Weird turn of events in continuing Rambus saga

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In the ongoing Rambus saga, the latest development now casts Rambus as the alleged victim of an antitrust conspiracy. What's more, an internal government squabble over document production could derail the FTC's case against Rambus' standards process skullduggery. Developments just get curiouser and curiouser.

FTC's case against Rambus

You will recall from the last Rambus story in *IEEE Micro* ("FTC Piles onto Rambus' Standardization Skullduggery," July-Aug. 2002, pp. 6-7, 86-87) that the FTC sued Rambus in the wake of Rambus' $7 million loss in a fraud jury trial in Richmond, Virginia. That suit was over a JEDEC Solid State Technology Association standard for synchronous dynamic random-access memory chips (SDRAMs). The fraud and FTC cases charged Rambus with misusing information it gained from JEDEC meetings on developing an industry standard for SDRAMs. Rambus had pending patent applications that eventually resulted in patents whose claims covered part of the technology embodied in the JEDEC SDRAM standard. Rambus did not disclose its pending patent applications to JEDEC and, based on what it learned from JEDEC meetings, changed those applications to cover the evolving JEDEC standard. The FTC called this behavior "Rambus' scheme to capture the SDRAM standards." (The jury and the district court in Richmond called it common-law fraud, a decision still pending on appeal.)

According to the FTC's complaint against Rambus

> Rambus would actively seek to perfect patent rights covering technologies that were the subject of an ongoing, industry-wide standardization process, in which Rambus itself was a regular participant, without disclosing the existence of such patent rights (or the pertinent patent applications) to other participants, many of whom, by producing products compliant with the standards, would later be charged with infringing Rambus's patents.

The FTC charged that this was "a continuous pattern of deceptive, bad-faith conduct" because

> ... Rambus's very participation in JEDEC, coupled with its failure to make required patent-related dis-

Published by the IEEE Computer Society

0272-1732/03/$17.00 © 2003 IEEE

> closures, conveyed a materially false and misleading impression—namely, that JEDEC, by incorporating into its SDRAM standards technologies openly discussed and considered during Rambus's tenure in the organization, was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.

The FTC concluded that this conduct amounted to

> ... a pattern of anticompetitive and exclusionary acts and practices, undertaken over the course of the past decade, and continuing even today, whereby it [Rambus] has obtained monopoly power in the synchronous DRAM technology market and narrower markets encompassed therein...in violation of section 5 of the FTC Act.

Among the "threatened or actual anticompetitive effects" of Rambus' misconduct, the FTC said, were

> ... increases in the price, and/or reductions in the use or output, of synchronous DRAM chips, as well as products incorporating or using synchronous DRAMs or related technology.

The price increases would have resulted because of the SDRAM royalties extracted from the *DRAMurai*—manufacturers in the competitive DRAM market. (Economic theory posits that, because the DRAM market is highly competitive, such sellers' cost increases as they pass royalties on to buyers.)

To remedy the alleged violation, the FTC wants to prohibit Rambus from enforcing its SDRAM technology patents against those using the JEDEC SDRAM standard.

This would amount to compulsory, royalty-free licensing of the fraudulently obtained patents, in the field of JEDEC-standard use (the setting in which the fraudulent conduct occurred).

Justice department investigation

At about the same time that the FTC filed its suit against Rambus (June 2002), the Antitrust Division of the US Department of Justice (DoJ) began a grand jury investigation of possible criminal behavior by DRAMurai. Micron Technology, Samsung, and Infineon (Rambus' adversary in the Virginia fraud case) confirmed that they were among the targets of the probe and had received grand jury subpoenas for documents. (Other alleged members of the DRAMurai caught up in this investigation include Hyundai Micro-Electronics, NEC, and Toshiba.) Presumably, the grand jury investigation has a DRAM price-fixing conspiracy as its main focus.

