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RAMBUS

UPDATE: THE STAGE SHIFTS TO THE FTC

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Abstract: *The final outcome of Rambus v. Infineon and its implications for anti-trust and intellectual property issues is now on hold while Infineon petitions the Supreme Court to intervene. But today the attention shifts to the Federal Trade Commission, as the FTC begins to present its own case in court against Rambus for alleged federal antitrust violations. If the FTC is successful, a measure of trust will be restored to the standard setting process. If Rambus wins again instead, the impact on the integrity of the system will be significant.*

Regular readers of the Consortium Standards Bulletin are aware that we have been following the case of **Rambus v. Infineon** and its potentially significant impact on standards organizations and their technical processes ([Rambus Update: It May Not Be Over Yet](#), March 2003; [Rambus - Hard Cases Make Bad Law](#), February 2003). The case and all of its final implications for anti-trust and intellectual property issues will not be known until the last decision is handed down. Since our last issue, the date that this will happen has been postponed, as a result of Infineon's filing a motion, granted by the Appeals Court on April 11. That motion will freeze the effectiveness of the Appeals Court decision while Infineon seeks to have the Supreme Court grant "certiorari," i.e., to consider one or more aspects of the case.

However, the more immediate concern for Rambus begins **today** as the Federal Trade Commission brings its own investigation against Rambus to trial. This part of the Rambus saga began in June of 2002, when the FTC charged Rambus with federal antitrust violations and deliberate and deceptive anti-competitive practices regarding its intellectual property rights. The FTC asserts that Rambus' actions would have direct and indirect impacts adversely affecting standard setting organizations and activities.

While the FTC's case, like the Infineon case, involves Rambus' participation in JEDEC's SDRAM standard setting work and its non-disclosure of relevant patent rights, the charges and laws involved in each case are distinct; possibly distinct enough to allow for a very different outcome for Rambus. For example, in *Rambus v. Infineon*, which was tried under Virginia state law, Infineon was required to support its claims based on a "clear and convincing evidence" standard of proof. The FTC, by comparison, bases its claims on alleged violations under federal antitrust law. Under this body of law, the government will be required to prove its case under the less stringent "preponderance of the evidence" test.

Furthermore, the burden of proof in regard to evidence in the FTC trial today will rest more heavily on Rambus than in the Infineon case as a result of determinations already made by the administrative judge presiding over the suit. Earlier this year, the FTC requested a default judgment against Rambus, claiming that the company had destroyed evidence related to the investigation and that it should therefore forfeit its right to trial. On March 5, 2003, administrative law judge James Timony denied the FTC's request, but agreed that Rambus had indeed destroyed or failed to preserve required evidence and therefore will have the burden of proving its innocence on certain points during the trial that begins today. In his statement, the judge wrote, "...it is clear that Rambus should not be rewarded for its gross negligence concerning, or reckless disregard of, its obligation to maintain documents potentially relevant to litigation and (to) inventory those documents destroyed." In other words, on some key points the Judge has already held that Rambus is "guilty until proven innocent."

The outcome of the FTC investigation will have widespread consequences monetarily for the organizations involved. Should the FTC prevail in its antitrust claims, Rambus would be forced to forfeit the right to receive what may potentially be as much as a billion dollars in license and patent-infringement fees. The stakes for standard setting organizations are also high. If Rambus is convicted, some measure of trust will be restored to the standard setting process. If Rambus is successful in defeating the FTC as well as Infineon, the reverberations will be far-reaching indeed.

We will continue to follow the case and update you on further developments as they occur.
