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STORY UPDATE

FTC REVERSES ITSELF, FINDING THAT RAMBUS CREATED AN UNLAWFUL MONOPOLY

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In what can only be called a stunning development in a high profile standards case, the U.S. Federal Trade Commission (FTC) announced last month that it had [unanimously reversed](#) the earlier decision of one of its own Administrative Law Judges, ruling now that semiconductor technology company Rambus, Inc. had "unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory," or DRAM.

The FTC is now in the process of deciding what penalties should be levied against Rambus. In support of that process, it may hold additional hearings at which Rambus and the FTC prosecuting attorney may present arguments on that issue. The FTC also announced that it would welcome industry advice on the penalties, setting a deadline of September 18 for presentation of *amicus curiae* (friend of the court) briefs, four of which were filed (including one filed by Gesmer Updegrove LLP and myself on a *pro bono* basis, the fourth such brief we have filed in relation to this case). The *amicus* briefs, together with the briefs on the penalty question filed by the FTC and Rambus, may be found at the FTC [Rambus docket page](#).

The most recent decision by the FTC is only the latest in the series of dramatic reversals that has typified the course of the web of lawsuits that have been filed by Rambus against four DRAM manufacturers (Infineon Technologies, Hynix Semiconductor, Samsung Electronics, and Micron Technologies); by the same manufacturers against Rambus; by antitrust regulators against Rambus; and by the same regulators against the same DRAM manufacturers, charging them with a price fixing conspiracy against Rambus relating to the same technology.

The decision by the FTC represents a vitally important ratification by the FTC of the need to enforce rules of trust in standard setting, and follows on a series of early victories by Rambus that threatened to undermine the credibility of the standard setting process. In response to those victories, scores of standard setting organizations reexamined and amended their intellectual property rights policies, in an effort to make it more difficult for those with ill intent to "game" their processes.

While a detailed review of the complete, tangled history of the Rambus litigation would require many thousands of words, the following describes the principal events to date.

All of the litigation and investigations arose from the conduct of the same participants in the same standard setting effort within the Joint Electron Device Engineering Council (JEDEC) in the 1990s. The standards under development in that effort would dictate the designs of hundreds of millions of DRAM chips worth billions of dollars in revenues – and even billions of dollars in royalties to anyone owning patents essential to those designs.

Rambus, it was alleged, dropped out of the standard setting process prior to the time when it would have been required to disclose any patents that would be infringed by the implementation of the standards being developed. After the standard was approved and widely adopted (or, in the words of antitrust law, after the market had become "locked in"), it began to contact the chip vendors that were implementing the

standards, and demanding royalties from them – in short, surfacing and threatening to fire the torpedoes after setting a classic "submarine patent" trap.

The four vendors referred to above refused to pay up, and all were sued by Rambus. The case that advanced most quickly was the suit brought against Infineon Technologies, a German semiconductor company. At trial, Rambus's conduct came to light – as did the fact that it had destroyed large numbers of documents, presumably in an effort to avoid the disclosure of its actions. The judge presiding in the Virginia federal district court in which the document destruction was revealed was greatly angered, and as a result refused to honor the attorney-client privilege between Rambus and its counsel, allowing other written evidence to reach the jury.

Those materials included notes from Rambus's own counsel, advising Rambus that it was violating JEDEC's rules by not disclosing its patents. Not surprisingly, the jury found for Infineon, and the judge directed Rambus to reimburse Infineon for millions of dollars in attorney's fees, in addition to other monetary damages.

The standard setting world heaved a sigh of relief when the decision was announced, because the standard setting process is built primarily on trust. After all, if one can gain more by cheating than by obeying the rules, then there are only two ways to react – either by cheating as well, or by refusing to adopt standards at all.

