

Standards Today

A Journal of News, Ideas and Analysis

A publication of
**CONSORTIUM
INFO.ORG**
GesmerUpdegrove^{LLP}

June–July 2009

Vol. VIII, No. 4

RAMBUS UPDATE:

The EC Settlement: Rambus, Writs and the Rule of Law

Andrew Updegrove

Why did perennial litigant Rambus, Inc. settle with the European Commission?



Certainly the most watched standards-related legal conflict of the decade involves the participation of memory technology vendor Rambus, Inc. in a working group hosted by standards developer Joint Electron Device Engineering Council (JEDEC) in the early 1990s. The fame (or notoriety) of the conflict arises in part from the importance of the conduct at issue (did Rambus set a "patent trap" for implementers of the standard that emerged from the working group?), and in part from the seemingly endless string of law suits that resulted from that conduct some fifteen years ago.

Most of these suits were brought by Rambus against vendors that refused to pay royalties when they implemented the standard, but these suits almost always resulted in vigorous counterclaims against Rambus, brought by those same implementers. Investigations into Rambus's conduct were also brought by the Federal Trade Commission (FTC) in the United States, and by the European Commission in the European Union. A separate string of cases related to alleged price fixing and other improper conduct by several vendors that participated in the same JEDEC working group (these were the same companies that refused to pay royalties to Rambus). These charges ended with the vendors paying record settlement amounts to the regulators. Needless to say, neither Rambus, nor those that it sued for royalties, had much to be proud of.

In the course of these many suits, investigations and appeals, Rambus has sometimes won, and sometimes lost. But every time it lost, it fought on - sometimes through multiple levels of appeal - until it ultimately prevailed.

That is, until now. On June 11, Rambus and the European Commission announced that they had reached tentative agreement on a settlement of the investigation that the EC had opened in August of 2007. In form, the settlement agreed upon is

similar to the (later overturned) restrictions levied upon Rambus by the FTC. That is, Rambus agreed to forward-looking caps on the amount of licensing royalties that it will be permitted to charge for the right to implement the JEDEC standard in question.

But why, you may ask, has Rambus finally decided to settle rather than fight on in a case that involves the same conduct that it has so vigorously defended before? That is indeed an excellent question, and I'll try and answer it as best I can in this entry.

What just happened: First, let's take a look at the facts. A [press release](#) issued by the EC when it opened its investigation stated in part as follows:

The [Statement of Objections issued by the EC] outlines the Commission's preliminary view that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patents which it later claimed were relevant to the adopted standard. This type of behaviour is known as a "patent ambush". Against this background, the Commission provisionally considers that Rambus breached the EC Treaty's rules on abuse of a dominant market position (Article 82) by subsequently claiming unreasonable royalties for the use of those relevant patents. The Commission's preliminary view is that without its "patent ambush", Rambus would not have been able to charge the royalty rates it currently does.

This is the first time that the Commission is dealing with a "patent ambush" under EC antitrust law, but the approach reflects well-established general case-law under Article 82 of the Treaty.

Comparatively little was heard about the EC investigation after this announcement. Meanwhile, the FTC was nearing the end of the process of losing, then winning, then ultimately losing again in its efforts to punish Rambus for what it viewed as violations of U.S. antitrust laws (you can read an overview of the FTC's efforts involving Rambus [here](#)).

The FTC's road ultimately came to a dead end just this spring, when the Supreme Court refused to review the final appellate decision that had found in favor of Rambus

The FTC's road ultimately came to a dead end just this spring, when the Supreme Court refused to review the final appellate decision that had found in favor of Rambus.

Rambus seemed to then be in the clear. But two weeks ago, it announced that it had entered into a tentative settlement agreement with the EC. The EC followed with a public statement the next day, calling for public comment on the terms of the agreement (the full text of both announcements appears at the end of this blog entry). Each side confirmed the following basic facts:

- As is usual in a settlement, there is no finding of guilt or innocence

- In exchange for the EC terminating its investigation, Rambus agrees to certain restrictions on its ability to profit from certain patent claims that would be infringed by implementation of the JEDEC standard.
- Interested parties will have one month to offer comments on whether the terms of the proposed settlement are appropriate. After the comment period closes, the EC will decide whether to make the terms of the proposed settlement legally binding on Rambus.

