UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9302

IN THE MATTER OF

RAMBUS INCORPORATED

BRIEF OF AMICI CURIAE, GESMER UPDEGROVE LLP AND ANDREW UPDEGROVE, ON THE ISSUE OF THE APPROPRIATE REMEDY FOR RAMBUS'S VIOLATIONS OF THE FTC ACT

[PUBLIC]

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MISCELLANEOUS

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are Gesmer Updegrove LLP and Andrew Updegrove, an attorney with that law firm. Since 1988, *amici curiae* have represented over sixty standard setting organizations (SSOs), as well as other non-profit organizations that support, promote or advocate in favor of open standards. *Amici curiae* have previously filed *amicus curiae* briefs on a pro bono basis before the Federal Circuit (Docket Nos. 01-1449, 01-1583, 01-1604, 01-1641, 02-1174, 02-1192; Amicus Brief in Support of Combined Petition for Panel Rehearing, and Rehearing En Banc by Defendants-Cross-Appellants), Supreme Court (Docket No. 03-37; Brief of Amici Curiae in Support of Petition for Writ of Certiorari) and the Federal Trade Commission (Docket No. 9302; Brief of Amici Curiae) in connection with the matters here at issue. Each brief was filed on behalf of large and diverse groups of SSOs. The brief previously filed with the Federal Trade Commission ("Commission") was submitted on behalf of 11 accredited and unaccredited SSOs, representing over 8,600 commercial, government, university and non-profit members.

Amicus curiae Andrew Updegrove has been the principal attorney at Gesmer Updegrove LLP representing each of the clients referred to above, and was the author of each of the *amicus curiae* briefs referred to above. He has presented invited testimony in joint hearings of the Commission and the Department of Justice on the topic of "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy." *See* Federal Trade Commission, Joint hearings of Federal Trade Commission and Department of Justice Antitrust Division (2002), at http://www.ftc.gov/opp.intellect/. He currently serves as a Director of the American National Standards Institute ("ANSI"),

which accredits SSOs in the United States and represents the United States internationally in many standards venues, as a Director of the Free Standards Group, which sets standards for the Linux operating system, and as a member of the Board of Advisors of HL7, an ANSI-accredited SSO that sets standards for clinical and administrative data in healthcare. He has also served as a member of the ANSI revision committee of the United States National Standards Strategy, and is the founder and editor of ConsortiumInfo.org (*available at* http://www.consortiuminfo.org), a free on-line resource with a global audience, which focuses on the topics of standards, standard setting and related intellectual property and other issues, as well as the Consortium Standards Bulletin (*available at* http://www.consortiuminfo.org), an on-line eJournal with thousands of subscribers throughout the world that addresses the same topics.[1]

Amici curiae believe that the maintenance of a robust, trusted and effective standard setting infrastructure is fundamental to the welfare of the government, the nation, and indeed to the continued functioning of the modern, technology based, networked world in which we live.

ISSUE URGED

The remedy levied by the Commission against Rambus must send a clear message to that company, as well as to all that participate in the standard setting process, that the consequences of such bad-faith conduct, if discovered, will significantly exceed the

[1] It must be noted that neither ANSI, the Free Standards Group, nor HL7 has reviewed this brief. The affiliations and activities above are included only as matters of record intended to indicate the depth of experience and familiarity with standard setting matters of *amicus curiae* Andrew Updegrove. Accordingly, no inference can or may be made that any statements made in this brief have been, or would be, endorsed by any of these entities.

potential gains of engaging in such practices. To fail to include a significant punitive element in the remedies assessed by the Commission would dangerously undermine the standard setting process, to the detriment of society and the national interest.

SUMMARY OF ARGUMENT

Standards are vital to government procurement, national competitiveness, and the efficiency and safety of society. Standards are created by voluntary, self-governing organizations that have no effective enforcement power to police the conduct of their members. In the technology sector, the implementation of standards is often likely to result in the infringement of the patents of members and/or non-members. If the owner of a patent that would be infringed by a standard is only willing to license that patent selectively, or on such unreasonable or discriminatory terms as it may wish, then severe consequences will follow, including unreasonable costs to end-users, unfair discrimination against industry participants, and even the complete failure of the standard in question. While the potential for such a result cannot easily be avoided in the case of a patent claim owned by a non-participant in the standard setting process, it is highly inequitable for a participating patent owner to manipulate the process of an SSO in which it was active to ensure such a result for its own benefit.

