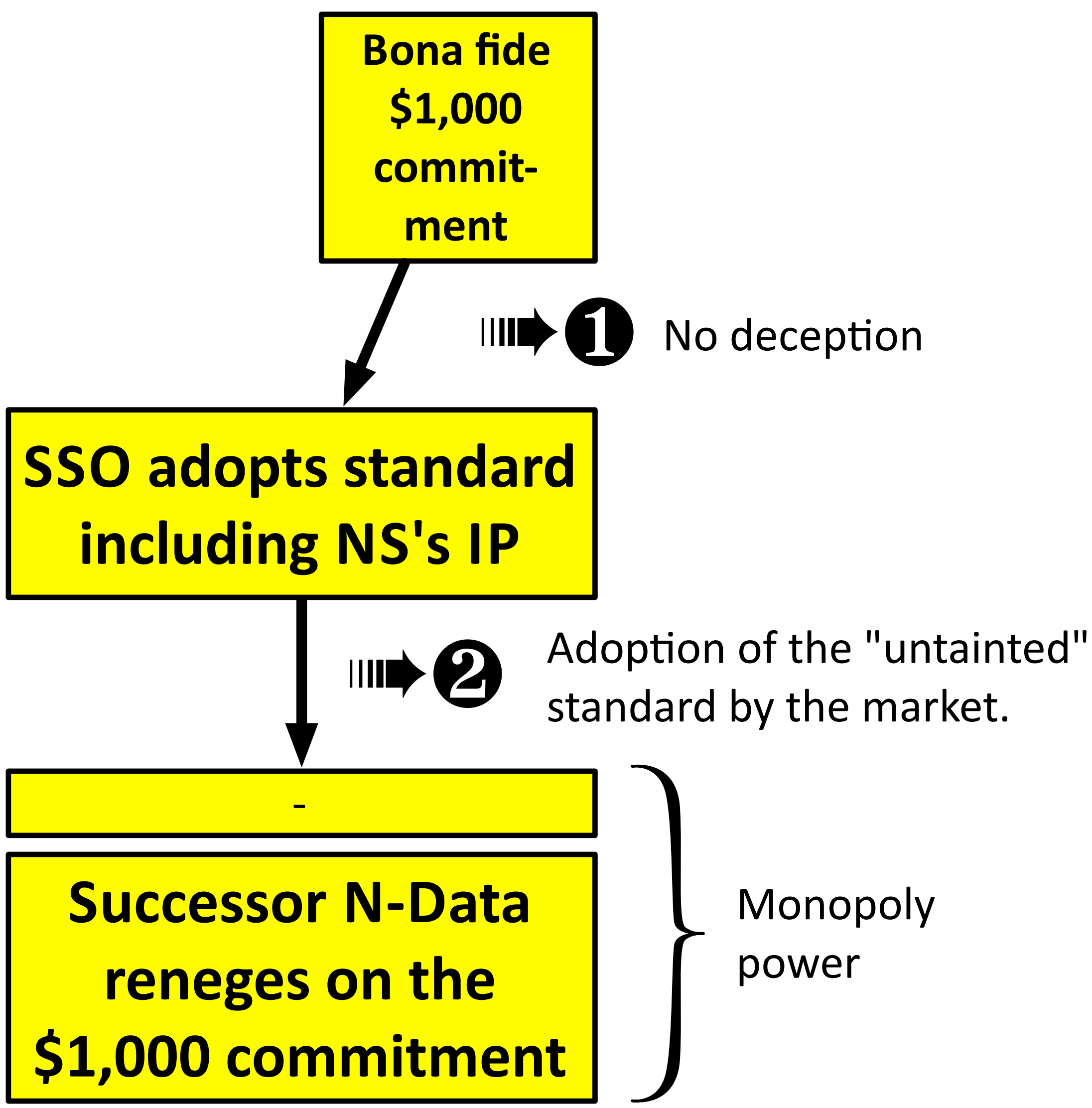
Cause of action: Tensions between *Rambus* (D.C. Cir.) *and Broadcom* (3rd Cir.)?



Broadcom v. Qualcomm, 501 F.3d 297 (3rd. Cir. 2007)

- Qualcomm (QC) promised to license mobile phone IP under FRAND terms. As a result, the SSO included the IP into the standard. Post-adoption, QC reneged on the promise and charged holdup royalties.
  - The 3rd. Cir. held that false FRAND promises may constitute a **cause of action** under §2.
- Tensions between the 3rd and D.C.Cir?
  - *Broadcom* (3rd Cir.): "Deceptive FRAND commitments, no less than deceptive nondisclosure of IPRs, may result in ... [anticompetitive] harm." (*Id*., 314)
  - *Rambus* (D.C. Cir.): JEDEC's "loss of [a RAND] commitment is is not a harm to competition from alternative technologies." (*Id*., 466)
- Is there a distinction?
  - In *Broadcom*, QC made and then broke a FRAND commitment. In *Rambus* there never was a FRAND commitment.
  - In *Broadcom*, the FRAND commitment was key for the SSO to choose QC's technology for including in standard over existing alternatives

