Commentary: Richard Wolfram

“Analyze This!” Deconstructing Rambus Following the Supreme Court’s Denial of Certiorari – The Mechanics of How the D.C. Circuit’s Decision ‘Jumped the Tracks’

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COMMENTARY

AUTHOR: Richard Wolfram, independent practitioner

CONTACT INFORMATION: rwolfram@rwolframlex.com

In late February, the Supreme Court denied the FTC’s petition for certiorari in its seven-year case against Rambus Inc. for alleged monopolization of DRAM computer memory technology through patent hold-up in standard setting. In April 2008, the D.C. Circuit had concluded that the Commission could not show that Rambus’s deceptive avoidance of a standard setting organization (SSO) obligation to license on reasonable and non-discriminatory (RAND) terms constituted exclusionary conduct under Section 2 of the Sherman Act. The FTC had acknowledged that it could not rule out the possibility that after Rambus, hypothetically, disclosed its intellectual property relevant to the standard, the SSO members, rather than choose an alternative technology, might instead have selected Rambus’s technology for the standard after extracting a RAND commitment. On this basis, the court found that Rambus’s deception did not necessarily exclude rival technology in the competition for selection as the standard and that it therefore could have lawfully acquired monopoly power.

In the following Commentary, Richard Wolfram, co-author of an amicus brief submitted by the AAI in support of the FTC, ‘deconstructs’ the reasoning of the Court of Appeals by focusing on the inconsistency between the court’s assumption that Rambus would have given a RAND commitment, on which the SSO would have relied in choosing its technology for the standard, and the FTC’s finding that in fact Rambus charged non-RAND royalties. The court was unconvinced, and the Supreme Court
evidently was unmoved, by arguments by the FTC and *amici* (including the AAI) that deceptive avoidance of a RAND commitment, intended by an SSO to prevent the acquisition of monopoly power by a participant whose technology is incorporated into a standard, can facilitate the acquisition of monopoly power.

Here, Wolfram takes another pass at the court’s decision, this time from a more mechanical perspective than the FTC and *amici* previously used. His goal is to limit the influence of the decision on other courts by exposing the mechanics of its error. If the court’s rationale does not stand up to the test of straightforward logic, then it is wrong and should be more readily recognized as such by other courts. The court’s conceptual error in failing to grasp the competitive significance of repudiation of a RAND commitment in standard setting, he explains, is revealed in its failure to complete the hypothetical which underpins its decision and to ask the following question: assuming Rambus had, hypothetically, disclosed its relevant IP and the SSO members had gone ahead and standardized that technology after extracting a RAND commitment, would they also have done so if they had known in advance that Rambus would repudiate that commitment? The answer is clearly ‘no’. In failing to ask – and answer – this question, the court erroneously discounted the importance of repudiation of a RAND commitment to competition for the standard. Contrary to the Court of Appeals, he asserts, when the owner of IP deemed relevant or essential to a standard, unconstrained by a RAND commitment which it deceptively avoided – or alternatively, which it gave but repudiated – then charges non-RAND royalties, the antitrust laws properly apply and should have applied in this case.
Detrimental reliance and repudiation – the antitrust implications of patent hold-up in standard setting turn on these two fundamental principles of law. In selecting technology for a standard, participants in standard setting organizations (SSOs) rely to their detriment on the commitment by an IP holder-SSO participant to license its IP relevant to the standard on reasonable and non-discriminatory (RAND) terms. When an SSO participant repudiates its commitment to license its IP essential to a standard on RAND terms, after its IP has been selected for the standard, it undercuts the other participants’ reliance on that prior commitment as a necessary condition to their selection of that technology for the standard. Thus, to the extent the participant’s market or monopoly power is created by the selection of its IP for the standard, that participant’s repudiation of its RAND commitment vitiates the lawfulness of the acquisition of that power.

Firms compete for a standard on quality and price. Choosing one technology over another for a standard, in reliance in part on the IP-holder’s commitment to license its IP chosen for the standard on RAND terms, directly affects the competitive structure of the relevant market because firms compete to have their technology selected for a standard on the basis of both quality and price – and the common, relevant “price” term in ex ante negotiations for selection of a standard is “RAND.”

