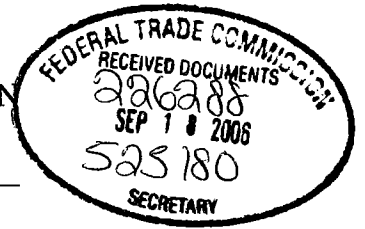


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



DOCKET NO. 9302

IN THE MATTER OF
RAMBUS INCORPORATED

**BRIEF OF AMICI CURIAE, GESMER UPDEGROVE LLP AND ANDREW
UPDEGROVE, ON THE ISSUE OF THE APPROPRIATE REMEDY FOR
RAMBUS'S VIOLATIONS OF THE FTC ACT**

[PUBLIC]

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September 14, 2006

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are Gesmer Updegrave LLP and Andrew Updegrave, an attorney with that law firm. Since 1988, *amici curiae* have represented over sixty standard setting organizations (SSOs), as well as other non-profit organizations that support, promote or advocate in favor of open standards. *Amici curiae* have previously filed *amicus curiae* briefs on a pro bono basis before the Federal Circuit (Docket Nos. 01-1449, 01-1583, 01-1604, 01-1641, 02-1174, 02-1192; Amicus Brief in Support of Combined Petition for Panel Rehearing, and Rehearing En Banc by Defendants-Cross-Appellants), Supreme Court (Docket No. 03-37; Brief of Amici Curiae in Support of Petition for Writ of Certiorari) and the Federal Trade Commission (Docket No. 9302; Brief of Amici Curiae) in connection with the matters here at issue. Each brief was filed on behalf of large and diverse groups of SSOs. The brief previously filed with the Federal Trade Commission (“Commission”) was submitted on behalf of 11 accredited and unaccredited SSOs, representing over 8,600 commercial, government, university and non-profit members.

Amicus curiae Andrew Updegrave has been the principal attorney at Gesmer Updegrave LLP representing each of the clients referred to above, and was the author of each of the *amicus curiae* briefs referred to above. He has presented invited testimony in joint hearings of the Commission and the Department of Justice on the topic of “Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.” See Federal Trade Commission, Joint hearings of Federal Trade Commission and Department of Justice Antitrust Division (2002), at <http://www.ftc.gov/opp.intellect/>. He currently serves as a Director of the American National Standards Institute (“ANSI”),

which accredits SSOs in the United States and represents the United States internationally in many standards venues, as a Director of the Free Standards Group, which sets standards for the Linux operating system, and as a member of the Board of Advisors of HL7, an ANSI-accredited SSO that sets standards for clinical and administrative data in healthcare. He has also served as a member of the ANSI revision committee of the United States National Standards Strategy, and is the founder and editor of ConsortiumInfo.org (*available at* <http://www.consortiuminfo.org>), a free on-line resource with a global audience, which focuses on the topics of standards, standard setting and related intellectual property and other issues, as well as the Consortium Standards Bulletin (*available at* <http://www.consortiuminfo.org>), an on-line eJournal with thousands of subscribers throughout the world that addresses the same topics.¹

Amici curiae believe that the maintenance of a robust, trusted and effective standard setting infrastructure is fundamental to the welfare of the government, the nation, and indeed to the continued functioning of the modern, technology based, networked world in which we live.

ISSUE URGED

The remedy levied by the Commission against Rambus must send a clear message to that company, as well as to all that participate in the standard setting process, that the consequences of such bad faith conduct, if discovered, will significantly exceed the

¹ It must be noted that neither ANSI, the Free Standards Group, nor HL7 has reviewed this brief. The affiliations and activities above are included only as matters of record intended to indicate the depth of experience and familiarity with standard setting matters of *amicus curiae* Andrew Updegrave. Accordingly, no inference can or may be made that any statements made in this brief have been, or would be, endorsed by any of these entities.

potential gains of engaging in such practices. To fail to include a significant punitive element in the remedies assessed by the Commission would dangerously undermine the standard setting process, to the detriment of society and the national interest.

SUMMARY OF ARGUMENT

Standards are vital to government procurement, national competitiveness, and the efficiency and safety of society. Standards are created by voluntary, self-governing organizations that have no effective enforcement power to police the conduct of their members. In the technology sector, the implementation of standards is often likely to result in the infringement of the patents of members and/or non-members. If the owner of a patent that would be infringed by a standard is only willing to license that patent selectively, or on such unreasonable or discriminatory terms as it may wish, then severe consequences will follow, including unreasonable costs to end-users, unfair discrimination against industry participants, and even the complete failure of the standard in question. While the potential for such a result cannot easily be avoided in the case of a patent claim owned by a non-participant in the standard setting process, it is highly inequitable for a participating patent owner to manipulate the process of an SSO in which it was active to ensure such a result for its own benefit.

The value and importance of standards in the modern world is profound. As an example, the Department of Commerce concluded in 2004 that standards affect an estimated 80 percent of world commodity trade. U.S. Department of Commerce, *Standards and Competitiveness – Coordinating for Results 1*, available at http://www.technology.gov/reports/NIST/2004/trade_barriers.pdf#search=%22U.S.%20Department%20of%20Commerce%2C%20Standards%20and%20Competitiveness%20%

E2%80%93%20Coordinating%20for%20Results%22 (May 2004). In the technology sector, the role of standards is particularly crucial, as vital infrastructural elements such as telecommunications, the Internet and the Web literally cannot exist without common agreement on, and implementation of, enabling protocols and other standards.