In October 2002, Rambus sent administrative subpoenas—a right it has in the FTC proceeding—to the DRAM manufacturers, seeking documents for use in defense against the FTC's complaint. Among other documents, Rambus requested records of all communications passed between the respective manufacturers and the DoJ. The DRAMurai

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resisted by moving to quash Rambus' subpoenas. At that point (late December 2002), the DoJ moved to intervene in the FTC case, opposing any discovery related to the grand jury investigation. In the interim, the DoJ moved to "stay" (suspend) the FTC discovery proceedings to the extent that they involved documents related to the grand jury investigation. The DoJ intervened because it has always championed the principle that the sanctity of the grand jury process prohibits any interference of any sort with grand jury investigations or with the maintenance of their absolute secrecy. And the DoJ has generally been successful in persuading courts to agree with this principle.

Back at the FTC

In response to the DRAMurai and the DoJ motions, Rambus filed papers explaining why it was entitled to the documents. First, Rambus denied any suggestion that it wished to hinder the DoJ's criminal investigation. Quite the contrary, Rambus says, for it is a victim of the supposed conspiracy: The DRAMurai made it a part of their conspiracy to refuse to take licenses under Rambus' RDRAM patents. According to Rambus, having its RDRAM technology become a de facto standard for memory chips would have compelled the DRAMurai to buy RDRAM patent licenses from Rambus, which they did not want to do.

According to Rambus: "In the face of the threat presented by Rambus, especially after Intel selected Rambus in 1996 as its choice for 'next-generation technology,'" the DRAMurai "joined together in a concerted effort to convince Intel and other purchasers of memory devices that Rambus DRAMs would be too difficult to build and therefore too expensive to buy" and also that cheaper alternatives were available that "offered equal performance." In addition, these manufacturers agreed "in concert" to limit their production of Rambus DRAMs and keep their prices high. In antitrust parlance, that type of behavior is a *horizontal boycott*, and it is "illegal per se." That term means that the conduct is illegal without proof of any more than the making of the agreement. That is, just the proof that there was such an agreement—regardless of its success—establishes the antitrust violation.

Just last month (January), the US Supreme Court decided a case in which it held that a conspiracy was punishable even though intervening police action had prevented the accomplishment of the conspiracy's objectives. In *United States v. Jiminez Recio* (01-1184), the government challenged a Ninth Circuit Court holding that a criminal conspiracy terminates as a matter of law when the conspiracy's objective has been defeated.

In this case, the fuzz intercepted and seized a shipment of illegal drugs en route to Idaho. Eager to please their new land-

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lords, the truck drivers agreed to proceed to the intended destination and page their contacts. Shortly thereafter, Recio and company appeared, took control of the truck, and drove away. Police stopped and arrested them soon thereafter.

The Ninth Circuit Court reversed the convictions for conspiracy to possess and to distribute the drugs. The court reasoned that, because the drugs had already been seized, the object of the alleged conspiracy (to distribute said drugs) had been "defeated." The Supreme Court reversed this decision, saying the essence of a conspiracy is the illegal agreement itself (http://www.supremecourtus.gov/opinions/02pdf/01-1184.pdf).

At the same time, Rambus added, the DRAMurai heavily promoted the double-data-rate (DDR) SDRAMs and SDRAMs of the JEDEC standard, because the DRAMurai had the impression that those technologies were under an open standard. (This seems to be an oblique way of saying that the DRAMurai did not know about Rambus' standardization skullduggery scheme, and therefore set themselves up for a black eye by walking into a door.)

Their problem, the DRAMurai recognized, was that Intel required huge quantities of RDRAMs. Intel was by far the largest DRAM customer and had selected RDRAM for its next-generation technology. Rambus produced a memorandum that it said was the 1996 minutes of a DRAMurai group known as the SyncLink Consortium. The memorandum stated

> Many [DRAM] suppliers are paranoid over the prospect of a single customer, e.g., Intel, having control of the market. We can't resist such a possibility individually. We need some united strategy.

