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CLIENT ALERT

Antitrust/IP Interface: D.C. Circuit Reverses FTC in *Rambus* Case Involving Alleged Deception of Standards Development Organization

Apr.24.2008

In a landmark decision this week, the United States Court of Appeals for the D.C. Circuit unanimously reversed the Federal Trade Commission's decision that Rambus violated the antitrust laws for alleged deception of a standards development organization. While not addressing whether Rambus' conduct might still have violated Section 5 of the FTC Act independent of a violation of Section 2 of the Sherman Act, the court expressed "grave doubts" about any liability being found on remand.

The *Rambus* case arises from the FTC's complaint alleging that Rambus unlawfully monopolized the market for four computer memory technologies incorporated into industry standards for dynamic random access memory ("DRAM") chips. Specifically, the FTC alleged that, while Rambus was participating in the Joint Electron Device Engineering Council (“JEDEC”), a standard-setting organization, it failed to disclose to the organization or its members that it had intellectual property interests in specific technologies that were ultimately incorporated into the standards. The FTC found that Rambus's omission constituted unlawful monopolization under Section 2 of the Sherman Act and unfair competition under Section 5 of the FTC Act, and imposed a compulsory licensing remedy. The Court of Appeals reversed.

In its decision, the court first noted that the FTC was unable to conclude that, but for Rambus' failure to disclose its patent position, JEDEC would have standardized around different technology. Thus, even assuming, without deciding, that so deceiving JEDEC would have been a Section 2 violation, the court held that the FTC had not proven that prong of its case. That left the FTC's alternative argument, that JEDEC was deprived the opportunity to obtain from Rambus a RAND (reasonable and non-discriminatory) licensing commitment. Here, however, the court concluded that Rambus' ability to charge a higher royalty for its patents was not a violation of Section 2, even if such opportunity arose through deceptive conduct. A higher royalty, the court reasoned, would be more likely to encourage alternatives to emerge, and was thus not "exclusionary" conduct of the type actionable as an act of monopolization. As the court put it: "[a]n otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." (citing to *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998)).

The court also expressed "serious concerns about the strength of the evidence" that Rambus violated JEDEC disclosure rules. The record was far from clear that Rambus had the specific duty to disclose asserted by the FTC, and the court expressed skepticism that any finding by the FTC of a violation of Section 5 on remand would survive review by the court.

The FTC now must decide whether to seek rehearing, appeal to the Supreme Court, or accept the defeat.

For more information, please contact the professionals listed below, or your regular Crowell & Moring contact.

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