The suitability of the voluntary, consensus-based standard setting process for creating standards for public, as well as private, interests has been recognized by Congress, which enacted the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Pub. L. No. 104-113, 110 Stat. 775 (1996). Under that Act, Congress instructed each Federal agency to utilize standards created by SSOs in preference to “government unique” standards to the extent “practicable.” Other government actions discussed below recognize, and encourage, industry-wide reliance on SSO developed standards. As a result of the promulgation of the NTTAA, the proper functioning of the voluntary consensus-based standard setting system has become vital to the proper functioning of government agencies charged with ensuring national interests as diverse as nuclear power, defense, transportation, healthcare and homeland security.

However, unlike public laws and regulations, standards are developed within a process that is not only entirely self-regulating, but also largely unsupervised, except by those that directly participate. As a result, its success or failure is highly dependent upon trust. If those that participate conclude that abusing the system is too easy to accomplish, and that such abuse is too lightly punished if discovered, then the entire system can find itself in danger of collapse, because the risks of participation and adoption of standards become greater than the benefits to be gained through such participation and adoption.

Were such a result to occur, virtually no aspect of society would be immune from the impact of that collapse.

It is not the intention of *amici curiae* in this brief to advocate for a particular remedy or remedies, with respect to which the Commission will undoubtedly receive advice from other sources. Rather, the *amici curiae* represented by this brief wish to stress the importance of imposing penalties that are sufficiently severe to clearly demonstrate that abusing the voluntary standard setting process cannot prudently be evaluated in terms of simple business risk. To do otherwise would be to send a clear signal not only to Rambus, but to the world at large that there is more to be gained in the United States by “gaming” the standard setting process than by obeying the rules.

ARGUMENT

I. THE EFFICIENT OPERATION OF THE VOLUNTARY STANDARD SETTING PROCESS IS VITAL TO THE NATIONAL INTEREST

A. Standards are Essential to Almost All Aspects of Modern Life

A standard is required almost any time two or more people need to agree to do something in the same way -- whether it be setting the distance between two railroad rails, the diameter of a pipe fitting, or the technical characteristics of a computer modem. Absent such agreement, one could ride one train only to the end of its owner’s tracks before having to switch to the train owned by the next carrier; one could only purchase plumbing products from a single vendor for a given project; and one could exchange electronic data only with a remote source known to have the same modem. Multiply this reality 1,000,000 times, and one begins to form a picture of the vital importance of standards.

Standards underlie almost all aspects of modern life. They are essential to protect security, safety and health. For example, SSOs set standards for building codes, fire safety codes and equipment specifications for diverse types of emergency worker equipment. SSOs swiftly acted to set diverse standards supporting the current Homeland Security Initiative, and continue to add to a growing list of such standards. SSO standards also enable and drive technological advancement and innovation, keeping our domestic infrastructure strong and our economy competitive. Fault intolerant areas such as finance, defense, aerospace and telecommunications depend on rigorous adherence to SSO standards-based specifications, tools, processes and certifications.

Economically, it is well recognized that “standardization has significant consumer benefits in many markets.” Lemley, Mark A., *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002). Standard setting serves to “increase price competition,” “increase compatibility and interoperability, allowing new suppliers to compete,” and “increase the use of a particular technology, giving the installed base enhanced economic and functional value.” Balto, David A., *Standard Setting in the 21st Century Network Economy*, Computer and Internet Lawyer, Vol. 18, No. 6, at 3 (Jun. 2001). Indeed, in the absence of appropriate standards in a patent-rich environment, only a single vendor and such licensees as it chose to favor could offer a new technology, resulting either in the failure of the technology to become widely adopted, or in the development of an inefficient monopoly in the IPR owner for the life of the involved patents.

Out of necessity, the modern world has become increasingly dependent upon the voluntary consensus process that creates standards. The result is a *global standard*

setting infrastructure that is as extensive as it is invisible to those not directly involved. This infrastructure includes the official national standard setting organizations of the 146 countries that together comprise the membership of the International Organization for Standardization (ISO). ISO, *ISO In Figures* (Jan. 2003), at <http://www.iso.ch/iso/en/aboutiso/isoinfigures/archives/January2003.pdf>. It is estimated that these and other national organizations maintain an incredible 780,000 (or more) official, nationally adopted standards. Toth, Robert B., ed., NIST, *Profiles of National Standards-Related Activities*, Spec. Pub. 912 (Apr. 1997). Consortia create thousands more standards that also achieve national or global adoption, particularly in the areas of information and communications technologies. As a result, standards represent essential underpinnings to the functioning of the entire modern world. Any action that impedes or imperils the process of creating or adopting these standards will also undercut the institutions that rely on them to function. Given our reliance on these institutions and the standards that they create, such actions will necessarily and adversely impact a bewildering array of aspects of modern life.

B. Congress Has Acted to Facilitate the Creation and Adoption of Standards, and to Make the Federal Agencies Dependent on those Standards

The Federal government has increasingly recognized that standards created through the voluntary consensus process are essential to its efficient and cost-effective functioning. Historically, the government preferentially used “government unique” standards in much of its purchasing, which often served to limit the number of bidding vendors and resulted in higher purchasing costs. As a result, Congress enacted the NTTAA in 1996, which not only requires Federal agencies to use non-government