But the relief was short lived. Rambus appealed the trial court decision to the Federal Circuit, which hears all patent-related appeals. Most observers expected the same judgment in that venue, and were therefore shocked when the first reversal occurred: a three-judge panel found in favor of Rambus in a two to one split decision (the third judge filed a strong dissent in favor of Infineon). One basis for the panel's decision was a finding that the JEDEC process was not sufficiently clear to hold Rambus accountable – even though the opinion also acknowledged that Rambus found the JEDEC policy clear enough to conclude that it was violating those same rules at the time.

Infineon then appealed the decision to the whole bench of the Federal Circuit. A number of "friend of the court" briefs were filed in support of Infineon. But the full court declined to re-hear the case.

Infineon next sought review by the US Supreme Court, and again supporting briefs were filed on behalf of standard setting organizations, industry participants, and others. Many State Attorneys General also wrote and filed their own brief as well. But the Supreme Court, which accepts only a very small percentage of all cases that seek their attention, also declined to hear the case.

Then the next reversal occurred: the Federal Circuit had remanded the case (i.e., sent it back) to Judge Payne, the Virginia Federal Court judge who had originally found in favor of Infineon – and Judge Payne proceeded to throw the case out of court, citing Rambus's document destruction, and leaving Rambus with no choice but to either begin the appeal process all over again, or to settle with Infineon. Rambus chose to cut its losses at this point and entered into a settlement with Infineon that was widely viewed by its stockholders as a disappointment: Infineon would pay its damages over time, and would receive favorable licensing terms on other Rambus technology. However, there were three more defendants to which Rambus could now turn its now undivided attention, which it proceeded to do.

Rambus was by this time also asserting additional claims against these vendors in addition to those relating to their refusal to pay royalties. In these new claims, Rambus alleged that the four vendors had entered into a price fixing scheme against Rambus relating to the same patented technology. The antitrust regulators then brought a suit against the vendors, eventually extracting some of the largest antitrust penalties ever collected in connection with the settlements agreed to by these companies.

In the third major litigation thread, the FTC brought an investigation against Rambus in June of 2002 in connection with Rambus's behavior in JEDEC. As noted above, an Administrative Law Judge (ALJ) found in Rambus's favor on every count in February of 2004. Like the Federal Circuit judges, the ALJ based his opinion in part on what he found to be defects in the JEDEC process.

The FTC complaint counsel appealed that decision to the Commissioners of the FTC, and once again supporting briefs were filed. The Commissioners both heard testimony as well as reviewed the complete trial record of the earlier trial, and as further disclosures were made in the concurrent private litigation, delayed issuing an opinion to permit further investigation. Close to two years elapsed, until the release of the Commission's opinion in August.

Certainly, the Rambus disputes represent one of the most convoluted and contradictory cases of standards-related litigation in recent technology history. In effect, it is as if two separate bands of criminals arrived at the same time, to rob the same bank, with each thinking that they had successfully raided the vault. Only later, when each side began suing the other, and when each was charged by antitrust regulators in turn, did each side learn that it was as much a victim as a victor.

Over the course of these events, Rambus became a day trader's darling, as its stock experienced huge swings over the years, depending on its fortunes in court (Rambus sells no products – it only develops and licenses technology). The situation in many ways was similar to the contemporaneous claims made by SCO, also a small company, in the Linux market, where SCO continues to assert claims (unsuccessfully) against IBM and others, resulting in active speculation in SCO's stock. Not surprisingly, one quarter of Rambus's market capitalization disappeared on the day that the FTC announced its decision.

Of course, the saga is still not complete. In Rambus's suit against Hynix, the judge has stayed further action, pending the results of the FTC's decisions on penalties. Meanwhile, multiple class action suits have been filed against Rambus, seeking damages for the incremental increase in SDRAM prices over the past many years during which some vendors were passing along Rambus royalties to their customers. And Rambus will be waiting to see what penalties the FTC decides to impose, before deciding whether to appeal or settle – a decision complicated by the effect that one decision or another will have on the hundreds of millions of dollars in royalties that it may (or may not) receive as a result in relation to its suits and settlements with the four semiconductor vendors.

