Broadened Antitrust Liability for Abusing Standards-Setting Process

Summary

On August 2, 2006, the Federal Trade Commission ("FTC") sent a loud and clear message that patent holders who abuse a standard-setting process face antitrust liability. In an opinion written by Commissioner Pamela Jones Harbour, the FTC found that Rambus, Inc. ("Rambus") violated Section 5 of the FTC Act by deceiving a standard-setting organization ("SSO") through concealing its patents until the SSO was committed to the standards.[1] Because Section 5 of the FTC Act does not contain a private right of action, however, SSOs and their members should not expect an immediate wave of follow-on private litigation under that statute.[2]

In reversing an administrative law judge opinion that ruled in favor of Rambus, the FTC found the company's deception contributed to Rambus's acquisition of monopoly power in the markets for four computer memory technologies that have been incorporated into industry standards.[3] This advisory reviews the background of the FTC case against Rambus, the notable portions of the Rambus opinion, and possible implications of the FTC's decision for technology firms and other entities involved in SSOs.

Standard-Setting Organizations

The FTC viewed Rambus's conduct as deceptive due to its actions while participating in a SSO. SSOs are common in many industries,[4] and, as in this case, often attempt to define physical interfaces and protocols between different product components to ensure their interoperability. Not uncommonly, SSOs are organized by and include companies that are competitors. SSO members may, however, legitimately cooperate in order to develop and implement standards that foster the creation of new or improved products and the expansion of markets, which can benefit both the consumer and the competing companies.[5] For this reason, if properly organized and run, SSOs are generally viewed as pro-competitive by the agencies enforcing the antitrust and unfair competition laws.

Participants in SSOs may sometimes own intellectual property related to standards under consideration. Inherent tension exists between the participants' intellectual property rights, which may be extremely valuable if they cover a successful standard, and the general goals of SSOs that pursue a strategy of setting standards accessible freely or at low cost. SSOs usually have policies that define the obligations of the participants who own intellectual property related to the standards. Many SSOs require participants to notify the standards body of the existence of intellectual property they hold that is related to the standards under consideration, and to commit to licensing intellectual property determined essential to using

the standards on reasonable and nondiscriminatory terms. The notice provides the SSO with the opportunity to evaluate the cost associated with adopting a particular standard through license fees required to be paid to the patent owner to practice the standard. Notice also provides the opportunity for the SSO to adjust the standard so that it no longer requires the notifying participant's intellectual property. As described below, the relatively unclear policy at issue in the SSO in which Rambus participated led to conduct by Rambus that the FTC found abused the standard-setting process.

Rambus and Its Involvement with the JEDEC Standard-Setting Organization

Rambus is a technology development and patent licensing company with a portion of its patent portfolio (constituting roughly 50 patents) directed to various components and interfaces associated with computer memory. In late 1991, Rambus joined the Joint Electron Device Engineering Council ("JEDEC") and became a member of the JEDEC subcommittee overseeing computer memory standards. While Rambus was a member of JEDEC, JEDEC had certain policies in place that discouraged adoption of standards referring to "a patented item or process" unless the committee knew "the technical information covered by the patent" and the patentee agreed to license the patent under reasonable terms. Simultaneously with its attendance at JEDEC meetings, however, Rambus allegedly continued to seek and obtain patents related to these technologies without fully disclosing those patents and patent applications to JEDEC.

The FTC Staff Complaint Against Rambus and ALJ Decision

The FTC staff filed its complaint against Rambus on June 18, 2002, and alleged that Rambus violated its disclosure duty to JEDEC and engaged in anti-competitive practices by enforcing its patent portfolio against computer memory manufacturers producing chips compliant with JEDEC standards. In an initial decision rendered February 23, 2004, Chief Administrative Law Judge ("ALJ") Stephen J. McGuire dismissed the complaint against Rambus based primarily on his findings that JEDEC patent policy did not require that participating companies disclose all of their patents and pending patent applications.[6] Moreover, the ALJ found that Rambus's patents were not necessarily essential to practice the standards adopted by JEDEC.