The value and importance of standards in the modern world is profound. As an example, the Department of Commerce concluded in 2004 that standards affect an estimated 80 percent of world commodity trade. U.S. Department of Commerce, *Standards and Competitiveness – Coordinating for Results* 1 (May 2004). In the technology sector, the role of standards is particularly crucial, as vital infrastructural elements such as telecommunications, the Internet and the Web literally cannot exist

without common agreement on, and implementation of, enabling protocols and other standards.

The suitability of the voluntary, consensus-based standard setting process for creating standards for public, as well as private, interests has been recognized by Congress, which enacted the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 110 Stat. 775 (1996). Under that Act, Congress instructed each Federal agency to utilize standards created by SSOs in preference to "government unique" standards to the extent "practicable." Other government actions discussed below recognize, and encourage, industry-wide reliance on SSO developed standards. As a result of the promulgation of the NTTAA, the proper functioning of the voluntary consensus-based standard setting system has become vital to the proper functioning of government agencies charged with ensuring national interests as diverse as nuclear power, defense, transportation, healthcare and homeland security.

However, unlike public laws and regulations, standards are developed within a process that is not only entirely self-regulating, but also largely unsupervised, except by those that directly participate. As a result, its success or failure is highly dependent upon trust. If those that participate conclude that abusing the system is too easy to accomplish, and that such abuse is too lightly punished if discovered, then the entire system can find itself in danger of collapse, because the risks of participation and adoption of standards become greater than the benefits to be gained through such participation and adoption. Were such a result to occur, virtually no aspect of society would be immune from the impact of that collapse.

It is not the intention of *amici curiae* in this brief to advocate for a particular remedy or remedies, with respect to which the Commission will be receiving advice from other knowledgeable sources. Rather, the *amici curiae* represented by this brief wish to stress the importance of imposing penalties that are sufficiently severe to clearly demonstrate that abusing the voluntary standard setting process cannot prudently be evaluated in terms of simple business risk. To do otherwise would be to send a clear signal not only to Rambus, but to the world at large that there is more to be gained in the United States by "gaming" the standard setting process than by obeying the rules.

ARGUMENT

I. THE EFFICIENT OPERATION OF THE VOLUNTARY STANDARD SETTING PROCESS IS VITAL TO THE NATIONAL INTEREST

A. Standards are Essential to Almost All Aspects of Modern Life

A standard is required almost any time two or more people need to agree to do something in the same way -- whether it be setting the distance between two railroad rails, the diameter of a pipe fitting, or the technical characteristics of a computer modem. Absent such agreement, one could ride one train only to the end of its owner's tracks before having to switch to the train owned by the next carrier; one could only purchase plumbing products from a single vendor for a given project; and one could exchange electronic data only with a remote source known to have the same modem. Multiply this reality 1,000,000 times, and one begins to form a picture of the vital importance of standards.

Standards underlie almost all aspects of modern life. They are essential to protect security, safety and health. For example, SSOs set standards for building codes, fire

safety codes and equipment specifications for diverse types of emergency worker equipment. SSOs swiftly acted to set diverse standards supporting the current Homeland Security Initiative, and continue to add to a growing list of such standards. SSO standards also enable and drive technological advancement and innovation, keeping our domestic infrastructure strong and our economy competitive. Fault intolerant areas such as finance, defense, aerospace and telecommunications depend on rigorous adherence to SSO standards-based specifications, tools, processes and certifications.

Economically, it is well recognized that "standardization has significant consumer benefits in many markets." Lemley, Mark A., *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002). Standard setting serves to "increase price competition," "increase compatibility and interoperability, allowing new suppliers to compete," and "increase the use of a particular technology, giving the installed base enhanced economic and functional value." Balto, David A., *Standard Setting in the 21st Century Network Economy*, Computer and Internet Lawyer, Vol. 18, No. 6, at 3 (Jun. 2001). Indeed, in the absence of appropriate standards in a patent-rich environment, only a single vendor and such licensees as it chose to favor could offer a new technology, resulting either in the failure of the technology to become widely adopted, or in the development of an inefficient monopoly in the IPR owner for the life of the involved patents.