Repudiation affects the competitive structure of the market. The failure to give a RAND commitment normally disqualifies a firm from competing in the selection process. Similarly, the repudiation of a RAND commitment, once given, by a firm which has had its technology chosen for the standard in part on the basis of that commitment, voids the selection, in strict contractual terms. More importantly for antitrust, the repudiation also clearly affects the competitive structure of the market because the commitment induces reliance by the other SSO members in selecting that technology for the standard, and that choice results in the exclusion of alternative technologies competing for the standard. The other members rely not just on the bare commitment, in choosing the technology, but of course also on the expectation that the IP-holder whose technology is standardized will honor the commitment. But for the commitment, and the expectation that the obligor (or an assignee) will fulfill it, the other SSOs members will not choose that technology for the standard. Repudiation therefore undermines the basis for the selection.

Where control over a standard confers monopoly power, the acquisition of such power through deception or other opportunistic conduct based on a repudiation of the RAND commitment is not the acquisition of monopoly power on the merits. Repudiation undermines the reliance triggered by the RAND commitment and distorts competition for

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1 RAND is the most common licensing term in the SSO context but SSOs also typically give their members the option to license royalty-free.
the standard because the evaluation of the relative merits of alternative technologies competing for the standard, of which the cost of licensing is a material element, has itself been distorted. The repudiation thus clearly affects the competitive structure of the relevant market, is exclusionary and therefore falls within the ambit of the antitrust laws on monopolization.

Supreme Court declines cert. in FTC v. Rambus. The foregoing propositions are – or should be – straightforward. The Third Circuit thought so, when it decided in 2007 in Broadcom v. Qualcomm that a firm’s deceptive inducement of an SSO into adopting a standard by committing to license IP essential to that standard on RAND terms and later, after lock-in has occurred, breaching that commitment by demanding non-RAND royalties, is actionable anticompetitive conduct under federal antitrust law.2

But the federal Court of Appeals for the District of Columbia Circuit made a fine muddle of these principles in its decision last April dismissing the FTC’s antitrust case against Rambus Inc., the DRAM technology developer, for patent hold-up.3 And now, the Supreme Court, which on February 22nd announced without comment that it will not review the case, has lost an opportunity to clear up what has become an unnecessarily confused area of the law.4

In July 2006 the Commission issued a decision finding Rambus liable for illegal monopolization. In February 2007 it issued a decision on remedies substantially reducing the royalties sought by Rambus but declining to require that it license on a royalty-free basis: the Commission reasoned that had Rambus properly disclosed its relevant technology, JEDEC might have gone ahead and selected it for the standard anyway, on condition that Rambus commit to license it on RAND terms. Then, last April, the Court of Appeals for the District of Columbia Circuit reversed the judgment of liability. In November 2008, the FTC filed a petition for certiorari, supported by seven amicus briefs signed by a number of major technology companies, standard setting organizations, antitrust scholars, industry associations, and consumer protection and policy entities,

2 50 F.3d 297 (3rd Cir. 2007). The court said that four elements were necessary for finding such conduct actionable: (1) a consensus-oriented private standard-setting environment; (2) an intentionally false promise by a patent holder to license essential proprietary technology on fair, reasonable and non-discriminatory terms; (3) reliance by an SSO on that promise when including the technology in a standard; and (4) the patent-holder’s subsequent breach of that promise. The court explained, quoting the FTC’s decision in Rambus: “[d]eception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer a monopoly on the patent holder.”


4 Four votes are required for a case to be accepted for review. As is usually the case with a rejection of a petition for review, there was no opinion and no dissent. A refusal by the Court to grant certiorari is not a decision on the merits; the decision below, by the U.S. Court of Appeals for the District of Columbia, therefore is technically binding in that circuit alone.

