ORIGINAL

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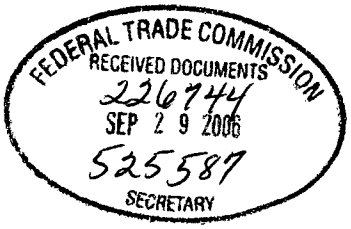
UNITED STATES FEDERAL TRADE COMMISSION



Docket No. 9302

In the Matter of

RAMBUS INC.,

A CORPORATION

RESPONDING BRIEF OF *AMICUS CURIAE*
AMERICAN ANTITRUST INSTITUTE, INC.
ON ISSUES OF REMEDY IN SUPPORT OF NEITHER PARTY

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Interest of *Amicus Curiae*

The American Antitrust Institute ("AAI") is an independent, not-for-profit

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Summary of the Argument

The ALJ argues herein that the Commission should [redacted]

[redacted]

fashioning a remedy. The first is that the purposes of an "open standard" are inherently inconsistent with a patent policy that encourages and rewards invention with *de jure* rights to exclusivity. By placing control over the practice of an invention in the hands of a patentee, patent policy seeks to suppress un-remunerated imitation. By contrast, open standards, particularly those related to interfaces in computer and information technology, are intended to encourage wide scale imitation in order to promote compatibility and interoperability of implementations of the standard by different manufacturers.

Second, even when a standard contains patented technology, the demand for the

[redacted]

I. An Appropriate Remedy Calibrates the Scope of Rambus' Prospective Patent Rights, If Any, to the *Ex Ante* Intended Openness of the Standard

A. The Ideal of a Fully Open Standard is Inconsistent With Patent Law and Policy

"Openness" with respect a standard is an important quality that summarizes the policies, purposes, and expectations of those engaged in standard setting activities. Standard setting organizations (SSOs) differ in the degree of openness toward which they strive. SSOs occupy different positions on a continuum depending on their policies and expectations with respect to a bundle of parameters.[1] In general, the greater emphasis placed by an SSO on developing open standards the stronger the preferences of its participants for standards that bear little or no licensing requirements or royalties. An idealized, fully open standard that lies

[redacted]

As a result, patent law, which constrains unauthorized imitation and rewards a

standard, therefore, may be undermined by the incentives to innovate created by patent policy. Similarly, intellectual property policies function properly when market participants are willing to pay increased prices to stimulate technological innovation. However, when open standards are called for, participants are not willing and should not be required to pay higher prices to stimulate such unnecessary incentives.

Accordingly, the nature of "competition" for

from competition among patented technologies outside of the standards context. Because implementers of open standards have strong preferences to avoid licensing and royalties, they are often willing to eschew proprietary technology to promote openness even if doing so sacrifices technical superiority. This has important consequences for any hypothetical *ex ante* negotiation between an SSO's members and one or more patentees proposing the adoption of

Rambus' patents would have been decisive in causing them to reject the Rambus specification on that basis alone. Decision at 75, note 407. Some implementers pursue a policy of embracing only open standards in certain circumstances and actively oppose the use of any royalty-bearing elements in standard specifications.[2]

Similarly, JEDEC itself claims to have a "strong aversion to including royalty-bearing patents in JEDEC standards." JEDEC Br. on Remedies at 5. Citing a series of policy statements that reach back more than twenty years, JEDEC claims that its "goal is to promulgate open standards that can be used widely by the industry ..." *Id.* at 4. JEDEC permits patented technology to enter its standards but only with "great care." *Id.* at 5. As a result, if the Commission concludes that JEDEC and its participants as an SSO placed a high value on openness, they would not, in any conceivable hypothetical [redacted]

nondiscriminatory (RAND) licensing commitments by Swanson and Baumol, for example, implicitly assumes that standard setting participants choose among competing patented technologies on a cost-performance maximizing basis (i.e., which [illegible]

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component of costs), their model does not provide a suitable framework for hypothesizing about the *ex ante* outcomes in selecting an open standard.[3]