As expected, the two press releases characterize the dynamics of the settlement in different ways, with the EC release including this interesting statement:

Following the Statement of Objections, Rambus proposed commitments to address the Commission's concerns. In particular, Rambus commits during five-years to put a cap on its royalty rates for products compliant with the JEDEC standards.

Certainly proposing a limit on royalties is rather different than having one imposed by legal action. So why did Rambus not take a similar tack with the FTC?

Certainly proposing a limit on royalties is rather different than having one imposed by legal action. So why did Rambus not take a similar tack with the FTC?

EC vs. FTC: For starters, perhaps they did, but settlement negotiations are confidential, and I therefore do not know what Rambus may or may not have been willing to offer the FTC at some

point in time in exchange for a settlement agreement. What we can tell is that the difference in terms between the final FTC judgment (later overturned) and the terms of the tentative settlement agreed upon by the EC and Rambus is rather great. The high level terms of each are as follows:

EC Settlement: According to the Rambus press release, for five years it will offer worldwide licenses with royalty rates not to exceed 1.5% on certain memory designs, while, "Licensees who ship less than 10% of their DRAM products in the older SDR and DDR DRAM types will enjoy a royalty holiday for those older types, subject to compliance with the terms of the license." For SDR memory controllers, the 1.5% rate will drop to 1.0% after April 2010; certain other designs will bear a 2.65% per unit royalty through the same date which will then drop to 2.0%. All royalty rates are applicable to future shipments only. According to the EC release, the settlement terms also include a "'Most-Favoured-Customer' clause which would ensure any future rate reductions would benefit the whole market.

FTC Order: The February 5, 2007 [FTC statement](#) announcing the final limitations that it imposed on Rambus summarized those restrictions as follows:

[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.

At the time of the FTC decision, ZDNet.com.uk [reported](#) that Rambus was charging a royalty of 3.5% per unit for DDR SDRAM, and that industry norms would have indicated that a 1% royalty would be the market rate in a non-monopoly setting.

While the two sets of restrictions are impossible to compare closely on an "apples to apples" basis, as the devices covered, time periods, and other details vary from one to the other, the EC restrictions are certainly less punishing than those that the FTC sought to impose. Clearly, then, the risk/reward analysis that would determine fighting versus settling with the EC may have been quite different than what Rambus faced with the FTC. But then again, maybe not, since the FTC may have offered to settle on more generous terms than it required after needing to go to the burden of taking Rambus to court.

While Rambus lost in the U.S., it has now agreed with the EC to provide licenses at reduced rates not only with respect to sales within the European Union, but throughout the world. So where the FTC failed, the EC has now succeeded, albeit on less restrictive terms

At the same time, however, it is important to focus on a single word in the EC release that might easily be missed. That word is "worldwide." In other words, while Rambus lost in the U.S., it has now agreed with the EC to provide licenses at reduced rates not only with respect to sales within the European Union, but throughout the world. So where the FTC failed, the EC has now succeeded, albeit on less restrictive terms.

Choice of law, jurisdiction and venue: In all likelihood, Rambus took a variety of factors into account in deciding whether a settlement with the EC at this time, and on these terms, was a smart move. It should be recalled, for example, that with each passing year, the Rambus patent claims grow closer to their expiration dates, and competing technologies continue to be developed. In other words, patent claims are depreciating assets, and the later in their useful life a settlement occurs, the less the patent owner gives away. Similarly, with this decision, its own licensing efforts may be more successful, and it can spend less money in litigation with vendors if those vendors find the EC-dictated terms to be good enough.