Out of necessity, the modern world has become increasingly dependent upon the voluntary consensus process that creates standards. The result is a *global standard setting infrastructure* that is as extensive as it is invisible to those not directly involved. This infrastructure includes the official national standard setting organizations of the 146

countries that together comprise the membership of the International Organization for Standardization (ISO). ISO, *ISO In Figures* (Jan. 2003), at http://www.iso.ch/iso/en/aboutiso/isoinfigures/archives/January2003.pdf. It is estimated that these and other national organizations maintain an incredible 780,000 (or more) official, nationally adopted standards. Toth, Robert B., ed., NIST, *Profiles of National Standards-Related Activities,* Spec. Pub. 912 (Apr. 1997). Consortia create thousands more standards that also achieve national or global adoption, particularly in the areas of information and communications technologies. As a result, standards represent essential underpinnings to the functioning of the entire modern world. Any action that impedes or imperils the process of creating or adopting these standards will also undercut the institutions that rely on them to function. Given our reliance on these institutions and the standards that they create, such actions will necessarily and adversely impact a bewildering array of aspects of modern life.

B. Congress Has Acted to Facilitate the Creation and Adoption of Standards, and to Make the Federal Agencies Dependent on those Standards

The Federal government has increasingly recognized that standards created through the voluntary consensus process are essential to its efficient and cost-effective functioning. Historically, the government preferentially used "government unique" standards in much of its purchasing, which often served to limit the number of bidding vendors and resulted in higher purchasing costs. As a result, Congress enacted the NTTAA in 1996, which not only requires Federal agencies to use non-government unique standards whenever possible, but to actively participate in the activities of SSOs to facilitate the development of those standards as well. The most important Federal

agencies in the United States use hundreds, and even thousands, of SSO maintained standards, and are completing the task mandated by the NTTAA of substituting SSO and other non-government standards for pre-existing government and agency-specific standards. In 1998, the Office of Management and Budget (OMB) updated Circular A-119 to provide additional guidance to the Federal agencies on implementing such standards. *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, Circular A-119, 63 Fed. Reg. 8545, 8546, 8554-55 (Feb. 19, 1998).

The National Institute of Science and Technology (NIST), which is charged by Congress with reporting on compliance by the Federal Agencies with the NTTAA, has reported that in Fiscal Year 2004 (the latest year for which information is publicly available), Federal agencies used a total of 4,559 voluntary consensus standards and only 71 government-unique standards, and that Federal Agency employees participated in the activities of a total of 431 SSOs. *See* McIntyre, Kevin and Moore, Michael B., National Institute of Science and Technology, *Eighth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment* (May 2005), at 7. The five Federal Agencies that use the largest numbers of standards (Department of Energy, Department of Health and Human Services, Department of the Interior, Department of Transportation and the General Services Administration) collectively utilized over 3,472 voluntary consensus standards in their procurement activities, and directed 1,759 of their employees to participate in the activities of SSOs. *See* McIntyre, *supra*, at Appendix B-1

In addition, the Department of Defense has "privatized" thousands of existing government unique standards in areas such as aerospace and electronics by allowing individual SDOs to take over the further maintenance and updating of these standards. The Federal government has also taken actions to facilitate standard setting by SSOs generally. In 2002, the Federal Trade Commission and the Department of Justice held joint hearings entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, which focused in part on IPR policies. *See* Federal Trade Commission, Joint hearings of Federal Trade Commission and Department of Justice Antitrust Division, *infra*. More recently (on June 22, 2004), President Bush signed into law the Standards Development Organization Advancement Act of 2003, Pub. L. No. 108-237, 118 Stat. 661 (2004), a bill that explicitly extends the coverage of the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301-4305 (1993) (the "NCRPA") to SSOs, in order to provide a measure of immunity to such entities from antitrust sanctions in order to encourage the creation of standards. Significantly for current purposes, while the preexisting provisions of the NCRPA extended protection to individual entities that engage in collaborative activities within the ambit of the Act, the amendment that extended its coverage to standard setting activities provides immunity only to qualifying SSOs – explicitly providing that it does not provide similar protection to the individual members of those same SSOs.

