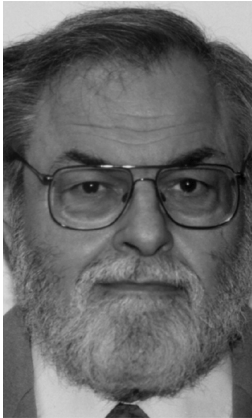


Micro Law



One of the Last Updates on Rambus Standardization Skulduggery

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.....The long saga of standardization skulduggery relating to the adoption of the Joint Electronic Device Engineering Council (JEDEC) standard for computer memory—specifically, for SDRAM technology—is beginning to wind down. It is now almost at the last stage—the FTC has filed a *certiorari* petition with the Supreme Court to obtain appellate review of an adverse court of appeals decision overturning its order against Rambus.¹

As earlier Micro Law columns detailed,² Rambus's alleged skulduggery escapade played out this way: Rambus duped JEDEC into incorporating patented Rambus technology into JEDEC's standard. JEDEC was deceived into thinking the technology was unpatented or at least available for licensing on reasonable and nondiscriminatory (RAND) terms. Rambus changed pending patent applications to cover technology incorporated into the standard. Once the industry implemented the standard, Rambus "demanded stiff royalties from makers of the great majority of computer memory chips,"¹ and began to enforce against users of the standard the Rambus patents covering the standard.³

The FTC learned of these events and sued Rambus for what it called "Rambus's scheme to acquire monopoly power by deceiving" JEDEC. After a lengthy proceeding, the FTC ordered Rambus to stop enforcing the patents against users of the JEDEC standard to

compel them to pay any higher royalties than would have been agreed to if the royalties had been set before the standard was adopted (that is, at a time when JEDEC could have standardized on different technology if Rambus demanded too high a royalty).⁴

DC Circuit ruling

Rambus then appealed to the federal courts—in this case, the United States Court of Appeals for the District of Columbia (the DC Circuit). The DC Circuit took a jaundiced view of the FTC's proceeding against Rambus.⁵ The court said that it was guided by two antitrust principles. The first was that, to be condemned as exclusionary, a monopolist's conduct must have "anticompetitive effect" (that is, it must harm the competitive process and thereby harm consumers). Second, the FTC bears the burden of proving the anticompetitive effect of the challenged conduct. The court concluded that the FTC had not adequately established that Rambus's standardization skulduggery had an anticompetitive effect, because the FTC's chain of reasoning was faulty.

The FTC had found that, but for Rambus's deceptions and skulduggery, JEDEC would have had two choices available to it. It could have

- chosen other, potentially unpatented, technology; or
- selected Rambus technology but secured a RAND commitment and

an opportunity to bargain before the industry was locked in to the technology (and thus, presumably, got a better price).

The court said this either-or approach was defective. If the FTC wanted to rely on the first option, it should have found that this would have occurred. But finding that the second option could have occurred undermined the FTC's finding that Rambus's deception had an anticompetitive effect.

The court reasoned that it was not anticompetitive to deprive JEDEC of the opportunity for a RAND commitment or the opportunity to bargain before the industry was locked into the Rambus technology. In so holding, the court said it relied on the Supreme Court's 1998 decision in the *NYNEX* case.⁶ According to the DC Circuit, under *NYNEX*, "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." Just raising prices is not necessary anticompetitive. Applying this reasoning, the court concluded that the hypothetical possibility that Rambus's deception merely avoided a RAND commitment was enough to insulate Rambus from liability for monopolization.

The court therefore set aside the FTC's order. If the Supreme Court does not grant *certiorari* to review the DC

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Circuit's decision, the saga of Rambus's standardization skullduggery may have finally come to an end.

Procedural oddity

The Department of Justice's Solicitor General declined to support the FTC's bid for Supreme Court review. Apparently, the administration agreed with the DC Circuit that mere greed on Rambus's part was not enough to justify FTC action. The relevant statute provides that when the Department of Justice refuses to support an FTC bid for Supreme Court review, the FTC is entitled to file its own papers asking the Court to take the case, and the FTC did so.⁷ In such a case, the Court will likely call for the views of the Solicitor General (known as CVSG). By the time a response from the Solicitor General to the CVSG would be due, a change in administration will have occurred. That might lead to a *volte face*.

