OVERVIEW

“Single–Firm Opportunism and the FTC’s Rambus Defeat: Implications for Section 2 of the Sherman Act”, Chris Hardee, Attorney, Antitrust Division, United States Department of Justice:

(A) “Before the Rambus decision, commentators had questioned whether antitrust law is the appropriate remedy for single-firm SSO [Standard-Setting Organization] manipulation.”

(B) “The D.C. Circuit delivered the FTC a major defeat in Rambus, Inc. v. Federal Trade Commission, 522 F.3d 456 (D.C. Cir. 2008).”

(C) “The court’s [D.C. Circuit] decision throws into doubt the circumstances in which antitrust provides a remedy for opportunistic single-firm conduct in the standard setting process.”

(D) “…such cases are not a good fit for standard antitrust analysis, because they turn overwhelmingly on the legality of the conduct in the light of SSO rules, not exclusively on competitive effects.”
I. BACKGROUND

(A) Rambus and The JEDEC Standard Setting Organization ("SSO"): (Cont’d)

6. Rambus attended its last JEDEC meeting in December 1995 and formally notified JEDEC of its withdrawal by letter on June 17, 1996.

7. As of Rambus’s last JEDEC meeting, Rambus held no patents that were essential to the manufacture or use of devices complying with any JEDEC standard.

8. The first presentation at JEDEC on the next generation standard – the DDR SDRAM – occurred six months after Rambus’ withdrawal. JEDEC approved the DDR SDRAM standard in March 1998 and published it in August 1999.

9. Rambus continued, after it withdrew from JEDEC, to file patent applications on the subject matter described in its initial ’898 application. These applications began issuing in 1999.

10. Starting in 1999, Rambus informed DRAM manufacturers that it held patent rights for technologies included in JEDEC’s SDRAM and DDR SDRAM standards and that manufacture and sale of products compliant with those standards infringed its rights.
I. BACKGROUND

(B) *Rambus, Inc. v. Infineon Technologies, AG*, 318 F.3d 1081 (Fed. Cir. 2003):

1. "In this case there is a staggering lack of defining details in the …JEDEC patent policy."

2. "In sum, substantial evidence does not support the jury’s verdict that Rambus breached its duties under …JEDEC policy. Infineon did not show the first element [duty of disclosure] of a Virginia fraud action and therefore did not prove fraud associated with the SDRAM standard."

3. "Because Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began, the district court properly granted JMOL of no fraud in Rambus’s favor on the DDR-SDRAM verdict."

(C) *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 441 F. Supp.2d 1066 (N.D. Cal 2006):

1. "The court grants as unopposed Rambus’s motion for summary adjudication that the JEDEC duty to disclose ends once a member formally withdraws for JEDEC."

2. "In light of the patent law policies implicated, breach of the JEDEC disclosure policies, without more, cannot give rise to antitrust liability."
II. FEDERAL TRADE COMMISSION PROCEEDINGS

(A) Complaint under §5(b) of the FTC Act (June 18, 2002):

1. Rambus engaged in unfair methods of competition and unfair or deceptive acts or practices in violation of the act.

2. Rambus breached JEDEC policies requiring it to disclose patent interests related to standardization efforts and the disclosures it did make were misleading.

3. By this deceptive conduct, Rambus unlawfully monopolized certain technology markets in which its patented technologies compete with alternative innovations to address technical issues relating to DRAMS.

(B) ALJ Initial Determination (February 17, 2004):

1. Rambus did not impermissibly withhold material about its intellectual property.

2. There was insufficient evidence that, if Rambus had disclosed all the information allegedly required of it, JEDEC would have standardized an alternative technology.

3. The Complaint should be dismissed in its entirety.
II. FEDERAL TRADE COMMISSION PROCEEDINGS

(C) The Commission’s Opinion (July 31, 2006):

1. The Commission reopened the record to allow supplemental evidence produced in the Infineon litigation regarding Rambus's spoliation of evidence and newly found documents produced in the Hynix litigation.

2. The Commission vacated the ALJ decision and set aside his findings of fact and conclusions of law.

3. The Commission found that while JEDEC's patent disclosure policies were "not as model of clarity", members expected one another to:

   (i) disclose patents and patent applications that were relevant to technologies being considered for standardization; plus

   (ii) disclose planned amendments to pending applications or “anything they’re working on that they potentially wanted to protect with patents down the road”.

(C) The Commission’s Opinion (July 31, 2006): (Cont’d)

4. The Commission held that Rambus willfully and intentionally engaged in misrepresentations, omissions, and other practices that mislead JEDEC members about intellectual property information "highly material" to the standard setting process.