One theory about why the Court refused to hear the case is that the facts, including evidence on the scope of the SSO’s disclosure obligation, were too muddy to garner enough support for the view that the case was a good vehicle for evaluating a monopolization claim based on patent hold-up. Another theory holds that there might have been four votes for review but that those four – most likely the so-called ‘liberal wing’ of the Court – suspected they might not get a fifth vote for reversal and so preferred to ‘cabin’ the case instead of having it become the law governing all circuits.
including the American Antitrust Institute and Consumer Federation of America. Although conceivably the FTC could re-open the matter on other grounds (e.g., only as “unfair competition” under Section 5 of the FTC Act, not predicated on the Sherman Act), the Supreme Court’s denial of certiorari puts an end to the Commission’s seven-year case against the company for patent hold-up in violation of antitrust law through deceptive manipulation of a standard setting process. Now, with the Court’s announcement, the Rambus decision remains the law in the D.C. Circuit.

As an observer/commentator/advocate in standard setting matters over the past decade or so, I respectfully submit that the Court of Appeals’ decision in Rambus is wrong and that it is inconsistent with relevant antitrust principles and even logic itself. The FTC and amici, including the AAI, of course have expressed this view before. But now that the Supreme Court has left the decision intact, and it cannot be avoided on matters governed by D.C. Circuit law, I will ‘drill down’ a little deeper to examine from a more mechanical perspective exactly where, in my view, the court’s analysis goes off the tracks. This exercise will require accepting, for the sake of argument, one of the key predicates of the court’s analysis – its causation standard – even though I and other observers view it as incorrect.

In particular, regarding the appropriate causation standard on a government monopolization suit, the court required that the FTC show that ‘but for’ Rambus’s deceptive avoidance of a RAND commitment, Rambus would not have acquired monopoly power, with the resulting anticompetitive effects alleged by the FTC. This causation standard is higher than, and appears to contradict, the standard applied by the D.C. Circuit itself, in the Microsoft case, and by five other circuit courts of appeal. Under that lower causation standard, the FTC here would have had to show only that Rambus’s conduct ‘reasonably appeared capable of making a significant contribution’ to the alleged anticompetitive effects. The FTC and amici addressed this point. ‘Drilling down’, however, to isolate and expose what I regard as the central error by the Court of Appeals, requires accepting, for the sake of argument, the court’s ‘but for’ causation standard, and it is therefore not the focus of this post.

The major purpose of this Commentary: to expose the court’s logic as untenable. The court’s principal error lies in its failure to recognize that deception that enables the avoidance of a RAND commitment – which is intended by an SSO to prevent the acquisition of monopoly power by a participant whose technology is relevant or essential to a standard – facilitates the acquisition of monopoly power in standard setting. Most particularly, this occurs when the owner of IP deemed relevant or essential to the standard, unconstrained by the RAND commitment which it deceptively avoided (or, in a related factual scenario, which it repudiates), then charges non-RAND royalties. Of course, the FTC and amici extensively and emphatically addressed this point, but evidently to no avail. The major purpose of this Commentary is to re-evaluate the court’s rationale, this time from a mostly mechanical and textual perspective, in order to show

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5 The author co-authored the AAI/CFA amicus.
6 The FTC withdrew the case from administrative adjudication on March 6th.
7 The D.C. Circuit has considerable, but not binding, influence over other circuits in antitrust.
Why it is not logically tenable and why the court is incorrect in denying that deception can facilitate the acquisition of monopoly power in standard setting, with antitrust consequences.

**Why Rambus matters: avoiding the court’s errors.** The second purpose of this Commentary – just when it may seem time to ‘let Rambus go’ and move on to greener pastures – is to show why Rambus still matters, even if some SSOs may have already absorbed certain lessons from it, such as the importance of clear disclosure and/or licensing rules.8 Where the Court of Appeals has trod, others might well follow and if what I identify here as the court’s principal error is not exposed and dissected, then it might be repeated. Shedding light on this error here can provide a basis for guidance for other SSOs, SSO participants, and other courts, so they can try to avoid or at least minimize the problems that befell JEDEC, licensees and the FTC in this case. In an area as important as standard setting, with precedent as substantially misguided as Rambus, it is important to begin to set the record straight in the hopes that over time a consensus will build around the contrary views of the Third Circuit in its 2007 decision in Broadcom v. Qualcomm, and that, at the very least, Rambus will fall into benign neglect.