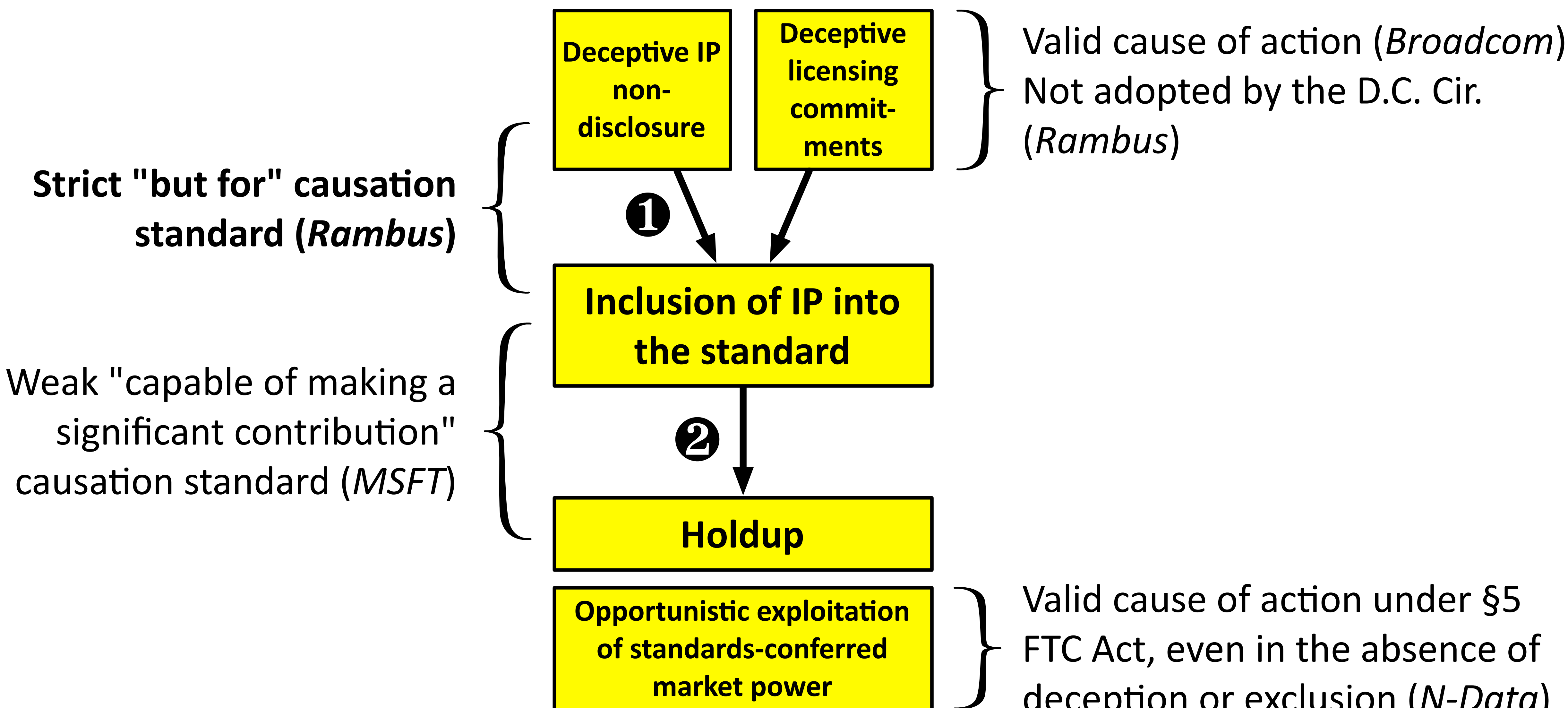
Liability for holdup *without* deception: *FTC v. N-Data* (2008)



- Natl. Semi. (NS) disclosed its Ethernet patents to the SSO and made nominal license commitments ($1,000). The SSO adopted the standard. Post-adoption, NS honored the commitment for many years. Then N-Data acquired the patents and started charging > $1,000 royalties.
- No deceptive (exclusionary) conduct during the SSO process; no adoption of a "tainted" standard; no causation
  - No §2 liability
- Unfair ex post exploitation of properly acquired, standards-based market power is sufficient for §5 FTC Act liability
  - Both "unfair competition" and "unfair practice"

N-Data LLC, FTC Docket No. 4234 (Complaint, 9/22/08)