Rambus contended that the DRAMurai's "united strategy"—conspiracy—was successful. Intel lost all interest in Rambus' RDRAM technology as a result of artificially low chip supply and artificially inflated prices. In late 2000, Intel said that it would instead use DDR chips compliant with the JEDEC standard. That left the DRAMurai free, Rambus charged, to jack up DRAM prices on SDRAM and DDR chips.

Rambus claims that it needs the documents it is seeking from the DRAMurai to prove that it is the victim here rather than the perpetrator. According to Rambus, the DRAMurai are not the victims of Rambus' standardization skullduggery. Rather, they are the real antitrust perpetrators, who engaged in a boycott against Rambus and its RDRAM technology, facilitating the very price-fixing conspiracy that the DoJ is investigating. Furthermore, Rambus claims, the documents will help refute the FTC charges of Rambus' patent skullduggery; they will also show that it wasn't Rambus, but the DRAMurai, who raised and threatened to raise DRAM prices. Prices went up only because of the DRAMurai's conspiracy, and Rambus maintains it couldn't have caused any price increase because the conspirators coaxed Intel away from RDRAMs.

Does Rambus have a good defense?

Unless the documents really are relevant to Rambus' defense against the FTC's charges, the subpoenas against the DRAMurai are unjustified. That's the basis for the FTC staff's opposition to the subpoenas. In addition, all parties seem to agree that they should not permit interference with a grand jury investigation. Rambus says the discovery that it wants will not hamper the criminal investigation and further claims that, as a victim, it applauds the grand jury investigation. If there is any problem, Rambus adds, the FTC should simply suspend the whole FTC case until the grand jury concludes the criminal investigation.

Doubtless, Rambus would be unhappy to see the FTC case against it halted for an indefinite period. But that's the price of living in a law-ordered society, and Rambus, as a good citizen, is willing to swallow its disappointment in silence.

Is there a fly in this ointment? Let's assume that Rambus' claim of what the DRAMurai were up to is true. We'll suppose that this group conspired to boycott Rambus' RDRAM technology in favor of SDRAM technology, thereby unknowingly jumping from the frying pan of Rambus' RDRAM patents into the fire of Rambus' SDRAM patents (which Rambus had manipulated to cover the JEDEC standard). We'll suppose, also, that the purpose of the DRAMurai boycott was to facilitate their DRAM price-fixing conspiracy. The question is whether these facts tend to establish a defense against the FTC's charges, assuming that the patent manipulation with which the FTC charges Rambus constituted illegal standardization skullduggery.

The fly in the ointment is that this just isn't a defense, even if you ignore the thinness of the factual claims. There are two possible defense theories, both of which are bad. The first is, "Hey, my alleged violation was that I did in some bad guys—I'm really dirty Harry or, at worst, a vigilante." The second is, "The real cause of DRAM price increases was not my conduct but the DRAMurai's conduct."

The first theory is simply not a defense. It is not a valid defense against an antitrust charge—especially one from the government—that the defendant beat up another malefactor. It is not even a defense against an antitrust suit by one malefactor against another. This point has been settled law for many decades. Therefore, the law would not excuse Rambus' fraudulent patent procurement, because the DRAMurai companies disadvantaged by the patents were engaging in a general price-fixing conspiracy or in a boycott against the allegedly fraudulent procurer, Rambus.

Among other reasons, the FTC is supposed to protect the entire public against violations. Just because a subclass of the entire public (the DRAMurai) is a bunch of unworthy rascals does not mean that the FTC should forget about protecting the rest of the class. For example, say the adverse effect of standardization skullduggery is that every PC buyer has to pay increased prices because of the patent royalties resulting from the standardization skullduggery. If that happens, the FTC is not supposed to just forget about it on the grounds that the company perpetrating the skullduggery was also mistreated.