FTC's Opinion Against Rambus

As noted above, on August 2, 2006, the FTC overruled the ALJ and found that Rambus had monopolized the relevant computer memory technology markets, which constitutes a violation of the FTC Act. As an initial matter, the FTC noted that a Sherman Act Section 2 monopolization claim requires more than mere possession of a monopoly, which can be legitimately obtained, and that anticompetitive or exclusionary conduct also must be shown.[7] While monopolization cases often rely on evidence of anticompetitive behavior for this element, it is not novel for deception to be alleged as an exclusionary element,[8] and here the FTC found the relevant exclusionary conduct to be Rambus's concealment of its full patent portfolio and pending patents while the standards were under consideration by JEDEC.[9]

The FTC rejected some of the points on which the ALJ relied. For example, while the ALJ focused on whether Rambus violated the specific rules promulgated by JEDEC, the FTC noted the rules were "not a model of clarity," and found that, regardless of the specific rules, a "duty of good faith underlies the standard-setting process …."[10] The FTC did not create a new duty for all participants to disclose all intellectual property to SSOs, but did find that the SSOs' rules, especially where unclear, should be followed under a duty of good faith. Additionally, whereas the ALJ appeared more sympathetic to Rambus's claims that its patents were not essential to produce products made to the standards adopted by JEDEC, the FTC appears to have focused on the fact that the markets at issue were ones "over which Rambus now claims patent rights."[11] The FTC determined that these claims were sufficient to find causation between Rambus's deception and harm to competition.

The Rambus opinion is notable for its express adoption of language originating from consumer deception law. Specifically, in this antitrust case, the FTC adopted language from its Policy Statement on Deception regarding a "'misrepresentation, omission or practice' that [is] 'material' in that it [is] likely to mislead 'others acting reasonably under the circumstances.'" [12] By applying standards usually applicable to consumer protection cases, the FTC arguably broadened the scope of conduct that can violate Section 5 of the FTC Act in an antitrust case.

Finally, the FTC did not rule on a remedy for Rambus's antitrust violations and requested briefing on remedy-related issues by September 15, 2006. While the FTC did not preview its potential remedies, it is possible that the FTC could impose an injunction to bar Rambus from collecting royalties on its patents that were adopted into JEDEC's standards without disclosure by Rambus. However, Rambus may appeal the FTC decision to any United States Court of Appeals where it conducts business or where the behavior complained of took place.[13] Consequently, the final act in this story may not occur for another year or so, particularly if the appeal process includes a certiorari petition to the Supreme Court.

Implications of the Rambus Opinion

The Rambus opinion is significant in emphasizing the FTC's willingness to apply consumer protection standards in an antitrust case. By incorporating language from the consumer protection area into a Section 2 monopolization case and imposing a good-faith dealing standard on members of the JEDEC, the FTC may be signaling its intention to apply consumer protection standards to regulate parties' behavior in the standard-setting process.[14] As noted in this advisory, the intersection of antitrust law, intellectual property law and standard setting is filled with tension, and the FTC may be attempting to resolve unanswered questions by applying the broad good-faith disclosure standards normally applicable to consumer transactions to SSOs and their members. While this FTC decision may not be the final word in this area due to likely appeal, SSOs and their participants need to be aware that the FTC has clearly signaled it is prepared to challenge entities that manipulate the standard-setting process to enhance market power.

Endnotes

1 *See In re Rambus, Inc.*, No. 9302, Opinion of the Commission, Aug. 2, 2006, *available at* http://www.ftc.gov/os/adjpro/d9302/index.htm; *see also* Press Release, FTC, *FTC Finds Rambus Unlawfully Obtained Market Power*, Aug. 2, 2006, *available at* http://www.ftc.gov/opa/2006/08/rambus.htm.

