

UPDATE

RAMBUS AND INFINEON SAY "ENOUGH"

Andrew Updegrove

Throwing in the towel: After years of dramatic victories and defeats on both sides (and the expenditure of tens of millions of dollars in legal costs), Rambus Inc. and Infineon Technologies buried the hatchet this week, announcing a settlement of all infringement and antitrust claims between the two combatants. The settlement comes on the heels of a serious defeat for Rambus three weeks ago, when a Federal judge in Virginia threw out the infringement suit originally brought by Rambus against Infineon in 2000. This reversal would have guaranteed the continuation of the battle for years to come.

While all of the terms of the settlement were not disclosed, those that were announced outlined an involved licensing arrangement that extended well beyond the patent claims immediately at issue. For its part, Infineon will pay Rambus U.S. \$5.85 million per quarter for nine quarters, commencing on November 15 of this year. If (but only if) Rambus is successful in achieving settlements in related litigation with Hynix Semiconductors and Micron Technologies, Infineon would make up to \$100 million in additional payments.

Rambus in turn would license not only the patents originally at issue, but other existing and future patents, including those relating to generations of semiconductors (referred to as DDR2 and DDR3) that are still under development. Infineon would also be granted "most favored customer" status, which usually means that if any other Rambus customer achieves better licensing terms, those secured by Infineon would immediately adjust to reap the same advantage. Rambus would also drop its charges against Infineon in a concurrent antitrust suit that it brought last year against Micron, Hynix and Siemens, as well as against Infineon (Siemens is the former parent company of Infineon).

Who won? As in much litigation, the best answer may be that no one did. In one sense, the litigation was simply the grotesquely expensive negotiation of a comprehensive vendor-customer relationship. But as regards the actual dispute, the early consensus is that Infineon came away from the experience far better off than did Rambus.

The indications leading to that conclusion include the fact that estimates of the royalties that Infineon might have owed for its past infringement of the patents at issue ranged from \$202 to \$269 million *per year*, while the settlement calls for no immediate payment for past infringement, and only \$23.4 million per year on a going forward basis for the use of not only the patents at issue, but additional patents as well.

The stock markets seem to agree. Rambus, a favorite of day traders due to the high theoretical value of Rambus' patent portfolio and the huge swings in its stock price occasioned by its day to day fortunes in court, shot up over 30% on release of the news of the settlement, but as of the close of trading the next day had lost half of that gain, slumping back to \$15.65 per share. That price was significantly lower than its price of only a month before, and at the bottom end of its 52 week trading range of \$12.34 to \$29.69. It also announced that it had lowered its expectations, due to lower sales and higher than expected litigation costs.

Infineon's stock price, conversely, dropped only .06% on the news, and as of yesterday's close was basically unchanged at \$9.53 (which was also at the low end of its narrower 52 week trading range of \$8.92 - 15.76).

What happens next? While Rambus' battle against Infineon is now over, its related suits against Micron and Hynix continue. Those cases had taken a back seat to the Infineon litigation, since most of the facts at issue, all arising in the JEDEC standard setting process, were the same. On the one hand, while Infineon will now be producing revenue for Rambus, that revenue does not begin to flow until the end of this year, while the Hynix trial is scheduled to commence in June, and the Micron case is due to go to trial in February of next year. Both will require expensive legal preparation. Consequently, the Infineon payments are not currently available to fund a substantial portion of the litigation costs involving the upcoming trial involving the other two companies.

At the same time, Rambus will be under pressure to secure settlements with each of these two companies in order to secure up to another \$100 million from Infineon -- and Hynix and Micron will know that, as well as the fact that Rambus will need to fund a "two front" legal war, while each of these two larger companies will only have to fund one battle. Given the fact that Rambus' business has generated no free cash for two years, it makes sense for Rambus to wrap things up now if it can.

While every lawsuit has different odds, since it plays out before different judges and juries, suits that are based upon the same facts do have a track record that helps establish the odds of success or failure for both sides. Having shown its hand to Micron and Hynix in its settlement with Infineon, and protestations by its CEO and spokesperson to the contrary, the rough parameters for settlements acceptable to Rambus have now been disclosed.

Collateral damage: And what of the standard setting process, the stage upon which the essential actions of this drama originally played out? The balance sheet goes something like this:

In the plus column: Consortia now have much more detailed intellectual property (IPR) policies. These policies not only have much clearer rules and choices than previously, but they are typically supported by much more detailed rules of procedure as well (accredited organizations are still largely living under their historical, high-level rules). Efforts to refine IPR policies still further are ongoing, including a project sponsored by the American Bar Association, which will release model rules and language later this year. Much of this concerted effort is the direct result of the attention that the Rambus dispute received, and especially in reaction to the surprise ruling in favor of Rambus handed down in the Federal Circuit two years ago.

In the negative column: The most serious negative impact of the Rambus saga was a holding by an Administrative Law Judge (ALJ) in the Federal Trade Commission's case against Rambus, which was based upon the same course of conduct that gave rise to the litigation between Rambus, Infineon, and others. In the course of finding in favor of Rambus on all counts, the judge held that there is no duty of good faith between participants in a standard setting process.

Given the fact that the rules that companies large and small have been able to agree upon in standard setting organizations still leave ample room for game playing, this represents a serious weakness in the standard setting infrastructure. The ALJ's decision has been appealed to the commissioners of the FTC, who have already reviewed the record and held two days of hearings. A final decision is expected to issue later this year.

Summary: The landmark litigation between Rambus and Infineon, and the related proceedings before the FTC, have dramatically raised awareness in the industry over the proper way to manage IPR issues in the standard setting process. Raising that awareness has been a good thing. But the issues identified have not yet found optimal solutions. As a result, the standard setting system remains vulnerable to abuse, and the courts have proven to be an unreliable ally in filling this gap. Work therefore remains to be done to shore up the standard setting system, whether by further refinement of IPR policies, legislative action, or both.

Comments? updegrove@consortiuminfo.org

Copyright 2005 Andrew Updegrove

To follow the history of the Rambus case, see the following chronological articles from the CSB:

- February, 2003:* Rambus - Hard Cases Make Bad Law
www.consortiuminfo.org/bulletins/feb03.php#editorial
- What Does Rambus Mean To You?
www.consortiuminfo.org/bulletins/feb03.php#featured
- March, 2003:* UPDATE: It May Not Be Over Yet
www.consortiuminfo.org/bulletins/mar03.php#rambus
- April, 2003:* UPDATE: The Stage Shifts to the FTC
www.consortiuminfo.org/bulletins/apr03.php#rambus
- June, 2003:* Shareholder Suit Against Rambus Dropped While FTC Trial Continues
www.consortiuminfo.org/bulletins/jun03.php#u1
- October, 2003:* Supreme Court says "No Dice" to Infineon
www.consortiuminfo.org/bulletins/oct03.php#ru
- March 2004:* FTC Loses Round One To Rambus
www.consortiuminfo.org/bulletins/mar04.php#ipr
- April, 2004:* FTC Appeals Rambus (With a Little Help From its Friends)
www.consortiuminfo.org/bulletins/apr04.php#ipr
- May, 2004:* RMBS And (Another) Dark Side of the Internet
www.consortiuminfo.org/bulletins/may04.php#blog
-