

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

**Statement of Commissioner J. Thomas Rosch,
Concurring in Part and Dissenting in Part**

I.

I concur in Parts I, II and IV of the majority decision, with the exception of the above zero royalty rate licensing provisions of the majority's decree that are described in Part IV B of the decision.¹ I respectfully dissent from Part III of the decision and from those above zero royalty rate provisions of the decree.

With respect to the majority's discussion of the Commission's remedial authority in Part II of its decision, I would only add that the Section 2 violation the Commission has found is a *continuing* violation of Section 2. The Commission found not just that Rambus engaged in a deceptive course of conduct, but that Rambus obtained enduring monopoly power by virtue of that deceptive course of conduct. Rambus continues to exploit that monopoly power by seeking royalties from those who practice the SDRAM and DDR-SDRAM standards. When a monopoly position is wrongfully acquired, exploitation of that monopoly position constitutes monopolization violative of Section 2.² Thus, by continuing to exploit its unlawfully acquired monopoly position, Rambus is engaging in a continuing violation of Section 2.

Rambus does not deny that when there is a continuing violation, the Commission can issue whatever order is reasonably necessary

¹ This opinion uses the same abbreviations used in the majority opinion.

² See *In re American Cyanamid Co.*, 72 F.T.C. 623, 690 (1967), *aff'd* *Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574, 579-80 (6th Cir. 1968) (upholding Commission finding that defendants engaged in attempted monopolization by exploiting a patent acquired by withholding information from the Patent Office); see also *Warner-Lambert Co. v. Federal Trade Commission*, 562 F.2d 749, 766, note 3 (D.C. Cir. 1977) (dissenting opinion) (distinguishing between an order eliminating the effects of a violation from an order stopping a continuing violation and stating with respect to the latter that while "[a] legally obtained patent permits a valid monopoly for the period of the patent; an illegally obtained patent shelters an invalid monopoly which can be 'broken up' by requiring the patent holder to license its patents to competitors.").

³ See RRBR at 1.

violation should be more cramped than the remedial authority of a district court to deal with such a continuing violation.

I agree with the majority's discussion in Part II B of the legal principles governing the Commission's authority to order royalty free licensing. Specifically, I acknowledge that there are significant limiting principles on the Commission's power to require royalty-free licensing. First, as the majority states, that remedy cannot go beyond what is reasonably necessary to stop a continuing violation of Section 2 and/or to terminate the ill effects of the violation.⁴ That means in this case that the Commission must conclude on the basis of the record that in the "but for world" – *i.e.*, the world that would have existed had Rambus not engaged in its deceptive course of conduct – Rambus would not have obtained any royalties. The parties agree on this limiting principle.⁵

Second, as the majority says, there is a spectrum of remedies with controls on conduct at one end and structural measures such as divestiture at the other end. The Commission should impose an order based on the record which is as close to the "conduct" end of the spectrum as possible so long as that remedy will insure that Rambus cannot continue to exercise its monopoly

⁴ See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n. 8 (1972); *Reynolds Metals Co. v. Federal Trade Commission*, 309 F.2d 223, 231 (D.C. Cir. 1962).

⁵ See CCBR at 1; RBR at 6; RRBR at 1.

⁶ See 16 C.F.R. §3.43 (a).

⁷ Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 70-71.

⁸ AREEDA & HOVENKAMP, *ANTITRUST LAW* ¶653(f), at 104 (2002).

⁹ The majority expresses itself somewhat differently, concluding that “Complaint Counsel must show that this form of relief is necessary to restore competitive conditions that would have prevailed absent Rambus’s misconduct.” Majority Opinion at 10. I do not discern any daylight between our views in this respect. Under both formulations, Complaint Counsel must bear the ultimate burden of proving that the compulsory licensing remedy they seek is needed to restore the conditions that would have ele

by the fact that they did so when they were *not* informed about those patents and patent applications. On the other hand, Complaint Counsel are wrong in asserting that the Commission has already concluded that a fully informed JEDEC and its members would not have incorporated the patented technologies in the standards. The Commission has, to be sure, concluded that Rambus failed to establish that the costs of alternatives exceeded the costs of Rambus's patented technologies, but in that analysis the Commission included as a portion of Rambus's costs the royalties Rambus has been demanding.¹³ The Commission did not hold that a fully-informed JEDEC would have adopted the alternatives if Rambus's technologies were demonstrably superior to them on a net cost/performance basis. Thus, I reject both of these contentions.

C.

However, there is strong evidence in the record that if JEDEC had been aware of the potential scope of Rambus's patent portfolio, it would have adopted standards that would have avoided Rambus's patents. JEDEC's rules, the expectations of its membership, and the market's concerns with costs generally and the cost of Rambus's technologies in particular all strongly support a finding that a fully informed JEDEC would have adopted standards that did not read on Rambus's patents.

JEDEC's written policies reflected deep concern with incorporating patented technologies into standards.¹⁴ Those concerns were echoed by JEDEC's members who repeatedly testified about their opposition to incorporating patents into JEDEC standards.¹⁵ The record demonstrates that the consensus needed to adopt Rambus's patented technologies could not have

¹³ See Op. at 95-96.