**Guidance for SSOs: Pro-active measures to avoid the Rambus trap.** Third, to fast-forward to the practical take-away: SSOs governed by D.C. Circuit law and the many companies and other entities that participate in them will need to pick their way around the Rambus decision carefully and watch out for potential hold-up in standard setting. They may also benefit from re-evaluating the trade-off between more permissive disclosure and licensing rules (such as the one at issue in Rambus), which may provide more protection for individual IP rights in an SSO context, and greater antitrust protection afforded by tighter rules against patent hold-up. Unfortunately, however, under Rambus it appears that a rule requiring a blanket, up-front RAND commitment would provide at best only marginally greater antitrust protection against patent hold-up than a rule requiring merely disclosure of relevant IP and a RAND commitment upon subsequent demand, after disclosure, as in Rambus. However desirable it may be to find that deceptive inducement and repudiation of a blanket RAND commitment should compel a different legal result than found in Rambus, I conclude that the (erroneous) rationale of the Court of Appeals could arguably be extended to include even blanket RAND commitments, and the critical discussion by the court itself of the Broadcom v. Qualcomm case, involving such a blanket licensing commitment, supports such a conclusion, as explained in more detail below.

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8 A recent decision by the Federal Circuit in another Broadcom/Qualcomm case has strengthened the protections of SSOs against potential patent hold-up. The appellate court affirmed the lower court’s reliance on evidence of SSO participants’ understanding of a duty to disclose, even when the SSO’s policies do not themselves explicitly impose such a duty. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir., Dec. 1, 2008) (holding that patents related to video compression technology were properly deemed unenforceable because Qualcomm, the assignee of the patents, breached its duty to disclose them to an SSO in which it participated in the development of an industry standard, and the patents reasonably could be necessary to practice the standard). Prudence nonetheless would suggest that a facially clear policy provides stronger protection than reliance on SSO members’ understanding in the absence of such a policy.
How the court ‘jumped the tracks’.

We turn, first, to how the FTC framed its case in the D.C. Circuit, what the court said, and how its analysis ran off the tracks.

Recap: D.C. Circuit decision. In its decision last April, the Court of Appeals, reversing the decision of the Commission, ruled that the FTC failed to show that Rambus, as a participant in the Joint Electron Devices Engineering Council (JEDEC – a standard setting organization), had monopolized the relevant technology market by deceptively failing to disclose intellectual property rights relevant to DRAM standards developed by JEDEC. According to the FTC, JEDEC required that participants disclose their IP relevant to an emerging standard (i.e., as the SSO is working toward a standard, and when it becomes reasonably clear to the participant that its IP might be infringed by the standard that is ultimately chosen) and then, upon demand by the SSO, commit to license that IP on RAND terms. (One variant of this rule among SSOs, as noted above, instead requires an up-front commitment by SSO members to license either royalty-free or on RAND terms.) JEDEC further prohibited the selection of any member’s IP for the standard if the member refused to make a RAND commitment upon demand.

How the FTC framed the case. The FTC found that Rambus had failed to make the necessary disclosure and that this alleged deception prevented JEDEC either (a) from adopting an alternative (proprietary or non-proprietary) technology or (b) from demanding – and presumably extracting – a RAND commitment from Rambus, with an opportunity for ex ante negotiations before its technology was standardized. As the FTC itself put it:

[T]he Commission considered whether an adequate causal link existed between the deceptive conduct and Rambus’s acquisition of monopoly power. The Commission recognized that it was difficult to determine with certainty what choices JEDEC would have made in the absence of Rambus’s deception, but concluded that, in a hypothetical “but for” world in which Rambus had not engaged in deception, there were two possible outcomes: either (1) JEDEC would have selected alternative technologies, or (2) [. . .] JEDEC would have selected Rambus technologies but, under JEDEC rules, required Rambus to make RAND assurances ex ante, thus preserving the benefits of competition from alternative technologies and protecting industry from patent hold-up ex post.9

But the Commission did not find that either of these two alternative outcomes, (1) or (2), was the more likely, and therein lay the seeds of its ultimate defeat, in the court’s

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9 FTC Petition for Writ of Certiorari at 10-11 (citations and footnote omitted). The FTC’s Opinion on Remedy (Remedy Decision) and Final Order (Feb. 2, 2007) enjoined Rambus from making misrepresentations to SSOs and barred it, for a period of three years, “from collecting royalties for JEDEC-compliant products in excess of levels that the record suggested would have been expected had Rambus adhered to JEDEC’s disclosure policy and engaged in ex ante negotiations with potential licensees.” Id. (citation omitted).
view. The court assumed without questioning that the first alternative would support a monopolization claim – i.e., that if proper disclosure would have caused JEDEC to adopt an alternative standard, then Rambus’s deceptive non-disclosure harmed competition for the standard. So far, so good.