Perhaps the most important factor to be taken into account, however, is that the competition laws in the EU are quite different from the antitrust rules and case law that apply in the United States. This distinction between the rules, laws and precedents that may apply to the same set of facts from country to country, from state to state, between federal and state courts, and even between federal courts, has often been lost on those that have cited one decision over another to support their beliefs about whether Rambus should or should not be held liable for its actions in JEDEC.

Under the English common law system that the U.S. and many other nations follow, someone cannot ordinarily be held accountable for behavior unless that behavior violates written law, as interpreted in the courts (whenever relevant cases are available). Under this legal system, it is not enough for conduct to be simply unfair or "inequitable," even if the predominant public perception is that an actual wrong has occurred. Instead, the legal system places a higher value on protecting the individual (or, in this case, a business) from judgments that may not only come as a surprise, but may seem to have been arbitrary in the absence of a statute for reference clearly defining the type of conduct that a legislature has made illegal.

In the case of the FTC, an additional set of limitations was at play, since most of the more logical causes of action that might be asserted against Rambus (e.g., breach of contract, fraud, etc.) were not available to the FTC to assert. Instead, it needed to find a cause of action under the antitrust laws enacted in the United States. This presented a more difficult avenue to pursue, as the arguments to be made were more attenuated, and the legal precedents available to the FTC to support its position under existing cases was less clear.

As famously observed by the eminent jurist F.W. Maitland, "The forms of action we have buried, but they still rule us from their graves."

The situation recalls the system that existed in England prior to the mid 1800s, when actions not only needed to violate specific laws before they could be taken to court, but law suits and prosecutions also needed to be brought under specific formal and rather arbitrary procedures, known as "forms of action." As a result, even if a party had a legal cause of action, unless there was a recognized "form of action," the plaintiff or prosecutor could not obtain the writ needed to bring its grievance before a court.

Unfortunately, the legacy of these forms of action lives on in other variously analogous ways, such as in the concept of "jurisdiction," which determines in what locations and courts a dispute can be brought, and which courts have authority over what types of claims. This can limit the ability of a court to deliver the highly desirable result of achieving finality after each side has had a fair chance to present its case, as well as the need (or opportunity) for litigants to divide a dispute involving one set of facts into different claims brought in different courts. This has in the Rambus cases, where different states have applied different laws, and federal courts have addressed patent law to come to different conclusions. As [famously observed](#) by the eminent jurist [F.W. Maitland](#), "The forms of action we have buried, but they still rule us from their graves."

As noted above, the FTC was not able to utilize all of the causes of action that a private litigant could have brought to bear in pursuit of victory (e.g., contract and fraud claims as well as antitrust claims). This is unfortunate, because private litigants may deem it to be in their best interests to settle a hard case where the law is nonetheless on their side, while a public agency might not. Thus, while a private party may choose to fold its hand due to ongoing legal costs as compared to the economic terms offered by its opponent, a public agency has a different motivation to soldier on, in order not only to right the wrong at hand, but to make

an example of the defendant as well and to set a precedent for future courts to follow.

The Bottom Line: There are other facts that Rambus doubtless took into account as well that vary in time and geography. Both Microsoft and Intel have recently learned to their sorrow that Neelie Kroes, the Commissioner of Competition of the European Commission, has found European courts to be more supportive of her claims than the FTC has found U.S. courts to be theirs.

A decision to fight rather than settle in the EU might therefore have seemed to Rambus to be more problematic than did its decision to take the FTC to the wall.

A decision to fight rather than settle in the EU might therefore have seemed to Rambus to be more problematic than did its decision to take the FTC to the wall. And even the prospect of granting worldwide royalty commitments might seem more palatable with a new administration in Washington that has already publicly stated that antitrust enforcement will be a higher priority than it was under the reign of its predecessor.

Whether the Obama administration will in fact aggressively pursue antitrust claims, and whether the courts will support it if it does, remains to be seen. For now, those that think that individual companies have been able to get away with too much in the marketplace can take heart in their ability to look to Europe to provide aggressive antitrust enforcement in a way that they used to be able to expect from Washington.

