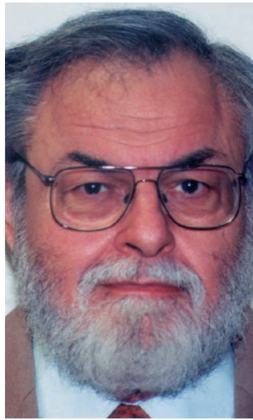

Another update on standardization skullduggery

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This is an update on the May-June and July-August Micro Law columns on recent abuse of the standard-setting process. On 9 August, the trial judge entered about 200 pages of final orders and opinions in the case. The next day, Rambus filed a notice of appeal to the US court of appeals for the Federal Circuit, which will probably take at least a year to dispose of the appeal case. Barring the unexpected, this should be the last you hear about this particular episode of standardization skullduggery for a long time. However, there seems to be no let-up in standardization skullduggery by others (see the "Unocal accused of skullduggery" sidebar).

As you may recall, a jury in Richmond, Virginia, found that Rambus, with the aid of a mysterious informant designated Secret Squirrel, defrauded the JEDEC Solid State Technology Association (formerly the Joint Electronic Devices Engineering Council—see http://www.jedec.org/Home/about_jedec.htm) and the dynamic RAM industry. Infineon had alleged that Rambus manipulated its claims in pending patent applications to cover the evolving JEDEC standards on single-data-rate (SDR) and double-data-rate (DDR) synchronous dynamic RAM (SDRAM) chips. After JEDEC issued the patents and published the standards, Rambus demanded that SDRAM manufacturers take high-priced licenses under the patents. Patent infringement litigation followed when three manufacturers (Infineon, Micron, and Hyundai) refused to take licenses. Infineon's case went to trial first, which led to the fraud verdict. Rambus filed papers with the court explaining why it was not guilty of fraud and asking the court to overturn the verdict and enter in its favor a judgment as a matter of law (JMOL). A JMOL is a judgment that a court enters to overturn a jury verdict because the court believes that no reasonable jury could have reached such a verdict.

Infineon gets another $7 million

The judge in the Richmond district court accepted some of Rambus' arguments but rejected most of them. He accepted the fraud verdict ($3.5 million, reduced to $350,000 under a state law capping punitive damages) on more limited grounds and, thus, denied the motion for a JMOL. He then awarded Infineon an additional $7

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million for attorney fees. Finally, he enjoined further infringement suits by Rambus against Infineon, under US patents covering SDRAM technology and products compliant with the 1995 JEDEC SDR SDRAM standard. However, he did not enjoin suits under foreign patents—thus letting a German patent infringement suit continue—nor did he enjoin suits under patents covering only DDR SDRAM technology.

The most interesting aspects of the court's opinions and orders are those affecting DDR SDRAMs and Secret Squirrel. JEDEC published its SDR SDRAM standard in 1995. Rambus quit JEDEC in 1996, to avoid the effect of JEDEC's patent policy requiring reasonable-royalty licenses. JEDEC's final DDR SDRAM standard did not issue until June 2000.

Rambus argued that it was not bound by JEDEC's patent policy in connection with any SDRAMs. As to SDR SDRAMs, Rambus said JEDEC's policy covered only *issued* patents but not patent *applications* while Rambus still belonged to JEDEC. As to DDR SDRAMs, Rambus argued that it quit JEDEC before serious work on that standard began. Infineon argued that the JEDEC working group discussed the concepts of the DDR standard before Rambus quit JEDEC in 1995, and that afterward Secret Squirrel told Rambus about the content of this standard.

Rambus wins case on one of two SDRAM standards

The main legal criterion for granting a JMOL motion is whether the jury had before it "substantial evidence" on which it could arrive at its verdict in favor of the prevailing party. (This assumes the jury received a legally correct *charge*, or set of instructions. If the jury received an incorrect charge that could have misled it, the verdict might be tainted.)

Here, the district court judge concluded that he did not make any legal mistakes. He also found that the jury had substantial evidence on which to conclude that JEDEC's members (including Rambus) understood well before 1995 that the JEDEC patent policy covered patents and patent applications that related to the standardization effort. Therefore, Rambus' arguments about the 1995 SDR SDRAM standard failed. Furthermore, Rambus and Infineon stipulated that a finding of fraud on the 1995 standard would support the entire jury verdict on fraud. Thus, Infineon was entitled to its fraud damages if the jury was right on both the 1995 and 2000 SDRAM standards or if the jury was right on just the 1995 standard. Hence, the denial of JMOL for the 1995 standard was enough to sustain the award for damages because of fraud.

As to the DDR SDRAM standard, the court ruled in favor of Rambus and allowed a JMOL. According to the court, the evidence was too weak to support the contention that the JEDEC members had any duty to disclose patents and patent applications to one another *before a* standard was nearly at its final stages. But the DDR standard reached its final stages in 1999 or 2000, and Rambus had already quit JEDEC by then. So, the evidence did not show that Rambus deceived JEDEC at a time that it had a duty to JEDEC not to conceal its patents and patent applications—no duty, no foul.

Furthermore, serious discussions about the DDR SDRAM standard—let alone finalization—did not begin until after Rambus quit JEDEC in 1996. Based on these facts, the court concluded that Rambus did not have a duty to disclose and offer reasonable-royalty licenses on Rambus patents related to the DDR SDRAM standard.

But what about Secret Squirrel?

This verdict effectively made the entire body of evidence about Secret Squirrel immaterial, which is somewhat of a shocker. Trade press coverage of the trial focused on the apparently extreme rascality of Secret Squirrel's actions.