FTC's arguments

The FTC argued, first, that it had shown monopolization in violation of Section 2 of the Sherman Act simply by establishing that Rambus had gained a monopoly over computer technology by exclusionary conduct—that is, by conduct other than competition on the merits—and that such conduct had significantly contributed to the creation of that power. No more stringent showing of causation, the FTC insisted, is necessary to establish a Section 2 violation.

Second, the FTC responded to the court's onslaught against its reasoning on causation of anticompetitive effect because of the either-or approach. The FTC defended its reliance on reasoning that JEDEC would have adopted an alternative technology or it would have required a RAND commitment from Rambus, and that this would have occurred but for Rambus's deceptive conduct. In a case like this, the FTC argued, the burden of any uncertainty regarding the "but for marketplace" (what would have happened in the marketplace if Rambus's deception had not

occurred) should fall on the defendant who misbehaved, not on the FTC.

What conduct is monopolization?

The first argument comes down to this: the FTC says that it is enough if misconduct contributes substantially to monopoly power, while the court demands proof that the particular conduct challenged itself caused monopoly. Rambus had a monopoly, but maybe the deception was not the operative cause; maybe it just contributed a little bit, a few percent worth. The FTC's position that contributing any substantial amount through misconduct is enough for liability appears to be the better side of the argument on this issue.

Who loses when there is uncertainty?

The case law appears to recognize a difference in burden of proof between establishing liability and showing entitlement to a given remedy. Although the DC court tried to paint the issue as one of liability, it appears to be more one of whether the RAND royalty remedy should be imposed on Rambus, given these facts. On remedy issues, doubts are resolved in favor of granting relief and against the wrongdoer, who (it is said) should expect to be "fenced in" as a result of its misconduct.

Is mere greed an excuse here?

The FTC also challenged the DC court's use of the *NYNEX* case ("greed is good"). Deception that undermines the operation of the marketplace is not good. It obstructs the competitive process. First, the argument begs or dodges the question of whether Rambus acquired its monopoly improperly in the first place. If it did so, a violation of law should be found and liability should result. Second, deception in standard setting is highly corrosive to the process. Whether or how much patent royalties must be paid is a critical factor in a standard setter's decision whether to use a given technology or a different one. Advance disclosure about royalty is critical to avoiding a hold-up after a standard is adopted and implemented.

Greed might be good in other contexts, but its operation to justify deception about whether patents cover technology proposed for a standard is simply unacceptable.

Did the FTC ride the wrong horse?

It is too late now to do anything about it, but the FTC wrong-mindedly insisted on litigating this case as an antitrust or monopolization case from the beginning. It could instead have simply attacked the conduct as a false and deceptive trade practice, which Section 5 of the FTC Act forbids, and probably it could have justified the same licensing relief. When challenged on this point, FTC officials just said that they preferred to do it the way they did, because it was more "appropriate." The Rambus skullduggery saga would have been fully told long ago if the FTC had been more flexible.

Or the FTC could have ridden its "unfairness" horse instead, because the FTC Act condemns "unfair" business practices too.⁸ Surely lying to JEDEC to deceive it into adopting patented technology is "unfair." But the FTC has been curiously reluctant to utilize this hard-won anti-unfairness power and refused to invoke it in this case. Again, the Rambus skullduggery saga would have been fully told long ago if the FTC had been more flexible and saddled up its unfairness horse.

One way or another, it is likely that we will soon come to the end of this long saga. One may wonder what lessons the FTC has learned from these ups and downs.

