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## Rambus — Gone But Not Forgotten

*Law360, New York (July 07, 2009)* -- On May 14, 2009, the Federal Trade Commission gave up its seven-year fight to establish new standards for standards-setting activities and formally dismissed its complaint against Rambus Inc.

In announcing the commission's decision, Richard A. Feinstein, the FTC's Director of the Bureau of Competition, gamely declared: "The standard-setting issues that were at the heart of this case remain important, both as a matter of antitrust policy and in order to protect consumers, and we will remain vigilant in this area."

The question left hanging is whether the FTC lost the battle but won the war. Did the commission's extended enforcement action against Rambus establish an in terrorem precedent that will frighten away other companies from following the path taken by Rambus in its standards-setting activities?

Let's review the conduct Rambus engaged in and see what all the very expensive fuss was about.

### **Single-Firm Behavior: The Rambus Case**

The Rambus case involved the design of semiconductors used for dynamic random access memory, which most computers use to store and process information while the computer is operating. Rambus develops, secures patents on and licenses technologies to companies that manufacture these sorts of semiconductor memory devices.

Rambus was founded in March 1990 by two professors who wanted to commercialize their concept for a new DRAM design that would break the "memory bottleneck" and speed up memory chips.

For more than four years during the 1990s, Rambus participated as a member of the Joint Electron Device Engineering Council (JEDEC), an industrywide standard-setting organization that operated on a cooperative basis.

JEDEC required that its members participate in good faith and reveal the existence of patents and patent applications that later might be enforced against those practicing the JEDEC standards.

In addition, JEDEC members were obligated to commit to licensing patented technologies on reasonable and nondiscriminatory (“RAND”) terms, before members voted to adopt a standard that would incorporate those technologies. The intent of JEDEC policy and practice was to prevent anti-competitive “holdup.”

Let’s pause for a moment and explain the idea of a patent “holdup.”

When a standard has been set, and as time passes, the industry commits greater levels of resources to developing products that comply with the standard and the costs of switching to alternative technologies rises.

Once switching costs become prohibitive, there is an effective “lock-in” to the standardized technology, which the owner may use to “hold up” the industry by charging supracompetitive rates.

To return to the story, the FTC was of the view that Rambus set about creating a “holdup” by disregarding JEDEC’s rules and its duty to act in good faith.

Rambus, the FTC found, had failed to disclose the existence of its patents and applications and misled members to believe that Rambus was not seeking patents that would cover implementation of the standards under consideration by JEDEC.

It was alleged that Rambus went a step further as a result of its participation in JEDEC and, using information gained about the developing standard, amended its patent applications to ensure that subsequently issued patents would cover the ultimate standard.

Through its successful strategy, the FTC believed, Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in. Only then did Rambus reveal its patents — through patent infringement lawsuits against JEDEC members who practiced the standard.

In 2006, the commission found that Rambus had violated the federal antitrust laws by engaging in a course of deceptive conduct that distorted the technology choices of a standard-setting organization and undermined the ability of the organization’s members to protect themselves against patent “holdup,” thus harming competition and driving up licensing fees to DRAM manufacturers.

In the Matter of Rambus Inc., Docket No. 9302 (Opinion of the commission filed Aug. 2, 2006).

In contrast to earlier standard-setting cases such as Indian Head, Radiant Burners and Hydrolevel, all of which involved conspiracies among competitors, the Rambus case involved single-firm misconduct, and the FTC held that Rambus violated Section 2 of the Sherman Act and Section 5 of the FTC Act, stating that:

By hiding the potential that Rambus would be able to impose royalty obligations of its own choosing, and by silently using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards, Rambus' conduct significantly contributed to JEDEC's choice of Rambus' technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates — which, in turn, significantly contributed to Rambus' acquisition of monopoly power. [FTC Opinion in Rambus, at 118-119.]

Rambus appealed the FTC's decision and, in February 2008, oral argument was held before three judges of the U.S. Court of Appeals for the District of Columbia Circuit in Washington D.C.

Two months later, the panel of judges handed down a stinging reversal of the commission. Unanimously setting aside the commission's orders, the court remanded the case for further proceedings. *Rambus Incorporated v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

The Circuit Court focused on one particular sentence in the FTC's opinion that the court considered to be a fatal concession:

[B]ut for Rambus' deceptive course of conduct, JEDEC either would have excluded Rambus' patented technologies from the JEDEC DRAM standards, or would have demanded RAND assurances [i.e., assurances of "reasonable and nondiscriminatory" license fees], with an opportunity for ex ante licensing negotiations. [522 F.3d at 461, quoting FTC Opinion at 74.]

In the view of the D.C. Circuit panel, if JEDEC might have standardized on the very same technologies without the deception (assuming RAND assurances had been given), then Rambus' alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws.

The court did not view JEDEC's loss of an opportunity to seek favorable RAND licensing terms as an "antitrust" harm.

Because the commission acknowledged that this was one possible outcome of Rambus' conduct, the court held that "the commission failed to demonstrate that Rambus' conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets." 522 F.3d at 467.

The appellate court gave little heed to the FTC's concerns about the effect of deception on the standard-setting process or on the other competitors participating in that process.

The D.C. Circuit panel flatly stated that “an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.” *Id.* at 464.

The commission was understandably concerned by what it viewed as the panel’s failure to recognize the competitive harm that anti-competitive deception causes in the context of industry standard-setting organizations and promptly filed a petition for rehearing before the full Court of Appeals for the D.C. Circuit.

On Aug. 26, 2008, to the surprise of a number of commentators, the Court of Appeals turned down the FTC's petition without issuing an opinion.

Because of its belief that outright deception of the type allegedly practiced in Rambus can undermine the standard setting process, the commission asked the solicitor general to seek certiorari but was turned down.

Thereafter, pursuant to its unique statutory right to act independently, the FTC petitioned the U.S. Supreme Court on its own, seeking review of the appellate court decision. On Feb. 23, 2009, without comment, the high court denied the petition for a writ of certiorari.

After considering its options for three months, the commission announced its decision to drop the case against Rambus on May 14. No doubt one of the factors in its decision was the highly negative remarks made by the D.C. Circuit panel about the likelihood of success on remand.

The panel had seemed to go out of its way to express “serious concerns about the strength of the evidence relied on to support some of the commission's crucial findings regarding the scope of JEDEC’s patent disclosure policies and Rambus’ alleged violation of those policies.” 522 F.3d at 467.

## **Conclusion: Using Deception in Standard-Setting Remains Risky**

Even though the FTC’s case against Rambus ended in a loss for the government, the moral of the story cannot have been lost on participants in technical standard-setting organizations like JEDEC: engaging in deceptive conduct of the sort allegedly employed by Rambus is dangerous, expensive and without assurance of an ultimately happy ending.

It is possible that future participants in standard-setting activities will feel they can now employ deception to their own advantage without fear of antitrust liability, but, if one takes it at its word, the commission fully intends to “remain vigilant in this area.”

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