5. The Commission focused entirely on the allegation of monopolization (Sherman Act, §2) and held that "but for Rambus's deceptive course of conduct, JEDEC:

   (i) either would have excluded Rambus’s patented technologies from the JEDEC DRAM standards,

   (ii) or would have demanded RAND assurances [i.e., assurances of ‘reasonable and nondiscriminatory’ license fees], with an opportunity for ex ante licensing negotiations".
II. FEDERAL TRADE COMMISSION PROCEEDINGS

(D) Commission's Remedial Opinion (February 7, 2007):

1. The Commission held that remedies beyond injunctions against further anticompetitive conduct would require stronger proof that they were necessary to restore competitive conditions.

2. The Commission refused to compel Rambus to license its relevant patents royalty-free because there was insufficient proof that "absent Rambus's deception", JEDEC would have standardized non-proprietary technologies instead of Rambus's.

3. The Commission decided to compel licensing at "reasonably royalty rates" which it calculated based on what the Commission believed would have resulted from negotiations between Rambus and manufacturers before JEDEC committed to the standards.

(A) The Court of Appeals Found that the Commission Failed to Sustain Its Allegation of Monopolization:

1. "In this case, under §5 of the FTC Act, the Commission expressly limited its theory of liability to Rambus's unlawful monopolization in violation of §2 of the Sherman Act."

2. "Therefore, we apply principles of antitrust law developed under the Sherman Act, and we review the Commission's construction and application of the antitrust laws de novo."

3. "It is settled law that mere existence of a monopoly does not violate the Sherman Act."

4. "In addition to the 'possession of monopoly power in the relevant market', the offense of monopolization requires 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident.'"

III. RAMBUS v. FEDERAL TRADE COMMISSION (522 F.3d 456, D.C. Cir. 2008)

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5. “The critical question is whether Rambus engaged in exclusionary conduct and thereby acquired its monopoly power in the relevant markets unlawfully.”

6. “First, ‘to be condemned as exclusionary, a monopolist’s act must have anticompetitive effect.’ That is, it must harm the competition process and thereby harm consumers. In contrast harm to one or more competitors will not suffice.”

7. “Second, it is the antitrust plaintiff – including the government as plaintiff – that bears the burden of proving the anticompetitive effect of the monopolist’s conduct.”

8. The Commission determined that had Rambus fully disclosed its intellectual property, “JEDEC either would have excluded Rambus’s patented technology from the JEDEC DRAM standards, or would have demanded RAND assurances, with an opportunity for ex ante license negotiations.”

9. “But the Commission did not determine that one or the other of these two possible outcomes was the more likely.”

10. “Commission counsel…[at oral argument confirmed] that the Commission was unable to decide which of the two possible outcomes would have occurred had Rambus disclosed.”
III. RAMBUS v. FEDERAL TRADE COMMISSION (522 F.3d 456, D.C. Cir. 2008)

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11. "We assume without deciding that avoidance of the first outcome was indeed anticompetitive."

12. "Therefore, for Commission to have carried its burden of proving that Rambus’s conduct had an anticompetitive effect, we must also be convinced that if Rambus’s conduct merely enabled it to avoid the other possible outcome, namely JEDEC’s obtaining assurances from Rambus of RAND terms, such conduct alone could be said to harm competition."

13. "Deceptive conduct – like any other kind - must have an anticompetitive effect in order to form the basis of monopolization claim."

14. "But an otherwise lawful monopolist’s use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus diminish competition. Consider for example, NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)…"

15. "Here, the Commission expressly left open the likelihood that JEDEC would have standardized Rambus’s technologies, even if Rambus had disclosed its intellectual property. Under this hypothesis, JEDEC lost only the opportunity to secure a RAND commitment from Rambus. But loss of such a commitment is not harm to competition from alternative technologies in the relevant markets."

16. The Court of Appeals noted the Hovenkamp IP and Antitrust treatise which urged "An antitrust plaintiff must establish that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission."
III. RAMBUS v. FEDERAL TRADE COMMISSION (522 F.3d 456, D.C. Cir. 2008)

(B) Court of Appeals Remand to The FTC:

1. "...the original Complaint also included a count charging Rambus with other unfair methods of competition in violation of Section 5 of the FTC Act."

2. "While the Commission dropped this aspect of the case and focused on a theory of liability premised on unlawful monopolization...at least one commissioner suggested that a 'stand alone' action would have had a 'broader province' than a Sherman Act case."

3. Accordingly, the Court of Appeals remanded the case to the FTC for "further proceeding".

4. In doing so, the Court of Appeals expressed its "serious concerns about the strength of the evidence relied on to support some of the Commission's crucial findings regarding the scope of the JEDEC's patent disclosure policies and Rambus's alleged violation of those policies."

IV. AFTERMATH

(A) Petition for Writ of Certiorari Denied (February 23, 2009).

(B) On May 12, 2009, the FTC ordered that the Complaint in the Rambus matter "be and it hereby is dismissed."


THANK YOU!