

PUBLIC RECORD VERSION

In the Matter of Rambus, Inc.
Docket No. 9302

OPINION OF THE COMMISSION

By HARBOUR, Commissioner, for a unanimous Commission.

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I. INTRODUCTION¹

Rambus Inc. is a developer and licensor of computer memory technologies. 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 (SSO) that operated on a cooperative basis. Through a course of deceptive conduct, Rambus exploited its participation in JEDEC to obtain patents that would cover technologies incorporated into now-ubiquitous JEDEC memory standards, without revealing its patent position to other JEDEC members. As a result, Rambus was able to distort the standard-setting process and engage in anticompetitive “hold up” of the computer memory industry. Conduct of this sort has grave implications for competition. The Federal Trade Commission (FTC or Commission) finds that Rambus’s acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act.

Standard setting occurs in many industries and can be highly beneficial to consumers. Standards can facilitate interoperability among products supplied by different firms, which typically increases the chances of market acceptance, makes the products more valuable to consumers, and stimulates output. But standard setting also poses some risks of harm to competition. By its very nature, standard setting displaces the competitive process through which the purchasing decisions of customers determine which interoperable combinations of technologies and products will survive.

Typically, the procompetitive benefits of standard setting outweigh the loss of market competition. For this reason, antitrust enforcement has shown a high degree of acceptance of, and tolerance for, standard-setting activities. But when a firm engages in exclusionary conduct that subverts the standard-setting process and leads to the acquisition of monopoly power, the procompetitive benefits of standard setting cannot be fully realized.

¹ This opinion uses the following abbreviations:

- CA - Complaint Counsel’s Appendix
- CE - Order Granting Complaint Counsel’s Motion for Collateral Estoppel
- CCAB - Complaint Counsel’s Appeal Brief
- CCRB - Complaint Counsel’s Reply Brief
- CX - Complaint Counsel’s Exhibit
- DX - Demonstrative Exhibit
- ID - Initial Decision of the Administrative Law Judge (ALJ)
- IDF - Numbered Findings of Fact in the ALJ’s Initial Opinion
- JX - Joint Exhibits
- RA - Respondent’s Appendix
- RB - Respondent’s Brief on Appeal and Cross-Appeal
- RFF - Respondent’s Proposed Findings of Fact
- RRB - Respondent’s Rebuttal Brief
- RX - Respondent’s Exhibit
- Tr. - Transcript of Trial before the ALJ.

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At the beginning of a standard-setting process, if there are a number of competing technologies, and if any one of them could win the standards battle, then no single technology will command more than a competitive price. Once the standard has been set, however, the dynamic changes. Soon after a standard is adopted, industry participants likely will start designing, testing, and producing goods that conform to the standard. Early in the process of implementing a standard, industry members still might find it relatively easy to abandon one technology in favor of another. But as time passes, and the industry commits greater levels of resources to developing products that comply with the standard, the costs of switching to alternative technologies begin to rise. Industry members may find themselves “locked in” to the standardized technology once switching costs become prohibitive. Once lock-in occurs, the owner of the standardized technology may be able to “hold up” the industry and charge supracompetitive rates.

Many SSOs have taken steps to mitigate the risk of hold-up by avoiding unknowing lock-in to a technology that may command supracompetitive rates. Many SSOs, for example, require their members to reveal any patents and/or patent applications that relate to the standard. These types of disclosures enable SSO members to evaluate potential standards with more complete information about the likely consequences, before the standard is finalized. Some SSOs also require members to commit to license their patented technologies on reasonable and nondiscriminatory (RAND) terms, which may further inform SSO members’ analysis of the costs and benefits of standardizing patented technologies.

JEDEC operated on a cooperative basis and required that its members participate in good faith. According to JEDEC policy and practice, members were expected to 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 offer assurances to license patented technologies on RAND terms, before members voted to adopt a standard that would incorporate those technologies. The intent of JEDEC policy and practice was to prevent anticompetitive hold-up.

Rambus, however, chose to disregard JEDEC’s policy and practice, as well as the duty to act in good faith. Instead, Rambus deceived the other JEDEC members. Rambus capitalized on JEDEC’s policy and practice – and also on the expectations of the JEDEC members – in several ways. Rambus refused to disclose the existence of its patents and applications, which deprived JEDEC members of critical information as they worked to evaluate potential standards. Rambus took additional actions that misled members to believe that Rambus was not seeking patents that would cover implementations of the standards under consideration by JEDEC. Rambus also went a step further: through its participation in JEDEC, Rambus gained information about the pending standard, and then amended its patent applications to ensure that subsequently-issued patents would cover the ultimate standard. Through its successful strategy, Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market

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any particular case typically will vary, depending on the spoliating party's degree of fault as well as the extent to which the other party is prejudiced.⁶⁴⁵

In the present case, we need not resolve whether Rambus engaged in spoliation because the record shows, by a preponderance of the evidence, that Rambus engaged in exclusionary conduct. Our findings stand firmly on the evidence that has survived. No remedy for the alleged spoliation is necessary, and we therefore do not undertake the inquiry required to resolve the spoliation issue.⁶⁴⁶

We stress, however, that Rambus's extensive document destruction campaign had the potential to deny the Commission an opportunity to examine thoroughly Rambus's conduct. In some instances, the Commission has relied on evidence that was preserved only fortuitously.⁶⁴⁷ If the record in this case had been marginal, while simultaneously containing evidence that Rambus had destroyed potentially relevant documents, we would have pursued the spoliation inquiry to its conclusion and, if appropriate, imposed a remedy. The Commission has a broad range of remedies available to address spoliation, ranging from drawing adverse inferences to ordering that a proceeding be decided against the spoliating party. If spoliation were proven in a future case, the Commission would not hesitate to impose warranted sanctions, in keeping with its fundamental interest in preserving the integrity of its administrative proceedings.