In short, the Federal government has placed vital national interests in all areas of its activities in the hands of the SSO based voluntary standards development process, and has acted to encourage industry generally to rely on standards developed by the same organizations. It is therefore critical that the reasonable rules adopted by SSOs to

manage their processes are given force and effect, and that those participants in SSO activities that are found to violate those rules are convincingly punished for their actions.

C. Leadership in Standard Setting Provides a Vital National Competitive Advantage

As noted by the Department of Commerce, leadership in standard setting is an important factor in maintaining national competitiveness. U.S. Department of Commerce, *supra*. NIST has reported that in 1997, the United States maintained over 93,000 national standards (excluding Consortium maintained standards), two and a half times more than the number maintained by the next closest contender (Germany, with approximately 37,000). *See* Toth, *supra*. Japan, the world's second largest economy, maintained only 18,000 standards, Toth, *supra*, a fact that reflects in part its role as a technology adopter that competes on price -- an area where the United States is at a disadvantage -- rather than a technology creator that can compete with the United States on innovation.

Excelling through innovation will not lend an important advantage to the United States over competitors such as Japan, however, if the resulting products are based upon standards that do not become internationally adopted. When a country is successful in gaining global acceptance of an important standard that originates from technology that its domestic companies have created, it gains an important lead in research, production and sales for the same companies. While the United States currently leads the world in many standard setting areas, due in significant part to the vigor of its SSOs, other countries and regions (in particular, Europe) increasingly are utilizing standards as competitive weapons to the advantage of their local industries. American National Standards Institute, *National Standards Strategy for the United States* (Aug. 31, 2000), at

http://public.ansi.org/ansionline/Documents/News%20and%20Publications/Brochures/national_strategy.pdf. More recently, China has been challenging the West with standards intended to benefit its domestic industries. Updegrove, Andrew, *The Yin and Yang of China's Trade Strategy: Deploying an Aggressive Standards Strategy Under the WTO*, Vol. IV, No. 4 (April 2005), at http://www.consortiuminfo.org/bulletins/apr05.php#feature. If the United States' standard setting process falters, American innovation will fail to capture markets that it could otherwise command.

II. CONSENSUS-BASED STANDARD SETTING CANNOT EXIST IF THE POTENTIAL RISKS OF PARTICIPATION EXCEED THE POTENTIAL REWARDS

Tens of thousands of members of SSOs participate in the development of standards voluntarily and at significant cost in terms of dollars and human resources. At the heart of the decision of each such member to join a standard setting body is the expectation that the benefits from participation will exceed the risks and costs. Any factors that make participation seem more burdensome and less beneficial will tend to discourage participation, with attendant damage to the best interests of consumers and national competitiveness in the global marketplace. *Amici curiae* believe that any failure to adequately punish Rambus would not only shake the faith of the members of SSOs in the voluntary consensus standards development process, but could encourage destructive behavior by additional participants as well.

Common benefits to all participants in standard setting arise when standards facilitate the rapid growth of markets and commercial opportunities. Those benefits can only be secured if all those involved work toward the goal of producing open standards.

By all common definitions, an "open standard" must be available to be implemented by all who desire to do so on "reasonable and non-discriminatory terms" (and ideally, at the lowest cost, in order to provide greater incentives for rapid adoption). Any failure to significantly punish a member (in this case, Rambus) of an SSO that has been found to have engaged in a course of deceptive conduct directed at distorting a critical standard-setting process, and of engaging in an anticompetitive "hold up" of an industry (in this case, the computer memory industry), can only serve to encourage other SSO members to reconsider the costs versus the benefits of engaging in similar destructive conduct.

