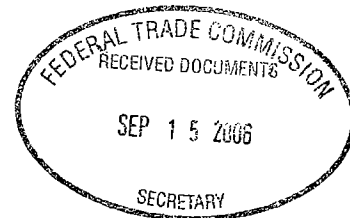


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the matter of)
)

RAMBUS INC.,)
)

a corporation.)
)

Docket No. 9302

BRIEF OF AMICI CURIAE NVIDIA CORPORATION, MICRON TECHNOLOGY, INC., SAMSUNG ELECTRONICS CORPORATION, LTD., AND HYNIX SEMICONDUCTOR, INC. ON THE ISSUE OF THE APPROPRIATE REMEDY FOR RAMBUS'S VIOLATIONS OF THE FTC ACT

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae NVIDIA Corporation, Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. (collectively “Amici”) are global technology leaders. One Amicus, NVIDIA, manufactures and sells products (graphics processing units) that are designed to use, or interface with, JEDEC-compliant dynamic random access memory (“DRAM”), including single data rate synchronous DRAMs (“SDRAMs”) and double data rate synchronous DRAMs (“DDR SDRAMs”). Other Amici design, manufacture, and sell JEDEC-compliant DRAMs. Amici contribute billions of dollars in annual sales to the U.S. and world economy, invest hundreds of millions of dollars in research and development, hold thousands of United States patents, employ thousands of people both in the United States and overseas, and maintain membership in a variety of standard setting organizations (“SSOs”).

SSOs, the standard setting process, and JEDEC standards in particular are of great importance to Amici. The goal of many SSOs, including JEDEC, is to set “open” standards that are broadly available, low cost, and free from restrictive patent rights. Such open standards are beneficial to manufacturers and consumers alike, because they ensure interoperability of standardized products supplied by different firms. This, in turn, promotes competition, increases market acceptance, and helps achieve economies of scale.

These benefits of open standards can be achieved, however, only when the members of an SSO act in good faith and refrain from deceptive and exclusionary conduct. When an SSO member engages in such anticompetitive conduct with respect to its patent rights, those patent rights improperly may allow one member of an SSO to hold-up the standard and charge monopolistic rates to use the standard, all to the detriment of direct participants in the standard, others in the industry, and consumers.

After a lengthy hearing and a detailed review of the evidence, the Commission determined that Rambus Inc. (“Rambus”) engaged in bad faith and deceptive conduct in violation of the antitrust laws. Contrary to JEDEC’s policy and practice, contrary to the expectations of JEDEC members and those who rely upon open JEDEC standards, and in breach of its duty of good faith, Rambus undermined the JEDEC standard setting process by concealing its patent rights from JEDEC, misleading JEDEC members into believing that Rambus was not seeking patents over JEDEC-compliant SDRAMs and DDR SDRAMs, and secretly tailoring its patent rights in an effort to cover the JEDEC standards.

In 2000, after the JEDEC standards had been adopted, and after the industry was locked-in to those standards, Rambus exercised the monopoly power it had acquired through its subversion of the standard setting process. It was only then that Rambus attempted to enforce its patent rights against the JEDEC standards through patent infringement lawsuits, through U.S. International Trade Commission enforcement proceedings, and through a licensing campaign. At least one Amicus was forced to pay royalties to Rambus in response to its licensing and litigation campaign.

Amici submit this brief to express their views on the appropriate remedy to redress Rambus’s exclusionary conduct.

ARGUMENT

I. THE COMMISSION SHOULD BAR RAMBUS FROM ENFORCING ITS RELEVANT PATENT RIGHTS AGAINST THE JEDEC STANDARDS.

By failing to disclose its patent rights, and by other misleading conduct, Rambus led JEDEC and its members to adopt and implement technologies in the JEDEC standards that Rambus contends violate its patents. This, in turn, has given Rambus monopoly power. To remedy Rambus’s antitrust violations, the Commission should bar Rambus from enforcing its

patent rights against the SDRAM standard, the DDR SDRAM standard, and successors of these JEDEC SDRAM standards.¹

A. Under Its Remedial Authority, The Commission Has The Power To Bar Rambus From Enforcing Its Patents Against The JEDEC Standards.

The Commission enjoys broad authority to remedy antitrust violations. This authority is not confined to prohibiting the specific conduct that the Commission has found to be illegal. As the Supreme Court explained in *Ford Motor Co. v. United States*, 405 U.S. 562 (1972):

[t]he relief which can be afforded under [the Sherman and Clayton Acts] is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is “*necessary and appropriate* in the public interest *to eliminate the effects* of the acquisition offensive to the statute,” or which will “*cure the ill effects* of the illegal conduct, and *assure the public freedom from* its continuance.”

Id. at 573 n.8 (citations omitted).

