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IPR UPDATE

FTC APPEALS RAMBUS (WITH A LITTLE HELP FROM ITS FRIENDS)

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While it may seem that the already decade-long tale of the JEDEC-based Rambus disputes may never end, the saga does have its more important chapters. One of those chapters is entering its final pages, and a significant event in that chapter occurred on April 16. Regular readers will know that the FTC brought an action against Rambus based on the conduct of Rambus within the JEDEC standard setting process; that the action was heard before an Administrative Law Judge (ALJ) last summer; and that the ALJ roundly rejected all important elements of the government case in a decision released in February of this year (see *FTC Loses First Round to Rambus* <http://www.consortiuminfo.org/bulletins/mar04.php#ipr>).

The FTC's rules permit its attorneys (referred to as "Complaint Counsel") to appeal a decision by an ALJ to the Commissioners themselves. The Complaint Counsel team, led by Geoffrey Oliver, has done so, filing an exhaustive 125 page rebuttal of the ALJ's findings of fact and legal conclusions on April 16. At the same time, several "friend of the court" briefs were filed. One was submitted by JEDEC itself. A second was filed by an industry group comprising three companies (Micron Technology, Hynix Semiconductors, and Infineon Technologies) independently sued by Rambus for royalties, based on the same SDRAM standard at issue in the FTC action. These briefs, of course, represent the views of interested parties, and that fact would be taken into account by the Commissioners when they review the points made in those briefs.

In order to emphasize the importance of punishing the conduct of Rambus to support the integrity of consensus-based standard setting, Gesmer Updegrove LLP (the sponsor of ConsortiumInfo.org) filed a pro bono brief written by this author on behalf of 12 standard setting organizations (including both consortia and accredited organizations). The membership of those organizations totals over 8,600 companies, government agencies and universities, and encompasses a broad range of technologies. The central thesis of the brief is that standard setting is vital to the national interest and society itself. Absent the enforcement of a good faith obligation on those that participate in the development of standards, the standard setting process itself is in danger of collapsing.

Rambus will now have an opportunity to file an answer to Complaint Counsels brief. A partial day of oral arguments will follow, likely in late summer. The Commissioners will then need to digest what they have heard and the hundreds of pages of decisions, appeals, and answers, as well as the voluminous trial record itself. A final decision would not be likely to issue in less than six to eight months from the date of oral argument.

In the meantime, the separate private suits between Rambus and the three private company defendants will continue. The Federal Circuit Court that ruled against Infineon Technologies returned portions of the case to the trial court, which must now address those elements of the case. Defense Counsel for Hynix and Micron, for their part, are free to bring different arguments before different judges and juries than did Infineon. And, of course, any or all of the private litigants can settle with Rambus at any time. At the moment, this appears unlikely.

In the absence of closure, standard setting organizations are taking what action they can. Most consortia have now revamped their intellectual property policies to tighten them up, and to specifically address the key areas addressed in the Rambus litigation.

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