For now, the standard setting world may feel more secure, knowing that the FTC has supported the standard setting process, sending a clear message to the industry that the antitrust regulators will punish those that take actions intended to manipulate that process in pursuit of anticompetitive goals.

A copy of the amicus brief filed the author and Gesmer Updegrave LLP with the FTC on the determination of damages may be found [here](#).

The following are excerpts from the FTC's announcement of its decision.

**FTC Finds Rambus Unlawfully Obtained Monopoly Power
Deceptive Conduct Fostered "Hold-Up" of Computer Memory Industry**

By a unanimous vote, the Federal Trade Commission has determined that computer technology developer Rambus, Inc. unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory - DRAM chips. DRAMs are widely used in personal computers, servers, printers, and cameras.

In an opinion by Commissioner Pamela Jones Harbour, the Commission found that, through a course of deceptive conduct, Rambus was able to distort a critical standard-setting process and engage in an anticompetitive "hold up" of the computer memory industry. The Commission held that Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act and contributed significantly to Rambus's acquisition of monopoly power in the four relevant markets. The Commission has ordered additional briefings to determine the appropriate remedy for "the substantial competitive harm that Rambus's course of deceptive conduct has inflicted."...

"We find that Rambus's course of conduct constituted deception under Section 5 of the FTC Act. Rambus's conduct was calculated to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant

products. . . . Under the circumstances, JEDEC members acted reasonably when they relied on Rambus's actions and omissions and adopted the SDRAM and DDR SDRAM standards."

"Rambus withheld information that would have been highly material to the standard-setting process within JEDEC," the opinion continues. "JEDEC expressly sought information about patents to enable its members to make informed decisions about which technologies to adopt, and JEDEC members viewed early knowledge of potential patent consequences as vital for avoiding patent hold-up. Rambus understood that knowledge of its evolving patent position would be material to JEDEC's choices, and avoided disclosure for that very reason."

"Through its successful strategy, Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in," states the opinion. "Only then did Rambus reveal its patents - through patent infringement lawsuits against JEDEC members who practiced the standard."

Analyzing Rambus's conduct under the standards of Section 2 of the Sherman Act, the Commission found that "Rambus engaged in exclusionary conduct that significantly contributed to its acquisition of monopoly power in four related markets. By hiding the potential that Rambus would be able to impose royalty obligations of its own choosing, and by silently using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards, Rambus's conduct significantly contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates - which, in turn, significantly contributed to Rambus's acquisition of monopoly power."

"Rambus claims that the superiority of its patented technologies was responsible for their inclusion in JEDEC's DRAM standards," the opinion states. "These claims are not established by the record. Nor does the record support Rambus's argument that, even after two JEDEC standards were adopted and substantial switching costs had accrued, JEDEC and its participants were not locked into the standards. Rambus now claims that we can and should blind ourselves to the link between its conduct and JEDEC's adoption of the SDRAM and DDR SDRAM standards, as well as to the link between JEDEC's standard-setting process and Rambus's acquisition of monopoly power. These claims fail, both as a matter of fact and as a matter of law. To hold otherwise would be to allow Rambus to exercise monopoly power gained through exclusionary conduct. We cannot abide that result, given the substantial competitive harm that Rambus's course of deceptive conduct has inflicted."

"Questions remain regarding how the Commission can best determine the appropriate remedy," the opinion states. "Now that the Commission has found, and determined the scope of liability, the Commission believes it would exercise its broad remedial powers most responsibly after additional briefings and, if necessary, oral argument devoted specifically to remedial issues."

In a separate concurring statement, Commissioner Jon Leibowitz wrote, "Rambus's abuse of JEDEC's standard-setting process was intentional, inappropriate, and injurious to competition and consumers alike." He adds that Rambus's conduct not only ran afoul of the antitrust laws, but also constitutes an unfair method of competition in violation of the broader reach of the FTC Act.

The Commission vote to issue the opinion and order was 5-0....

Copies of the complete opinion and order are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.