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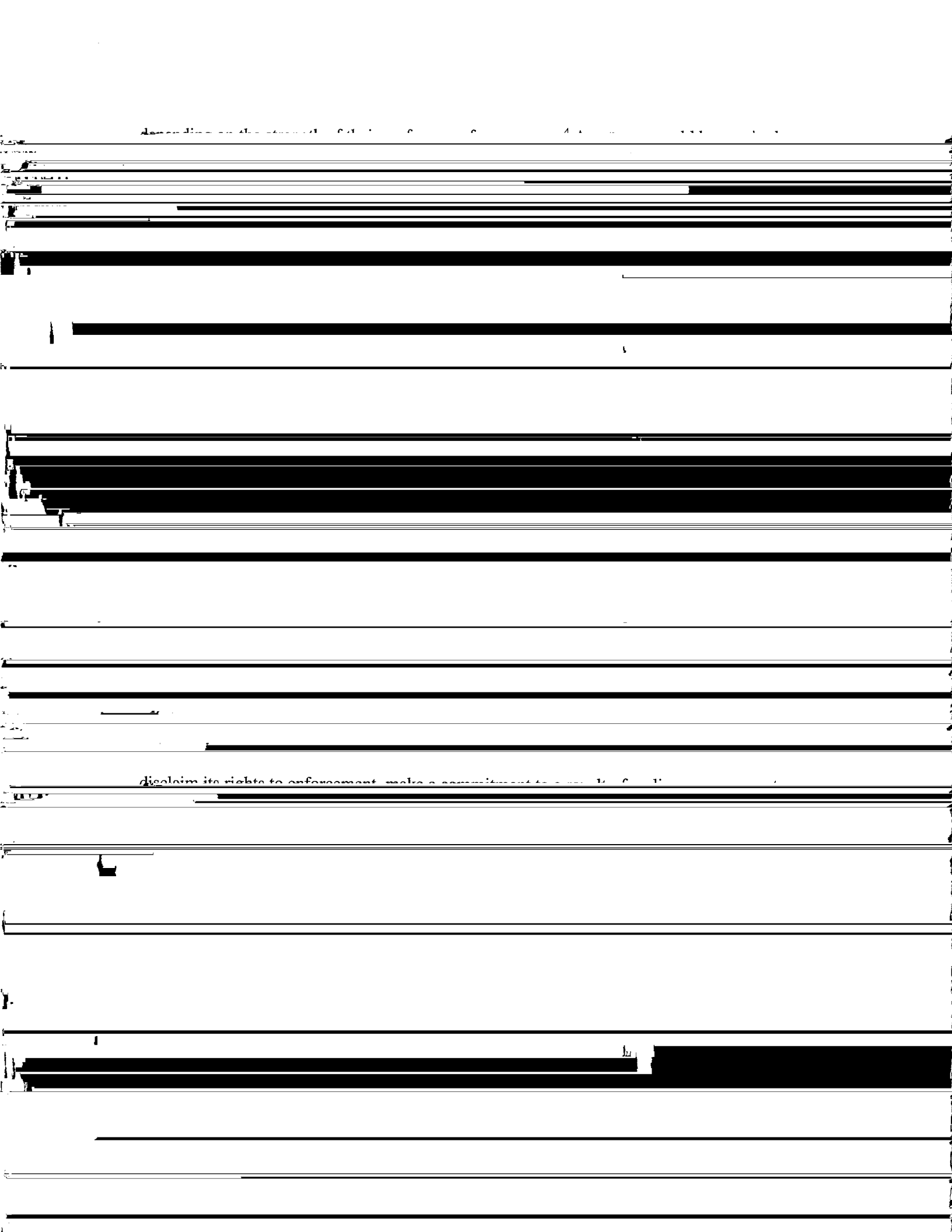


II. An Appropriate Remedy Will Not Reward Rambus for Demand for the Standard

The second principle that should guide the Commission in fashioning a remedy in this matter is that Rambus' patents do not entitle it to a reward for commercial demand attributable to the economic benefits of the standard, as opposed to the economic benefits of its patented inventions.[5] According to Professor Patterson, this insight has two important implications:

would not exist.[7]

In between these polar cases, patented technology may make some contribution to the standard, either by enabling an SSO to adopt a standard that is superior to a proposed alternative or by enabling implementers to comply more easily or cheaply with a standard already adopted.

The foregoing suggests that in order to avoid rewarding Rambus for the commercial demand attributable to the standard rather than its inventions, Rambus should bear the burden of justifying any claimed royalty rate with sufficient evidence to allow the Commission to conclude that the relevant patents materially contribute to the commercial demand for

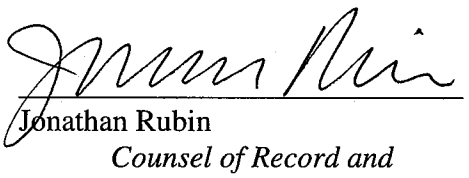
compliance with the standard. Thus, Rambus should be entitled to enforce a royalty-bearing

license if and only if the Commission finds by clear and convincing evidence that but for the

Conclusion

Based on the foregoing arguments, the American Antitrust Institute, Inc. respectfully requests that the Commission to order a remedy in this case consistent with the principles advocated herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2006, I