¹⁴ See CX 207a at 8 (1990 EIA Style Manual that governed standards issued by JEDEC [one of EIA's units], stated that JEDEC should "[a]void requirements in EIA standards that call for the exclusive use of a patented item or process"); CX 208 at 19 (1993 JEDEC Manual of Organization stated that "committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all of the relevant technical information covered by the patent is known"); JX 53 at 11 (1993 EIA Manual stated that "[r]equirements in EIA Standards which call for the use of patented items should be avoided"); see also JX 5 at 4 (JEDEC minutes stated, "If it is known that a company has a patent on a proposal then the Committee will be reluctant to approve it as a standard."); J. Kelly, Tr. 2073-2074 ("JEDEC, however, is concerned and I said before that JEDEC and EIA do not have a preference for including intellectual property in standards because of the fact that there may be a royalty that may increase the cost. The goal is always to try to produce a standard which is going to gain marketplace acceptance, and if the cost of the product is going to -- is likely to be increased by intellectual property, that's a general concern. That doesn't go to the licensing terms, however. That goes to the basic question of whether to include the IP at all or not.").

¹⁵ See Bechtelsheim, Tr. 5813-14; see also Sussman, Tr. 1417 (Sanyo's JEDEC representative testified, "If I understood that there was IP on the programmable, I would have voted -- changed my direction and voted to take the fixed one."); G. Kelley, Tr. 2576 (IBM's JEDEC representative noting that "[p]atent issues are a concern on every JEDEC proposal" and that when a technology was considered for the first time "it was especially valuable to have the consideration of patents so that we could possibly avoid them").

²⁶ *See* RBR at 3-4.

²⁷ *See* RBR at 10-11; RRBR at 9-10.

²⁸ *See* CX 208 at 27 (1993 JEDEC Manual of Organization and Procedure states that “[s]tandards that call for use of a patented item or process may not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent or pending patent is known to the committee, subcommittee, or working group.”

Rambus for its RamLink and SyncLink standards. *See* CX 487 (letter from an IEEE standards committee asking Rambus whether a proposed standard infringed on any of Rambus's patents and if so whether Rambus was willing to commit to RAND licensing terms.). In noting that it was not a member of the IEEE, Rambus refus

³⁴ See CX 533 at 9-10; CX 535 at 1, 4-5; CX 543a at 11-12, 16; Farnwald, Tr. 8204-8205.

³⁵ The majority reasons that since the adoption of SDRAM and DDR SDRAM

40 526 U.S. 137, 149-150 (1999).

41 *See In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999).

42 RBR at 17-18; RRBR at 13. Rambus asserts elsewhere that any atte

⁴⁹ See Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 60-61; *supra* notes 29-31, 33 and accompanying text.

⁵⁰ See discussion *supra* pp. 8-9.

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⁵⁵ See sources cited *supra* note 54.

⁵⁶ See RX 538 at 21 (1991 NEC RDRAM license agreement included a \$2 million up-front license fee in addition to royalties on sales); CX 1592 at 21 (1994 Samsung RDRAM license agreement included a \$3 million up-front license fee); CX 1600 at 11-12 (1995 Hyundai RDRAM license agreement included a \$2 million up-front license fee and \$1.5 million “Design Fee.”); CX 1609 at 10 (1997 Mitsubishi RDRAM licenses agreement included a \$2 mi

the marketplace can stimulate output and competition.⁶⁰ If that is so, it is equally plausible that honest inventors would be more, rather than less, inclined to innovate if they felt that rivals who engaged in deceptive conduct during the standard-setting process would be denied the fruits of their wrongdoing in their entirety.

Ultimately, I conclude that licensing on terms above zero would enable Rambus to obtain royalties it would not have obtained in the “but for world.” That would enable Rambus to continue to reap the fruits of its ongoing violation of Section 2.

F.

Rambus asserts that the Commission has described this conclusion as “extreme.”⁶¹ However, that misdescribes the Commission's liability decision. In its decision the Commission described the parties' positions as being at “opposing extremes.”⁶² We (or at least I) meant by that that the positions of the parties respecting the royalties Rambus would have obtained in the “but for world” were at opposite ends of the spectrum. On the basis of this record, the limited royalty free license that I favor is not extreme.

In rejecting Rambus's characterization of the remedy as extreme, I must emphasize that the royalty free licensing order I would issue would not run against any patents in their entirety. To the contrary, as previously discussed, I would only order royalty free licensing with respect to patents reading on SDRAM and DDR SDRAM standards in favor of those who are practicing those standards. Thus, for example, Rambus would be able to collect royalties on any patents reading on DDR2 SDRAM and all other JEDEC standards from those who practice those standards.

III.

I do not wish to exaggerate my differences with the majority. The majority has done its best to try to construct above zero royalty rates. I simply believe that the assumptions the majority has made in doing that are contrary to the evidence in the record – particularly the evidence related to Rambus's positions and conduct – both in terms of whether *ex ante* negotiations would have occurred in the “but for world” and in terms of the royalty rates such negotiations would have yielded. However, if I agreed with the majority's assumptions, I would subscribe to the majority's decree because I agree entirely that the Commission has the authority to issue such a mandatory licensing decree.

⁶⁰ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978); see also U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 1-7 (August 18, 1996), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153.

⁶¹ See RBR at 5.

⁶² See Op. at 119.