Unocal charged with standards skullduggery

The US Federal Trade Commission (FTC) is investigating how Unocal acquired patents on gasoline formulations for lower emissions. ExxonMobil had complained to the FTC that Unocal "subverted the standard-setting process to obtain unlawful monopoly profits." Unocal had participated in an industry-wide standard-setting proceeding during the late 1980s under the sponsorship of the US Environmental Protection Agency (EPA) and California Air Resources Board (CARB). While the panel was meeting and advising EPA and CARB on gasoline emission and blending standards, a Unocal official advised his company that "it would be in the best interest of Unocal to input and help shape regulations made by the EPA and the CARB" to help steer the regulations toward Unocal's pending patent applications. This action would pave the way toward Unocal's positioning itself to gain significant licensing revenue from the rest of the industry.

Apparently, this plan worked. Exxon complains that Unocal was using the information it gained from the panel to help it secretly patent the blending processes that the final gasoline standard required. Unocal counters that the agreement governing the standardization consortium did not require the participants to tell others about their research. But, says Exxon (which Unocal later sued for patent infringement), Unocal had an obligation to divulge its pending patent applications because they could affect consumer gasoline prices.

After Unocal's five patents issued, it imposed licenses on the industry, bearing royalties between 1.2 and 3.4 cents a gallon, or about $100 million a year. The royalty allegedly constitutes 20 percent of the margin of refiners in making gasoline. If the FTC determines that Unocal engaged in unfair competition, or an unfair act or practice, the most likely outcome will be Unocal signing a consent order voluntarily agreeing to stop collecting further royalties, though not actually admitting any wrongdoing. (In theory, the FTC could ask Unocal to disgorge its ill-gotten gains, as ExxonMobil suggests: "Undoing the effects of Unocal's improper conduct would include requiring it to disgorge any royalties that it has received as a result of the patents." But that is unlikely to occur.) An order just to stop enforcing patents was the outcome of the 1995 FTC investigation of Dell Computer for similar conduct involving patents on the Video Electronics Standards Association's VESA local bus.

Perhaps this ruling is not part of the legal precedent set here, because it is arguably not necessary to reaching the outcome. Because the skullduggery about the SDR SDRAM standard was enough to support the jury damages verdict, whatever additionally occurred regarding the DDR SDRAM standard is extraneous. You don't need to drive two stakes through Count Dracula's heart. Nevertheless, the ruling raises questions.

Hypothetically speaking

Imagine a hypothetical case that does not involve the SDR SDRAM standard—only the DDR SDRAM standard. Hypothetically, Rambus quits JEDEC at an early date or never even joins it. But Rambus still has a confederate, Secret Squirrel, who leaks to JEDEC outsider Rambus the details about the emerging JEDEC standard on DDR SDRAMs. Is that all right?

Rambus would argue that it had no duty toward the JEDEC standard setters. Also, to accept any theory of liability would stifle standard setting and discourage participation in standard-setting organizations.

Granted, in reality, it never became clear why Secret Squirrel was spying on the JEDEC standard setters or what Secret Squirrel's relationship to Rambus was. Perhaps, we'll never know. But in our hypothetical case, Secret Squirrel is a de facto Rambus agent. Thus, the acts of Secret Squirrel are the acts of Rambus. Rambus, therefore, would incur whatever patent obligations Secret Squirrel incurs as a member of JEDEC, such as the duty to offer reasonable-royalty licenses on patents embodied in the standard.

Another possible legal theory is that it is unfair competition to covertly ascertain a proposed standard's content and then alter patent applications to cover products that comply with the standard. Such actions are equivalent to industrial espionage. More important, it is injurious to the standard-setting process and therefore contrary to the public interest.

Part of one of the court's opinions supports this view. The court had to decide whether to enter a permanent injunction barring further infringement suits against Infineon under Rambus' US patents related to the 1995 SDRAM standard. One of the factors in assessing the propriety of a permanent injunction is whether granting it would serve the public interest. In analyzing the public interests at stake in this case, the court strongly endorsed standard setting as a benefit to the public:

> [The] public has a strong interest in protecting standard-setting bodies like JEDEC from the manipulation practiced by Rambus here. JEDEC's stated goal is to adopt industry-wide standards [that] allow computer products to be easily interchanged among different manufacturers. This is clearly in the public interest. To this end, JEDEC sought to avoid incorporating patented technologies into its standards, or if a JEDEC member held a patent on a desired technology, JEDEC asked the member to license that technology on reasonable terms and conditions that were free from discrimination. The public benefits from JEDEC's activities because the public enjoys the advantages of being able to purchase products from different manufacturers that conform to an industry standard. An injunction serves the important objective of preserving the viability of organizations such as JEDEC and of warning others who would abuse their membership in standard-setting bodies that they will not profit from wrongful conduct.

For these reasons, the same principles that led the court to condemn Rambus' misconduct in connection with the 1995 SDRAM standard could apply to the hypothetical case. Rambus apparently plans to continue asserting its patent rights in its suits with Micron and Hyundai. Therefore, a ruling on this or a similar issue in connection with the DDR SDRAM standard and Rambus' patents may arise from those cases.

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tor to the investors acting on analysts' recommendations. Rather, the true error comes from the analysts' implied assumption that the best will survive at all, an issue separate from whether their grading was correct or not.

It is always quite possible that all the entrepreneurs would face similar adoption problems and operating complexities, and that all would experience the same results, each generating costs in excess of revenues. No preordained reason makes it inevitable that at least one worthwhile decision will arise out of multiple failures. Analytical completeness and proper caution require considering the possibility of a very gloomy outcome.

For a few years such completeness and caution were missing. It is in this sense that the irrational exuberance of the times interfered with clear thinking, making the boom and bust worse than it needed to be. In other words, some failure was inevitable, but when naive optimism springs eternal, it is more likely that more failures will follow.

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