As explained above, however, the Commission had acknowledged in its remedy decision that it could not conclude with certainty that Rambus’s non-disclosure prevented JEDEC from selecting an alternative technology – i.e., the Commission could not establish with certainty that upon proper disclosure, JEDEC would have chosen an alternative technology, rather than select Rambus’s technology anyway. For this reason, the Commission was supposedly thrown back upon the second leg of its so-called syllogism: namely, now assuming JEDEC went ahead and selected Rambus’s technology, the Commission – according to the court – would have to show that Rambus’s deception, by preventing JEDEC from extracting (i.e., by enabling Rambus to avoid giving) a RAND commitment, alone could constitute exclusionary conduct and harm competition.

The court reasoned that a price increase by a legitimate monopolist does not violate antitrust law, and in one of the two possible scenarios, Rambus acquired its monopoly power lawfully. The court concluded that the FTC could not show that Rambus’s deceptive avoidance of pricing restraints on the royalties it sought from the licensing of its standardized technology constituted exclusionary conduct. The court explained, citing the Supreme Court case of NYNEX v. Discon, which involved fraudulent conduct by a lawful monopoly provider of local telephone service, that “an otherwise legitimate monopolist’s deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.” The court then reasoned that all Rambus did under this second scenario was deceptively avoid the RAND constraint, after it had already legitimately acquired monopoly power. On this reasoning, all that JEDEC lost was an opportunity to extract a RAND commitment from a lawful monopolist. And on the authority of NYNEX, any subsequent supracompetitive price increase (i.e., beyond RAND), although possibly the basis for a claim in contract or tort, could not support an antitrust claim because such a price increase alone by a legitimate monopolist could not distort the competitive structure of the market, as contrasted with exclusionary conduct in the acquisition of its monopoly power.

If JEDEC might have selected Rambus’s technology anyway, in the absence of its deceptive disclosure, the court reasoned, then how could the FTC show that Rambus’s deception had an anticompetitive effect on the structure of the relevant market – i.e., that Rambus’s conduct necessarily excluded rival technology improperly from being selected for the standard? And that being the case, how then could the FTC show that the

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10 As the Commission explained in its remedy decision, “Our liability opinion identified two realistic possibilities for what would have occurred had Rambus not engaged in deception of JEDEC members: either (i) JEDEC would have chosen alternative technologies, or (ii) JEDEC would have incorporated Rambus’s technologies into the standard but would have demanded, as a pre-condition of adopting Rambus’s technology, that Rambus agree to license the technology on RAND terms.” Remedy Decision at 12 (citing Commission decision on liability).

royalties later charged by Rambus were anything but mere supracompetitive prices – like the price increases in NYNEX – by a lawful monopolist? In other words, the court concluded, the FTC could not show that Rambus’s supracompetitive royalty charges had any effect on the competitive structure of the relevant market, for it would have been JEDEC itself which conferred a monopoly on Rambus, by willingly selecting its technology for the standard. Stated another way, Rambus’s alleged deceptive non-disclosure would have had nothing to do with its acquisitio of monopoly power.

Where the court’s rationale runs off the rails: the court’s hypothetical fails to take account of the full scope of Rambus’s alleged deception. The court’s critical error here – where it runs right off the tracks – lies in its misinterpretation of what exactly the FTC meant in its remedies decision and the court’s inexplicable failure to grasp the full scope of Rambus’s deception, as it would play out in the very hypothetical, articulated by the FTC, which the court invites us to accept as the central construct of its rationale.