And what of the other half of the equation - why did the EC decide to settle on what may seem to be rather generous terms? With the FTC's experience with Rambus already known, perhaps the EC concluded that going as far as the FTC had done was likely to result in a long and drawn out battle. And, as noted by [Bloomberg](#), Neelie Kroes' term in office will come to an end in November. She may be anxious to clean out as much of her docket as she can before she turns over the reins to someone that will be entitled to establish their own prosecutorial priorities.

At the end of the day, it is unlikely that we will ever learn exactly what all went into the decision of Rambus to kneel to Neelie after consistently fending off the FTC. But to the good, and despite the fact that a settlement does not require an actor to admit fault, if the settlement becomes final we will at last have a legal ruling in place that both bends Rambus to the will of civil authority, but also provides some measure of relief to industry from the level of royalties that Rambus has to date required its licensees to pay.

And most importantly, we will finally have an object lesson for others illustrating what may happen as a result of the type of much disputed, incessantly litigated, and certainly regrettable activities that occurred within JEDEC so many years ago.

Copyright 2009 Andrew Updegrove

Sign up for a free subscription to **Standards Today** at

<http://www.consortiuminfo.org/subscribe/2.php?addentry=1>

MEMO /09/273

Brussels, 12 June 2009

Antitrust: Commission Market Tests Commitments Proposed by Rambus Concerning Memory Chips

The European Commission has invited comments from interested parties on commitments offered by microchip designer Rambus to meet concerns that it may have infringed EC Treaty rules on abuse of a dominant position (Article 82) by claiming unreasonable royalties for the use of certain patents for "Dynamic Random Access Memory" chips (DRAMs) (see [MEMO/07/330](#)). Rambus in particular is prepared to commit to put a cap on its royalty rates for the five year duration of these commitments. The cap includes a "Most-Favoured-Customer" clause which would ensure any future rate reductions would benefit the whole market. Interested parties can submit comments within one month from the date of publication. Following the market test, the Commission may decide to adopt a decision under Article 9 (1) of Regulation 1/2003, making the commitments legally binding on Rambus.

On 30 July 2007, the European Commission adopted a Statement of Objections against Rambus, a company incorporated in Delaware, USA. This outlined the Commission's preliminary view that Rambus may have infringed Article 82 of the EC Treaty by abusing a dominant position in the market for Dynamic Random Access Memory (DRAMs). DRAMs are used to temporarily store data in products such as PCs.

JEDEC, an industry-wide standard setting organisation, developed an industry standard for DRAMs. JEDEC-compliant DRAMs represent around 95% of the market and are used in virtually all PCs. Worldwide sales of DRAM chips in 2008 exceeded 34 billion US Dollars. Rambus claims its patents cover technologies included in these JEDEC standards and is asserting these against manufacturers of DRAMS that comply with the JEDEC standard.

The Commission's preliminary view, set out in the Statement of Objections, was that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted

standard. Against this background, the Commission's provisional view, as outlined in the Statement of Objections, was that Rambus was abusing its dominant position by claiming unreasonable royalties for the use of its patents against the JEDEC-compliant DRAM manufacturers at a level which, absent its conduct, it would not have been able to charge.

Following the Statement of Objections, Rambus proposed commitments to address the Commission's concerns. In particular, Rambus commits during five-years to put a cap on its royalty rates for products compliant with the JEDEC standards.

The Commission considers that an effective standard setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation. Standards bodies should be encouraged to design clear rules respecting these principles. However, in a specific case where there appear to be competition concerns, the Commission will investigate and intervene as appropriate.

As required by Article 27 (4) of Regulation 1/2003, a so-called " market test notice" with a summary of the proposed commitments has been published in the EU's Official Journal on 12 June 2009. The full version of the commitments is available on the Commission's website at:
<http://ec.europa.eu/comm/competition/antitrust/cases>.