The second theory—causation—is also problematic. Suppose Jimmy Thug and Harry Yegg conspire to rob the First National Bank. They are driving to the bank with their safecracking tools and run a red light. A policeman stops them, leading to their arrest. Just before they go through the red light, Billy Gunsel robs the bank and takes all the money in it. Under prevailing law, Thug and Yegg are still guilty of conspiring and attempting to rob the bank, although they are not guilty of actual robbery. The same thing would be true if the police had learned of the conspiracy and dozens of them were hiding in ambush at the bank. Factual impossibility, unknown to the conspirators, is not a valid defense.

Or, say I negligently set a fire at location A. You negligently set a fire at location B. The two fires converge at location C and damage the property of D, valued at $1,000. D has a claim for negligence against each of us for $1,000 (although D cannot recover the same damages twice and collect a total of $2,000). Another malefactor's misdeeds do not exempt me from liability for my acts that would independently have caused the same harm.

In this case, the FTC said that the "threatened or actual anticompetitive effects" of Rambus' misconduct were to increase the price of SDRAMs and products incorporating them (such as PCs). It might be that these actual anticompetitive effects did not yet materialize, and maybe they never will. Nevertheless, the standardization skullduggery's threatened effect was and is to increase the price of SDRAMs and products incorporating them. Therefore, the claim that the DRAMurai conspiracy actually caused the price increases is immaterial, as is evidence of the conspiracy.

A further question lurks, however, that the parties have not raised so far. This question concerns relief. Is the prohibition against patent enforcement that the FTC seeks justified if the actual cause of the price increases is solely the DRAMurai conspiracy? That might depend on the legal theory involved. You will recall that the FTC proceeded on a purely antitrust theory in this case and not on a deceptive- or unfair-practice theory. The appropriateness of what amounts to compulsory, royalty-free licensing of Rambus' patents in the absence of proof of *actual* anticompetitive effects of Rambus' conduct is questionable.

The FTC might have finessed this point, however, by alleging different anticompetitive effects as well as raising prices. These additional effects include pollution of the standardization process and consequent inhibition of standard setting:

> … decreased incentives, on the part of DRAM manufacturers and others, to participate in JEDEC or other industry standard-setting organizations or activities; and both within and outside the DRAM industry, decreased reliance, or willingness to rely, on standards established by industry standard-setting collaborations.

These effects have nothing to do with the DRAMurai conspiracy. By the same token, evidence of the DRAMurai conspiracy would not be material to the granting of relief based on such effects. On the other hand, Rambus might be entitled to pursue the challenged discovery for purposes of the relief case unless the FTC proceeding included protections against unfair surprise to Rambus. The surprise could be that Rambus had insufficient warning that the FTC was seeking royalty-free licensing even in the absence of any price effects.

But the FTC could avoid the problem of unfair surprise in either of two ways. One way would be for the FTC to disclaim any plan for such relief, which might or might not be acceptable to the FTC. Another way, which might be more acceptable, would be to have a separation of the relief trial from the merits trial—with a discovery interlude between them. That would cause undesirable delay, but that could be the lesser evil. The reason is that to deny this discovery could be a violation of procedural due process and an error requiring reversal of any final order of patent relief when Rambus appeals the case to the courts, if it loses before the FTC.

Unless the FTC adopts some technique to eliminate any present need for discovery regarding the DRAMurai conspiracy, it could risk a reversible error or a loss of the sought-for royalty-free licensing relief. (I am assuming that producing the communications between the DoJ and the DRAM manufacturers, and other discovery related to the grand jury, is simply out of the question.) Rambus' lawyers might therefore have hit upon a ploy to derail the FTC's case against Rambus, unless the FTC engages in some fancy footwork to counter the ploy. Perhaps, they have been taking a lesson from the lawyers for accused terrorists, who try to throw a monkey wrench into their clients' trial by demanding discovery into matters that the government does not want aired in court. The hope of those using this tactic is that it will make the government's cost in pursuing the case exceed the case's perceived value.

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