-- By accepting the FTC’s hypothetical, the court implicitly instructs us to assume that Rambus would give a RAND commitment – as Rambus’s briefs confirm. There are two distinct elements, and two phases, to Rambus’s deception – its deceptive non-disclosure and its charging non-RAND royalties in repudiation of the hypothetical RAND commitment. We have already addressed the deceptive non-disclosure component. As for the second component, it should be stressed that the court, based on the second leg of the hypothesis articulated by the FTC, implicitly instructs us to assume that Rambus would give such a RAND commitment. Rambus itself, in various briefs below and its Opposition to the FTC’s cert. petition, assures us that it would have made such a commitment (even as it tries to undermine it by questioning its meaning).12 But the court stops short and fails to reason the hypothetical through to its conclusion: it does not address the consequences of such a commitment or the effect of its repudiation. In short, the court constructs its opinion around the first element of Rambus’s deception – its deceptive failure to disclose relevant IP – but within the hypothetical it selectively ignores the second element – the repudiation of the RAND commitment that Rambus claims it would have given.

-- The court ignores the competitive effect of giving a RAND commitment – and then repudiating it. Saying, as the court does, that all JEDEC missed as a result of

12 For instance, as the Commission noted in its Remedy Decision, Rambus contended that “JEDEC . . . would have preferred Rambus’s technologies in the ‘but for’ world in which Rambus had disclosed its patent position. At most, according to Rambus, JEDEC would have requested a commitment to license on reasonable and nondiscriminatory . . . terms, and Rambus would have had no real choice but to comply.” Remedy Decision at 12, citing Rambus’s Reply Brief on Remedy. Rambus’s acknowledgement that it would have given a RAND commitment is also implicit in its Opposition, where it states as follows: “The Commission also contends that Rambus’s avoidance of a RAND commitment injured competition because JEDEC’s requirement of a RAND commitment ‘was the means by which JEDEC sought to preserve the benefits of ex ante competition. . . . ‘[. . . W]hile a RAND commitment does require the patent holder to license the relevant patents on reasonable and nondiscriminatory terms, there is no evidence of what JEDEC understood the royalty constraint to mean, much less any evidence that it was meant to emulate hypothetical, ex ante bargaining.” Rambus Opposition at 25 (noting further that “there is no evidence that Rambus would have licensed its technologies at a more competitive rate or that a RAND commitment would have required it to do so”) (citations omitted).
Rambus’s deception was an opportunity to extract a RAND commitment from an otherwise lawful monopolist, misses the competitive significance of the commitment as both a condition precedent and condition subsequent to the selection of an SSO participant’s technology. It is a condition precedent because if the IP holder refuses to make a RAND commitment after disclosure of relevant IP and upon demand, its technology cannot – by JEDEC rules – be considered for the standard. And it is a condition subsequent in the sense that the failure by the owner of the technology selected for the standard to fulfill its RAND commitment vitiates the selection of that technology for the standard. The reliance by the members of the SSO who voted to standardize a technology in the expectation that its owner would license it, as promised, on RAND terms, would thus have been undercut. In contract law, this is an unremarkable proposition: a subsequent material failure to perform by a promisor can void the contract and relieve the other party of its own corresponding consideration, or obligation. And it should be similarly unremarkable – although the point eluded the court of appeals – that the repudiation of a RAND commitment affects the competitive structure of the relevant market by distorting competition for the standard.

Repudiation of a RAND commitment is similar to other opportunistic conduct that has been held to be the basis for stating a claim of exclusionary conduct under Section 2. For instance, in Eastman Kodak Co. v. Image Technical Services, Inc., Kodak altered its policies to permit only Kodak-licensed service agents to purchase replacement parts for Kodak copiers. Because non-Kodak copier repair service providers were unable to obtain spare parts as a result of the new policy, the policy change effectively eliminated competition in that segment of the market. Kodak’s ex post conduct was found to be exclusionary because it foreclosed competition in copier repair services through a policy change that could not have been reasonably foreseen by Kodak’s copier customers when they purchased the copiers, with attendant ‘lock-in’ effects. The Supreme Court held that Kodak’s opportunistic about-face after consumers had made significant and irreversible investments in its copiers could be a basis for a finding that Kodak engaged in exclusionary conduct under Section 2. Similarly, here, users are locked in by their investments in Rambus’s technology. Assuming a hypothetical RAND commitment by Rambus, based on the D.C. Circuit’s analysis, then Rambus’s conduct fits within the category of exclusionary conduct outlined in Kodak of a policy change that could not have been reasonably anticipated by those dependent on its intellectual property – but with even more reason here, because of the standard setting context in which this matter arises. As Kodak instructs, this is classic installed-based opportunism, in which users are locked in to the market and their resulting dependence on the standardized technology can then be exploited by the technology owner. And that entity – here, Rambus – will not have thereby acquired its monopoly on the merits but instead through deception, by falsely inducing the SSO members to choose its technology for the standard in reliance on its commitment to license on RAND terms.