VI. CONCLUSION

We find that Rambus engaged in exclusionary conduct that significantly contributed to its acquisition of monopoly power in four related markets. 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's conduct significantly contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future

⁶⁴⁵ See *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994).

⁶⁴⁶ Accordingly, Complaint Counsel's pending motion for sanctions is denied. Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (Aug. 10, 2005), available at <http://www.ftc.gov/os/adjpro/d9302/050810ccmosanctions.pdf>.

⁶⁴⁷ For example, the only sources of Crisp's JEDEC-related e-mails were a hard drive found in Crisp's attic, see CX 5075 at 3-5 (deposition transcript at 296-302) (Crisp 2004 *Infineon* Dep.), and an old Rambus server that Crisp had used to transfer e-mails between his Macintosh and PC office computers. See Crisp, Tr. 3572-76, 3588-92; CX 5078 at 14 (trial transcript at 124). Likewise, although Rambus's outside patent counsel, Vincent, destroyed most of his Rambus-related files, he retained certain relevant correspondence in his personal files. See CX 5066 (designated GCWF 3448). In addition, records that Rambus failed to produce in the normal course of discovery were retrieved from corrupted back-up files in the subsequent *Hynix* litigation, and the Commission was able to add this evidence to this proceeding's record on appeal. See CX 5100-16; see also *supra* Section II.B.

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royalty rates – which, in turn, significantly contributed to Rambus’s acquisition of monopoly power.

Rambus claims that the superiority of its patented technologies was responsible for their inclusion in JEDEC’s DRAM standards. These claims are not established by the record. Nor does the record support Rambus’s argument that, even after two JEDEC standards were adopted and substantial switching costs had accrued, JEDEC and its participants were not locked into the standards. Rambus now claims that we can and should blind ourselves to the link between its conduct and JEDEC’s adoption of the SDRAM and DDR SDRAM standards, as well as to the link between JEDEC’s standard-setting process and Rambus’s acquisition of monopoly power. These claims fail, both as a matter of fact and as a matter of law. To hold otherwise would be to allow Rambus to exercise monopoly power gained through exclusionary conduct. We cannot abide that result, given the substantial competitive harm that Rambus’s course of deceptive conduct has inflicted.

VII. REMEDY

Complaint Counsel seek an order preventing Rambus from enforcing, against JEDEC-compliant products, (1) any patents that claim priority based on applications filed before Rambus withdrew from JEDEC and (2) any existing licensing agreements.⁶⁴⁸ Rambus argues that the Commission lacks authority to impose such a remedy and that the royalty rates set by its existing licenses already satisfy all remedial concerns.⁶⁴⁹

Both parties’ arguments regarding remedy have been scant and, for the most part, reflective of opposing extremes.⁶⁵⁰ Now that the Commission has found, and determined the scope of, liability, the Commission believes it would exercise its broad remedial powers most responsibly after additional briefing and, if necessary, oral argument devoted specifically to remedial issues.

The accompanying order establishes a briefing schedule. The parties’ written presentations directed by the accompanying order will be confined to remedy; re-argument of issues of liability will not be permitted in those presentations. The Commission is most interested in the parties’ views regarding possibilities for establishing reasonable royalty rates for JEDEC-compliant products affected by Rambus’s exclusionary conduct. The parties should

⁶⁴⁸ CCAB at Attachment 2; CCRB at 95-100.

⁶⁴⁹ RB at 128-33.

⁶⁵⁰ *See generally* United States v. National Lead Co., 332 U.S. 319 (1947) (rejecting the imposition of compulsory, royalty-free licenses when they were not “necessary in order to enforce effectively the Anti-Trust Act,” and finding that “licenses at uniform, reasonable royalties” would be sufficient to accomplish the discontinuance and prevention of the illegal restraints). For discussion of Rambus’s existing royalty rates, *see supra* Section IV.C.4.

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address, without limitation: (1) means for the Commission to determine, based on the existing record, reasonable royalty rates for licensing all technologies applicable to JEDEC-compliant products and covered by relevant Rambus patents; (2) alternative mechanisms and procedures for determining reasonable royalty rates, such as an independent arbitrator, a special master, or an ALJ; (3) qualitative characteristics descriptive of appropriate relief, against which specific royalty proposals might be evaluated; and (4) appropriate injunctive and other provisions that should be incorporated in the Final Order in this proceeding.