

# Rambus v. FTC: Memory Chip Pioneer Rambus Rescued a Second Time From the Quicksand of Standards Setting

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In an opinion dated April 22, 2008, the Circuit Court of Appeals for the District of Columbia cleared Rambus from a finding by the Federal Trade Commission (FTC) that Rambus violated the antitrust laws in failing to disclose fully its patent position when it participated in standard setting by an industry organization.

Companies that pioneer important technology often participate in industry standard-setting organizations, but there are tough rules for such participation. When the pioneering company is found to violate the rules, it risks having its patents subject to lower than desired royalties, being licensed for free, or even invalidated, in addition to risking liability for antitrust violations.

In this case, Rambus pioneered the development of synchronous DRAM (a type of memory chip used in computers) and eventually was able to charge hefty royalties for licenses to its technology. Rambus participated for a number of years in a standard setting organization initially called the Joint Electron Device Engineering Council ("JEDEC") – then a part of what is now called the Electronics Industries Alliance ("EIA"). Using an approach to nomenclature only an electronics engineer could love, the organization became a trade association affiliated with EIA and is now known as the "JEDEC Solid State Technology Association." After Rambus left JEDEC, it began licensing and enforcing its patents, which covered standards that JEDEC adopted, one standard adopted while Rambus was a member and another standard adopted later.

The FTC then instituted proceedings against Rambus under the antitrust laws on the grounds that Rambus broke JEDEC's rules requiring Rambus to tell the complete story to JEDEC about the Rambus patent position when Rambus participated in JEDEC. The FTC opinion held that but for Rambus's deceptive behavior, JEDEC would have either (1) excluded Rambus technology from the standards or (2) demanded assurances from Rambus that Rambus would license the industry on

"reasonable and non-discriminatory" (RAND) terms. The FTC was not more specific; the deceptive behavior caused the occurrence of either (1) exclusion of Rambus technology from the standards or (2) failure to demand RAND assurances.

The DC Circuit Court, in a precisely crafted decision, faulted the FTC's logic. There can be no antitrust violation for behavior that does not have an anticompetitive structural effect, said the DC Circuit court. If the FTC had solid evidence that JEDEC would have excluded the Rambus technology from its standards but for Rambus's deceptive behavior, then the FTC could prove an anticompetitive structural effect. Not so, however, if Rambus's deceptive behavior merely prevented the standards organization from demanding assurances of RAND licensing terms. The RAND assurances would reduce the royalties the industry would pay, but they would not affect use by competitors of other technology – under this scenario Rambus might be a price gouger, but use of competitive technology would not have been affected.

Amazingly, before the decision of the DC Circuit Court, the Rambus-JEDEC saga was already the subject of a 2003 decision by a sister appeals court, the Federal Circuit Court, in the case of *Rambus v. Infineon Technologies AG*, 318 F.3d 1081 (Fed. Cir. 2003). The Federal Circuit, among other things, reversed a finding that Rambus's conduct in participating in JEDEC amounted to fraud. The DC Circuit Court favorably quoted the Federal Circuit Court to the effect that "JEDEC's patent disclosure policies suffered from 'a staggering lack of defining details.'" Thus Rambus twice escaped from the same quagmire of standard setting with JEDEC.

There is more to this story. The FTC's brief had quoted favorably from *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), involving one of numerous battles between Broadcom and Qualcomm. In this opinion, the Third Circuit Court of Appeals, quoting the FTC's *Rambus* decision, held that, where a patent holder participating in a

standards organization deceptively promises to license essential proprietary technology on RAND terms, the standards organization then relies on that promise in including the technology in a standard, and the patent holder then breaches that promise, the patent holder's conduct is an actionable violation of the antitrust laws. The DC Circuit in the *Rambus* case had no kind words for the Third Circuit's decision, and suggested that it may be inconsistent with Supreme Court precedent, including *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

The Rambus saga is a warning to pioneering companies thinking of participating in standard setting: be prepared to license your technology on reasonable and non-discriminatory terms, and fully disclose your patent position and intentions, failing which you can be burned. The alternative is to stay out of standards setting altogether, and these risks can be avoided. But sometimes, you might get lucky. ✧