The Supreme Court also has made clear that the public interest is the paramount guiding principle in the Commission’s development of a remedy: “The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). In recognizing in one case that an injunction against future violations was “not adequate to protect the public interest,” the Supreme Court instructed:

If all that was done was to forbid a repetition of illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic

¹ In this brief, when Amici refer to a remedy that limits enforcement of Rambus’s “patent rights,” Amici are referring to those patent rights, domestic and foreign, that claim priority to or through a patent application that was filed on or before June 17, 1996, the date that Rambus withdrew from JEDEC. The remedy proposed herein would not impact the dozens of Rambus patents (many of which Rambus has licensed) that claim priority to applications after June 17, 1996.

practices and profit from the unlawful restraints of trade which they had inflicted on competitors.

Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948).

For these reasons, forward-looking remedies, such as “fencing in” violators, frequently are appropriate, especially when the anticompetitive conduct could be hidden. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (explaining that fencing-in provisions serve to “close all roads to the prohibited goal, so that [the Commission’s] order may not be by-passed with impunity”).

Consistent with these authorities, the Commission has recognized that, when a patent owner subverts an SSO and misuses patent rights to hold-up a standard, the appropriate remedy is to bar the patent owner from enforcing its patent rights against the affected standard.

In *Dell*, for example, the respondent belonged to an SSO that considered, and ultimately adopted, a “VL-bus standard.” The respondent had patent rights that covered the VL-bus standard, but the Commission found that respondent had failed to disclose those rights and misled the SSO into adopting the standard. To remedy the respondent’s deceptive and exclusionary conduct, the Commission insisted on an order barring the respondent from enforcing its patents against the standard. *In re Dell Computer Corp.*, 121 F.T.C. 616, 624-25 (1996).

Similarly, in *Unocal*, the respondent presented technology to the California Air Resources Board and industry groups for a cleaner burning gasoline. The respondent represented to those bodies that its technology was non-proprietary. The respondent also influenced those bodies to incorporate its technology into industry regulations that established a statewide standard. At the same time, the respondent secretly prosecuted a patent that covered the technology. After the regulations were adopted, the respondent enforced its patent rights against

companies that complied with the standards, both through licensing and litigation. To remedy the respondent's deceptive and exclusionary conduct, the Commission again insisted on an order barring the respondent from enforcing its patent rights against gasoline that was made in compliance with the regulations. *In re Union Oil Co.*, no. 9305, 2005 WL 2003365 (F.T.C. Aug. 2, 2005).

Here, in the wake of a fully-litigated finding that Rambus violated the antitrust laws, there is even stronger reason to follow *Dell* and *Unocal* and bar Rambus from enforcing its patent rights against the JEDEC standards. Any lesser remedy would represent a step backward from the clear and consistent precedent the Commission already has established.

B. Barring Rambus From Enforcing Its Patents Against JEDEC Standards Is Consistent With The Commission's Liability Findings And The Evidence.

The Commission already has found that, had Rambus timely disclosed its patent rights, JEDEC would have adopted alternative technologies or, at the very least, would have demanded RAND assurances pursuant to JEDEC policy that bars the use of patented technologies without RAND assurances (Opinion at 74, 97).² Under either scenario, Rambus should be barred from enforcing its patent rights against the JEDEC standards. On the one hand, if JEDEC had adopted alternatives, Rambus would not be in a position today to enforce its patent rights against the standards. On the other hand, if JEDEC had demanded RAND assurances, JEDEC still would not have adopted Rambus's technologies, because the evidence makes clear that Rambus never would have offered RAND assurances to JEDEC. Because Rambus would not be in a position now to enforce its patent rights against the JEDEC standards had it acted in

² As used herein, "RAND assurances" means assurances that relevant patents would be licensed to all on reasonable and nondiscriminatory terms.

good faith and consistent with JEDEC's policies, practices, and expectations, the remedy should bar such enforcement.

1. JEDEC Would Have Adopted Alternatives To Rambus's Patented Technologies.

To begin with, the record evidence strongly shows that JEDEC would have adopted alternative non-infringing technologies had Rambus disclosed its patent rights. This is fully consistent with JEDEC's policies and historical practice.

The goal of JEDEC was to adopt open standards that were not encumbered by patent rights. CCFF 300, 301.³ JEDEC policy provided that JEDEC should avoid using patented technologies. CCFF 303. Even Richard Crisp, Rambus's JEDEC representative, understood that "[t]he job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible." CCFF 301. JEDEC insists on open standards because everyone can use them, because they are not subject to hijack or the exercise of market power, and because they cost less to use (as royalties are generally avoided). CCFF 300, 302, 303.

Consistent with this policy, and as the Commission has recognized, when JEDEC knew of Rambus's patent rights and thought they might be relevant to a JEDEC standard, JEDEC "took deliberate steps to avoid standardizing the Rambus technology." Opinion at 74 & n.403 (describing JEDEC's immediate steps to avoid Rambus's "loop-back clock" technology in its '703 patent when NEC made a "loop-back clock" proposal in 1997). *See also* CCFF 2436-2439. Similarly, when JEDEC learned that patent rights might cover the Quad CAS standard

³ Citations to "CCFF" are to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order, dated September 5, 2003.