Interested parties are invited to present their comments within one month of the publication in Official Journal .

Under Article 9 of Regulation 1/2003, the Commission may decide to make the commitments legally binding on Rambus. Such an Article 9 decision would find that there are no longer grounds for action by the Commission, without concluding whether or not there has been or still is an infringement of EC antitrust rules.

Rambus Reaches Tentative Settlement with European Commission

Forward-looking royalty rates established for DRAMs and memory controllers

LOS ALTOS, CALIFORNIA, UNITED STATES -06/11/2009 - Rambus Inc. (NASDAQ:RMBS), one of the world's premier technology licensing companies specializing in high-speed memory architectures, today announced that it has reached a tentative settlement with the European Commission (the "Commission") to resolve the pending case against the Company. Under the proposed resolution, the Commission would make no finding of liability relative to JEDEC-related charges, and no fine would be assessed against Rambus. In addition, Rambus would commit to offer licenses with maximum royalty rates for certain memory types and memory controllers on a forward-going basis. European Commission antitrust procedures stipulate that a final decision must be preceded by a consultation of interested third parties on the terms of the commitments offered (the "Commitment"); this consultation was initiated today.

"Our view regarding standard-setting organizations is that the rules of such organizations must be written and clear, and that there should be consequences if such clear written rules are violated," said Thomas Lavelle, senior vice president and general counsel at Rambus. "We did nothing wrong during our participation in the JEDEC standard-setting organization, as demonstrated in multiple U.S. court victories including before the D.C. Court of Appeals. With this proposed resolution, we create a new platform where all parties can move forward by licensing our patented innovations for future use in their products rather than engaging in costly litigation."

Under the proposed resolution, Rambus will offer licenses with maximum royalty rates for five-year worldwide licenses of 1.5% for DDR2, DDR3, GDDR3 and GDDR4 SDRAM memory types. Licensees who ship less than 10% of their DRAM products in the older SDR and DDR DRAM types will enjoy a royalty holiday for those older types, subject to compliance with the terms of the license. In addition, Rambus will offer licenses with maximum royalty rates for five-year worldwide licenses of 1.5% per unit for SDR memory controllers through April 2010, dropping to 1.0% thereafter, and royalty rates of 2.65% per unit for DDR, DDR2, DDR3, GDDR3 and GDDR4 memory controllers through April 2010, then dropping to 2.0%. This commitment to license at the above rates will be valid for a period of five years from the adoption date of the Commitment decision. All royalty rates are applicable to future shipments only.

Rambus management will discuss this development during a special conference call on Friday, June 12, 2009 at 6:00 a.m. PDT. The call will be webcast and can be accessed through the Rambus website. A replay will be available following the call on Rambus' Investor Relations website or for one week at the following numbers: (888) 203-1112 or (719) 457-0820 with ID# 4179468.

The European Commission originally brought charges against Rambus in August 2007 alleging violation of European Union competition law. The Commission's investigation followed complaints set forth by certain DRAM manufacturers originating with Rambus' 1992-1995 participation in an industry standard-setting organization, the Joint Electron Device Engineering Council ("JEDEC"). Similar charges had been pursued by the Federal Trade Commission (FTC) in the United States. The FTC recently closed its investigation following a series of U.S. Court rulings underlining that the allegations of Rambus' wrongdoing were ill-founded.

About Rambus Inc

Rambus is one of the world's premier technology licensing companies specializing in the invention and design of high-speed memory architectures. Since its founding in 1990, the Company's patented innovations, breakthrough technologies and renowned integration expertise have helped industry-leading chip and system companies bring superior products to market. Rambus' technology and products solve customers' most complex chip and system-level interface challenges enabling unprecedented performance in computing, communications and consumer electronics applications. Rambus licenses both its world-class patent portfolio as well as its family of leadership and industry-standard interface products. Headquartered in Los Altos, California, Rambus has regional offices in North Carolina, India, Germany, Japan, Korea and Taiwan. Additional information is available at www.rambus.com.