If participants in SSOs do not feel protected from such behavior in the future, they are likely to conclude that it is ultimately safer to revert to the vastly less preferable (and recent) practice of developing completely proprietary products and services whenever possible.[2]

[2] The classic example of such behavior is the commercial war which raged between two competing, patented, video designs: JVC's VHS format and Sony's Betamax format. This failure by industry participants to agree on a common standard ultimately left millions of consumers with Betamax video players for which new videotapes could not be rented after the VHS format achieved supremacy. *See* Updegrove, Andrew, *What (and Why) is a Consortium?* (2003), at http://www.consortiuminfo.org/what. Sadly, many of the same companies are engaging in the same sort of destructive strategies today, as next-generation DVD players are now reaching the market. Instead of all vendors agreeing on a single standard, two rival formats are being promoted in yet another winner-take-all contest that will ill serve content owner, rental businesses, consumer electronics stores, and end-users alike.

III. THE INTEGRITY OF THE VOLUNTARY STANDARD SETTING PROCESS WOULD BE JEOPARDIZED BY THE FAILURE OF THE COMMISSION TO ADEQUATELY PUNISH THE CONDUCT OF RAMBUS

As noted by *The Economist,* predicting the events here at issue with uncanny accuracy at the very time that the conduct at issue was occurring, "[T]he noisiest of …competitive battles (between suppliers) will be about standards….[I]n the computer industry, new standards can be the source of enormous wealth, or the death of corporate empires. With so much at stake, standards arouse violent passions." The Economist, *Do It My Way*, Vol. 326, Issue 7800, 11 (Feb. 27, 1993). With the stakes so high, it is hardly surprising that some participants in the standard setting process would seek to gain an unfair advantage to bias the results in their favor. How then are honest participants in particular, and the nation in general, to be protected?

This is a particularly troubling concern in the area of technology, where standards are essential to communicate via the Internet and to facilitate the assembly of systems from products of multiple vendors. Here, SSOs provide their members with the potential for the rapid development and commercial launch of new products and services. Yet these groups are voluntary, consensus-based organizations. The complex set of rules under which they function ultimately relies on a fragile "honor" system, guided by common principles of collaboration and collective benefit. The conduct of which Rambus has been found guilty is particular destructive in such an environment. The members of JEDEC unknowingly helped create (and then walked into) an extremely expensive trap laid by Rambus. Inadequately punishing behavior that exhibits bad faith in the standard setting process necessarily threatens the integrity and future of that

process, because it increases the rewards for bad faith conduct at the expense of those who act in good faith, for whom the risks of participation increase.

Participation in SSOs is not only voluntary, but in many cases quite expensive. Participants in SSOs pay (often substantially, in the case of upper level memberships in many consortia) for the privilege of creating standards. It is important to note that the current proceedings do not involve a respondent that is asserting patents against third parties with which it had no prior relationship, but a respondent that voluntarily participated in a standard setting process with the goal of later asserting patent claims against the standards being created by that process. Each other participant in that process anticipated jointly shared commercial benefits from the adoption and broad implementation of the open standards intended to be created through their joint efforts, and was working towards that end.

In some commercial situations, merely requiring a guilty party to disgorge any excess profits, and limiting its entitlement to those future profits that could reasonably have been anticipated absent the bad-faith might be appropriate. In the current context, however, such a remedy would be disastrous, as an SSO member would have nothing to lose by attempting to game the system. Simple economics dictates the conclusion that a significant punitive penalty must be applied, or the incentives to play by the rules would simply disappear – as would the very viability of the entire voluntary, consensus-based standard setting system.

CONCLUSION

Due to the severe impact that any weakening of the voluntary consensus standards development infrastructure would have on consumers, participants and the national interest, *amici curiae* respectfully request that the Commission include a significant punitive element in the remedies that it assesses against Rambus.

Respectfully submitted,

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Dated: September 14, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2006, I caused true copies of the foregoing Brief of Amici Curiae on the Issue of the Appropriate Remedy for Rambus's Violations of the FTC Act, to be served as described below.

Service by overnight delivery of paper copies, including one original, signed version, and 12 copies and by electronic mail, was provided to:

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Service of one copy as provided, via first class mail, to:

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