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IPR UPDATE

FTC LOSES FIRST ROUND TO RAMBUS

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Long-time readers of the **CSB** will be well aware that we have followed the saga of chip technology licensing company Rambus closely. Since our last issue, Rambus has won (again) in its ongoing, ten year old battle to assert patent claims against those that implement certain SDRAM standards. This time, Rambus defeated the Federal Trade Commission (FTC) in the first round of the government agency's effort to sanction the licensing company for its behavior in the JEDEC committee that created those standards. The action began on June 19, 2002, when the FTC filed a complaint against Rambus, charging the technology company with "deliberately engaging in a pattern of anticompetitive acts and practices that served to deceive an industry-wide standard-setting organization, resulting in adverse effects on competition and consumers."

First-hand observers of the trial held last summer before Administrative Law Judge (ALJ) Stephen J. McGuire were not optimistic about the outcome of the trial, and with good reason: on February 17, McGuire dismissed the government's complaint. And, in a 348 page opinion released a week later, the judge resoundingly rejected the FTC's case on every count.

In the decision, the ALJ summarized the questions at issue as follows:

- whether Rambus engaged in a pattern of deceptive, exclusionary conduct by subverting an open standards process
- whether Rambus used that conduct to capture a monopoly in technology-related markets
- whether Rambus' conduct violated antitrust law
- whether Rambus' conduct resulted in anticompetitive injury

Judge McGuire then answered each question with a definitive "no." Perhaps the holding that dismayed observers the most was the ALJ's conclusion that the JEDEC policy merely encouraged, rather than required, early disclosure by participants in the standard setting process. Given that threshold determination, much of the rest of the decision became inevitable.

FTC Complaint Counsel Geoffrey Oliver filed a motion on March 1 to appeal the ALJ's decision to the FTC Commissioners. The initial due date for briefs supporting the appeal was March 26, but on March 19, the FTC awarded an extension until April 16. Once those briefs are filed, it is likely to be a long wait before the Commissioners announce a decision. If their verdict is the same as McGuire's, it will be bad news for the defendants in the various law suits still outstanding between Rambus and those chip vendors that still refuse to pay royalties.

And it will be worse news for the integrity of the standard setting process, where it will appear to some that there is more to be gained by gaming, than by abiding by the rules.

Note: The host of this site, Gesmer Updegrove LLP, filed pro bono "friend of the court" briefs in the earlier case of *Infinion v. Rambus* with both the Federal Circuit and the United States Supreme Court. The latter brief was supported by five accredited standard setting organizations and six consortia, representing over 8,600 companies, universities and government agencies. We will be filing a new brief,

based on the Supreme Court brief, in support of the FTC. The Supreme Court brief, and the full list of SSOs that supported it, may be viewed at http://www.consortiuminfo.org/news/Rambus_Amicus_Brief.pdf

If your organization or company is interested in supporting this brief, please contact Updegrove@consortiuminfo.org. There is no charge to participate, as Gesmer Updegrove will be filing the brief on a pro bono basis.

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