Putting it all together: Patent holdup after *Rambus*, *Broadcom*, and *N-Data*

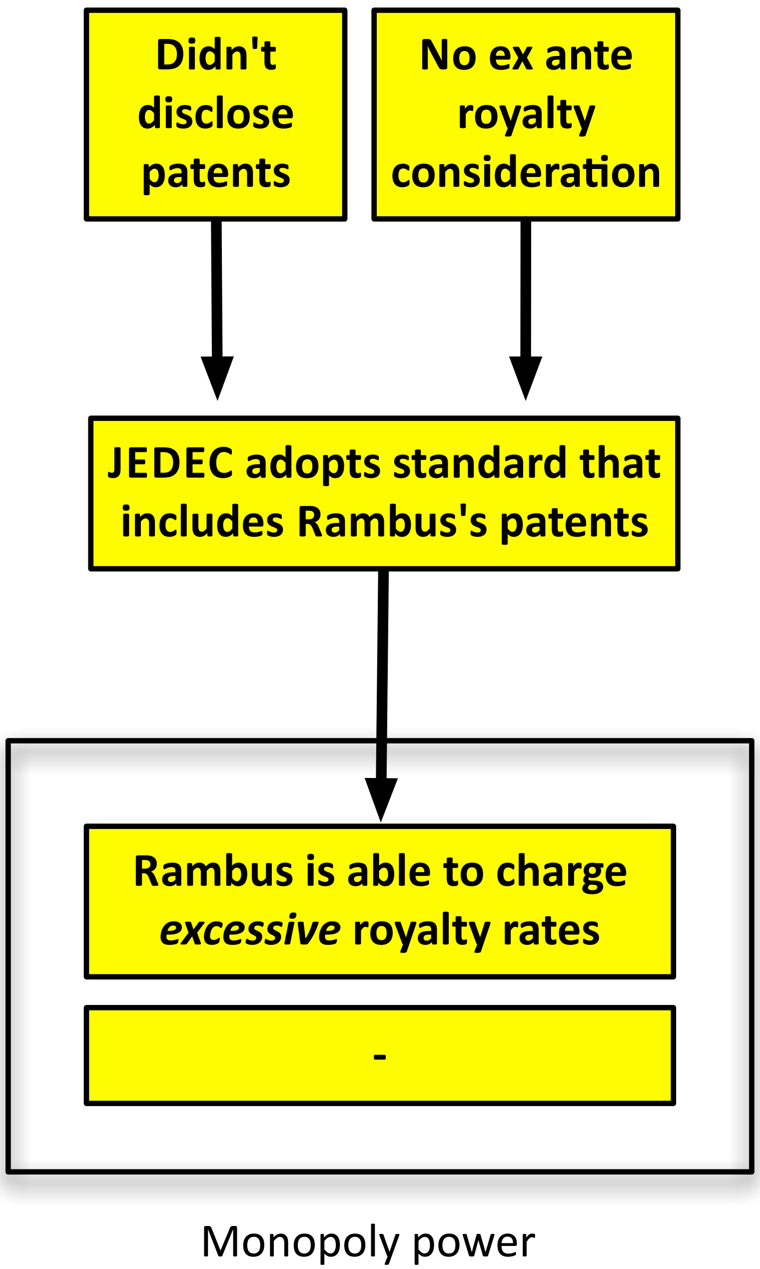


What SSOs can do to mitigate the holdup risks

Rule	Licensor members promise:	Comment
Disclosure	"I have some patents here that may relate to the technology. I may or may not license them once we've agreed on a standard."	Enables "inventing around," which also reduces incentives to disclose. Does not remove the "nuclear option" (injunction) if patents are included in the standard. Insufficient.
Royalty free license	"For the uses covered by the standard, you may use my patented technology for free."	Highly effective. However, some IP holders will avoid the SSO, which may be counterproductive (they can still sue later on). Common in open source IP environments.
RAND (and FRAND)	"Once the standard is set, I will license my essential patents at a reasonable, non-discriminatory rate.")	Takes the threat of an injunction off the table—mostly, at least. However, what's reasonable? 25% of running royalties? 5%? Are grantbacks or admissions of validity and infringement part of RAND?
Unilateral, ex-ante RAND	"I will license my essential patents at RAND terms, no worse than $10/unit plus exclusive grantback for 5 years."	Even better than RAND alone, as it allows choosing alternative technologies while there are still options.
Penalty defaults	"For any undisclosed essential patent, the maximum royalty is $10,000."	Creates a strong incentive to search for and disclose essential patents. Very effective if coupled with (ex ante) RAND.
Joint ex ante negotiations	Actual negotiation of licensing terms at the outset of the process	Front-loads and delays the technical process. SSO's concerned about potential (buyer or seller) price fixing. DOJ indicated that rule of reason applies to bona fide ex ante term negotiations.

Lemley, Ten Things to to about the Holdup of Standards (2007)

The EU case against Rambus
Settled, December 2009



- By and large same facts as in U.S. case
- But subtle difference in the law. Under §2, a cause of action exists if the exclusionary conduct <u>results</u> in monopoly power.
  - In other words, the Δ does not have to be a monopolist at the time of the challenged conduct.
- In contrast, Art. 102 only applies to firms that are already dominant at the time of the challenged conduct
  - However, unlike §2 and much like §5, Art. 102 also covers "exploitative abuses," e.g., unfair practices.
  - "imposing unfair purchase and selling prices or other unfair trading conditions." Art. 102(a)
- Settlement: No royalties for older generation DRAM; reduced royalty rates for later generations for 5 years