2 While a wave of Section 5 FTC Act private litigation will not follow, not surprisingly, Rambus has already been sued by at least one private plaintiff alleging theories similar to the FTC's action, but under other statutes. *See Vladimir Chernomorets v. Rambus, Inc.*, Case 3:06-cv-04852-JCS, U.S. Dist. Co., N. D. Cal., filed Aug. 10, 2006.

3 *See* Rambus opinion, *supra* note 1.

4 Well-known SSOs include the American National Standards Institute (ANSI); Institute of Electrical and Electronic Engineers (IEEE); Internet Engineering Task Force (IETF); International Telecommunications Union (ITU); International Standards Organization (ISO); 3GPP; W3C; and EPCglobal.

5 The three-prong wall socket and plug (NEMA 5-15), WiFi (IEEE 802.11), ZigBee (IEEE 802.15), and WiMax (IEEE 802.16) are examples of highly successful standards that have created entirely new product lines for consumers' and producers' benefit.

6 *See In re Rambus, Inc.*, No. 9302, Initial Decision of Chief Administrative Law Judge Stephen J. McGuire, Feb. 24, 2004, *available at* http://www.ftc.gov/os/adjpro/d9302/index.htm. *See also In the Matter of Rambus, Inc.*, FTC Docket No. 9302, Intellectual Property Advisory issued by Alston & Bird, Mar. 1, 2004, *available at* http://www.alston.com/articles/Rambus,%20Inc.pdf (summarizing ALJ decision).

7 *See* Rambus opinion, *supra* note 1, at 28.

8 *See id*. at 29 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (discussing Microsoft's deception with respect to Java application as exclusionary conduct)).

9 In reaching this decision, the FTC acted consistently with earlier pronouncements by some Commissioners and Bureau Directors. *See, e.g.* Deborah Platt Majoras, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Prepared for Standardization and The Law: Developing the Golden Mean for Global Trade (September 23, 2005) *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

10 *See* Rambus opinion, *supra* note 1, at 52.

11 *Id*. at 5, 73, n.397 (Statement by Rambus's former Chairman: "Q: So am I right, then that it's Rambus's position [] that any SDRAM or RDRAM being used in main memory PCs today [January 31, 2001] are covered by their patents?...[A.] I would say that it is highly likely that is true.").

12 *Id.* at 30. In addition, Commissioner Jon Leibowitz filed a concurring opinion that makes clear his view that Section 5 of the FTC Act prohibits "[u]nfair methods of competition," and "unfair or deceptive acts or practices" separate and apart from antitrust laws such as the Sherman Act, which was at issue in this case. *See In re Rambus, Inc.*, No. 9302, Concurring Opinion of Commissioner Job Leibowitz, Aug. 2, 2006, *available at* http://www.ftc.gov/os/adjpro/d9302/index.htm (citing 15 U.S.C. § 45(a)(1)). CommissionerLeibowitz also noted that the FTC's enforcement powers "can fairly extend more broadly than the antitrust laws." *Id.* Note that Section 5 of the FTC Act does not include private rights of action.

13 *See* 15 U.S.C. 45(c). However, Rambus may not be able to appeal to the Federal Circuit, which ruled for Rambus in separate fraud litigation with similar claims at issue as those here. *See Rambus, Inc. v. InfineonTechs. AG*, 318 F.3d 1081 (Fed. Cir. 2003).

14 The concurring opinion's focus on the FTC's independent power under Section 5 of the FTC Act to condemn unfair business practices and recent comments by Commissioner J. Thomas Rosch suggest that at least two of the five FTC Commissioners are prepared to apply that provision alone in a traditional antitrust context. See J. Thomas Rosch, Perspective on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhauser Amicus Brief, Remarks at the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar (July 6, 2006) *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf ("Section 5 of the FTC Act prohibits all 'unfair methods of competition.' That's very broad language – much broader than any language found in the Sherman or Clayton Acts.").

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