Notes

1. FTC *Certiorari* Petition in *FTC v. Rambus Inc.*, US Supreme Court, Nov. 2008 (hereafter cited as "FTC Petition") at 3.
2. "Preventing Abuse of IEEE Standards Policy," vol. 21, no. 3, May 2001, pp. 8-11; "More Standardization Skullduggery," vol. 21, no. 4, Jul./Aug. 2001, pp. 12-15; "Another Update on Standardization Skullduggery," vol. 21, no. 5, Sep./Oct. 2001, pp. 8-10; "FTC

- Piles onto Rambus' Standardization Skulduggery," vol. 22, no. 4, July 2002, pp. 6-7, 86-87; "Weird Turn of Events in Continuing Rambus Saga," vol. 23, no. 1, Jan./Feb. 2003, pp. 76-80; "Unresolved Legal Questions about Patents and Standard Setting," vol. 23, no. 5, Sep./Oct. 2003, pp. 5, 72-74; and "Coming Down the Home Stretch in the Rambus Standardization Skulduggery Saga: To Levy or Not to Levy Royalties," vol. 27, no. 2, Mar./Apr. 2007, pp. 80-82.
- The FTC said that by this time "industry members had become 'locked in' to

the newly adopted standards because of the cost and delay of switching to alternatives." FTC Petition at 8.

- This corresponds to the royalty regime that applies in patent infringement litigation after findings of infringement and that the patentee is entitled to a reasonable royalty. The royalty level is determined by applying a list of factors known as the "Georgia-Pacific" test.
- Rambus Inc. v. FTC*, 522 F.3d 456 (US District Court for the DC Circuit), 2008.
- NYNEX Corp. v. Discon Inc.*, 525 US 128, 1998.

7. This is only the fourth time this has occurred. See FTC Petition at 1 n.1. The FTC stated: "The Commission does so here because it believes that the decision below will have exceptionally serious adverse consequences for enforcement of the antitrust laws."

- FTC v. Sperry & Hutchinson Trading Stamp Co.*, 405 US 233, 1972.

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Micro News

Questions of Patent Eligibility since the *Bilski* Opinion

.....Since the US Court of Appeals for the Federal Circuit decided the *Bilski* case in October 2008 (see Micro News, Nov./Dec. 2008), the US Patent and Trademark Office (PTO) has pushed the fringes and unaddressed issues in the *Bilski* opinion. The *Bilski* court ruled that a claim to a method is patent eligible only if its underlying principle is implemented with a "particular machine" or if the method transforms an article from one state or thing to another. The *Bilski* court left for future decisions what would be a "particular machine." It did explain, however, that "the use of a specific machine or transformation of an article must impose meaningful limits on the claim's scope to impart patent eligibility."

Now, in a January 2009 ruling, *Ex parte Cornea-Hasegan*, the PTO's Board of Patent Appeals and Interferences (BPAI) has applied the principles of *Bilski* to product claims to determine what is or isn't a "particular machine." In *Cornea-Hasegan*, Intel applied for a patent on an improved way to make

certain calculations. The application claimed the expedient both as a method and as a storage medium containing software instructions for a "processor" to perform the method. The two kinds of claim were identical in substance.

The BPAI said that that the claim limitation of requiring "a processor" is not a limitation to a "particular" machine. The BPAI explained that "nominal recitations of structure in a method claim do not convert an otherwise ineligible claim into an eligible one." The purpose of the machine-transformation test is to distinguish between "claims that 'seek to pre-empt the use of' a fundamental principle, on the one hand, and claims that seek only to foreclose others from using a particular 'application' of that fundamental principle, on the other." Yet:

The recitation of a "processor" performing various functions fails to impose any meaningful limits on the claim's scope. The recitation of a "processor" performing various functions is nothing more than [saying that] a general-purpose computer...has been programmed in an

unspecified manner to implement the functional steps recited in the claims. The recitation of a processor in combination with purely functional recitations of method steps...is insufficient to transform otherwise unpatentable method steps into a patent-eligible process. Holding otherwise would exalt form over substance and would allow preemption of the fundamental principle present in the non-machine implemented method by the addition of the mere recitation of a "processor."

In other words, saying that a general-purpose digital computer is being used to carry out the claimed invention does not make patent eligible a claimed invention that is basically a computer program or algorithm. That would be like claiming a method of determining the length of a hypotenuse by taking the square root of the sum of the squares of the sides, limited to when you use a general-purpose digital computer to perform the necessary calculations. In that context, a programmed general-purpose digital computer is not a "particular machine."