



UPDATE

FTC CAPS RAMBUS ROYALTIES

ANDREW UPDEGROVE

The Federal Trade Commission announced on February 5, 2007 that it had at last delivered a penalty ruling in its long-running prosecution of memory technology company Rambus, Inc. The full Board of Commissioners had earlier found, on appeal from a holding in favor of Rambus by an FTC Administrative Law Judge in 2004, that Rambus had illegally created a monopoly in certain standards-reliant technology by abusing the JEDEC standard setting process in the early 1990s.

That opinion was handed down in August of 2006, at which time the Commission announced that they would hold further hearings with FTC Complaint Counsel and Rambus, and would welcome industry input regarding what penalties would be appropriate to levy against Rambus. Several industry groups and I filed amicus briefs in response. My own brief urged the FTC to include a punitive element, in order to emphasize that abuse of the standard setting process would result in dire results. Most obviously, such an element could bar Rambus from charging any royalties at all from those that wished to implement the standard at issue.

The stakes were high for Rambus while awaiting the Commissioners' decision, since that decision could influence the outcome and damages assessed in the multiple private cases that are ongoing between Rambus and the various semiconductor companies that have refused to pay royalties to Rambus. These royalties relate to patents that the FTC had already held were illegally hidden by Rambus from the working group members in JEDEC created the SDRAM standard at issue. At least one judge had already delayed further action in one of these cases, in order to learn what penalty the FTC might conclude would be appropriate under the circumstances.

For the standards community, the FTC's anticipated judgment would also be significant, because if Rambus were to be let off lightly, gaming the standards system could appear to offer better business returns than playing by the rules. Such a perception could tempt other companies to try the same gambit, and also lessen participation in standard setting overall. Clearly, if there is more to lose than to gain by helping create, and then adopt, a standard, then standards development could become a process in which only the unaware – and those that wished to prey upon them – would participate.

In fact, the FTC had substantial latitude in arriving at its decision. As noted by the Commission in the majority opinion announced on February 5, the Supreme Court has previously:

...emphasized the Commission's wide discretion in its choice of remedy, and stated the expectation that the Commission would 'exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices'....[Thus, the Commission] enjoys 'wide latitude for judgment' in fashioning a remedial order, subject to the constraint that the requirements of the order bear a reasonable relationship to the unlawful practices that the Commission has found.

In a somewhat similar case, Dell Computer acquiesced in 1996 to an FTC consent decree, under which it surrendered any right to require payment of royalties by implementers of a VESA standard. Like Rambus, Dell had been accused of failing to disclose a patent during a VESA standards development process, and then later asserting that patent against implementers of the same standard. Dell was also

required to subject itself to oversight in its standards-related activities for a period of ten years. Most obviously, then, the FTC could decide to limit the royalties that Rambus could charge to implement the SDRAM standard, or to bar Rambus from charging any royalties at all.

In the event, the FTC opted to require Rambus to license its essential patent claims (something that Rambus was already doing), to limit the amount of royalties that Rambus could charge, and to bar it from charging any royalties at all after three years.

In order to determine the amount of royalties Rambus would be permitted to charge, the Commissioners attempted to determine what licensing terms would have prevailed had Rambus disclosed its patents in timely fashion. Or, as stated in the FTC press release, quoting the majority opinion:

“Having found liability, we want a remedy strong enough to restore ongoing competition and thereby to inspire confidence in the standard-setting process. At the same time, we do not want to impose an unnecessarily restrictive remedy that could undermine the attainment of pro-competitive goals,” it says.

“[T]he Commission has previously declared, and we agree, that ‘where the circumstances justify such relief, the Commission has the authority to require royalty-free licensing.’ . . . We conclude, however, that Complaint Counsel have not satisfied their burden of demonstrating that a royalty-free remedy is necessary to restore the competition that would have existed in the ‘but for’ world – i.e., that absent Rambus’s deception, JEDEC would not have standardized Rambus technologies, thus leaving Rambus with no royalties. . . .We have examined the record for the proof that the courts have found necessary to impose royalty-free licensing, but do not find it.”

But how, exactly, does a court determine how to take the marketplace back in time, and predict how it would have behaved, based only upon assumptions derived from the evidence provided by each side? The press release continues as follows:

“We therefore are left with the task of determining the maximum reasonable royalty rate that Rambus may charge those practicing the SDRAM and DDR-SDRAM standards. Royalty rates unquestionably are better set in the marketplace, but Rambus’s deceptive conduct has made that impossible. Although we do not relish imposing a compulsory licensing remedy, the facts presented make that relief appropriate and indeed necessary to restore competition,” the opinion states.

“[W]e find that a maximum royalty rate of .5% for DDR SDRAM, for three years from the date the Commission’s Order is issued and then going to zero, is reasonable and appropriate. We also find that a corresponding .25% maximum rate for SDRAM is appropriate. Halving the DDR SDRAM rate reflects the fact that SDRAM utilizes only two of the relevant Rambus technologies, whereas DDR SDRAM uses four.”

Significantly, the order also prohibits Rambus from charging more than these rates on any outstanding license agreement. This element of the order would seem to automatically diminish the damages that Rambus could be awarded in any ongoing litigation based upon alleged infringement of the patents in question.

The Commissioners also imposed an oversight condition that echoes the intent, but does not replicate the specifics, of the Dell consent decree. Under this section of Commission’s order, Rambus must in the future not only make complete disclosure of all relevant patents when and as required by the rules of any standard setting organization in which it participates, but it must “employ a Commission-approved compliance officer to ensure disclosure of intellectual property rights to standard-setting organizations and to verify the accuracy of Rambus’s periodic reports to the Commission,” as well as keep records of its participation that can be audited by the Commission to monitor Rambus’ compliance with the order.

Unlike the decision this summer, which was unanimous, the new opinion was supported by only three out of the five Commissioners (Commissioners Pamela Jones Harbour and J. Thomas Rosch concurred in part and dissented in part; each also issued a separate opinion).

Those looking to future holdings by the FTC should note well that both of the dissenting Commissioners would have imposed more stringent penalties than the majority. In his dissent, Commissioner Rosch stated his belief that Rambus should have been barred from receiving any royalties at all. To do otherwise, he stated, would enable Rambus to "continue to reap the fruits of its ongoing violation of Section 2." Commissioner Harbour reached the same result, observing "I also dissent [because] I do not believe the remedy adopted by the majority goes far enough to restore competition."

What happens next? Rambus has announced that it will appeal the Commissioner's order, which otherwise would take effect in 60 days time.

Independent of any appeal by Rambus, Mondays' decision is not the final word in the broader context of its liability. Judges in the ongoing litigation between Rambus and the memory manufacturers may perhaps find the dissenting opinions of Commissioners Rosch and Harbour to be more persuasive. And future standard setting participants might find that odds of 3-2 do not appear attractive at all, especially after the substantial costs of litigation already incurred by Rambus are taken into account.

The FTC press release can be found [here](#). Copies of the Commission's opinion and order, the Commissioners' separate statements and the other legal documents associated with this case are available from the [FTC Website](#) and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

The press release issued by Rambus can be found [here](#).

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