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14 See also Hewlett-Packard Co. v. Boston Scientific Corp., 77 F.Supp. 2d 189 (D. Mass. 1999) (finding that allegations that defendant’s post-merger failure to fulfill binding commitments in a consent order to take certain actions to facilitate post-merger entry and competition, as a condition for FTC approval of a proposed transaction, would support a Section 2 claim, on the theory that the defendant thereby acquired
Rambus’s charging non-RAND royalties constitutes repudiation in the court’s hypothetical and undercuts reliance as the basis for the acquisition of a lawful monopoly: if the SSO members had known in advance that Rambus would repudiate, they would not have adopted its technology for the standard. The court’s reasoning therefore rests on a hypothetical possibility – that JEDEC might have chosen Rambus’s IP for the standard anyway after disclosure of its relevant technology – and the supposedly non-antitrust consequences therefrom. But in constructing its rationale on this hypothetical possibility, the court selectively ignores the finding by the Commission – which the court elsewhere acknowledges and does not dispute (and indeed rationalizes, in concluding that Rambus’s licensing did not violate antitrust law) – that following selection of Rambus’s IP, Rambus imposed non-RAND royalties. The importance of this finding is that it undercuts the allegedly legitimate basis, according to the court’s hypothetical, on which JEDEC would have chosen Rambus’s IP, upon disclosure by Rambus of its relevant IP. The court, perhaps lost in the thicket of abstraction surrounding its ‘syllogism’, may have confused and conflated the two elements of Rambus’s deception, while failing to distinguish the second and noting only that the FTC could not show that Rambus’ behavior – understood to mean only its deceptive non-disclosure – at all affected the competitive structure of the relevant market.

But if we are to follow the hypothetical, as we must, for it is the basis of its decision, then we must play it out to the end. The story does not simply stop with Rambus giving a RAND commitment and JEDEC then going ahead and (possibly) choosing Rambus’s technology. Following the hypothetical, the court should have asked whether the royalties demanded by Rambus comported with RAND, and if they did not, whether that affects the basis for JEDEC’s (hypothetical) selection of Rambus’s technology for the standard. More precisely, given the FTC’s finding that Rambus in fact charged supracompetitive, non-RAND royalties, the court should have asked whether

15 The finding is a mixed question of fact and law, but not antitrust law, as antitrust itself plays no part in the legal determination of whether a royalty comports with required RAND licensing; antitrust is implicated only in determining whether the non-RAND licensing is exclusionary.

16 The court said that the FTC was unable to find that Rambus’s behavior caused JEDEC’s choice: in other words, had JEDEC known of Rambus’s relevant IP, JEDEC might have gone ahead and selected it for the standard, after demanding, and presumably extracting, RAND assurances. In this sense, the FTC therefore could not find that Rambus’s deceptive non-disclosure caused JEDEC’s choice of Rambus’s technology.
JEDEC would have selected Rambus’s technology for the standard if it had known in advance that Rambus would repudiate the commitment. Although the court, as noted, did not dispute the FTC’s finding that Rambus’s royalties were not “RAND,” it nonetheless inexplicably and without logical justification did not pose this pivotal question. Given the court’s invitation to assume that Rambus would have complied with a demand from JEDEC to charge RAND royalties, one is hard pressed to find any principled, legal justification for the court then to have excluded from its analysis the competitive effect of Rambus’s ultimately charging non-RAND royalties on the selection of a technology for the standard.

It is a matter of logical certainty that JEDEC would not have adopted Rambus’s technology for the standard had it known that Rambus would repudiate. This refutes the court’s rationale that Rambus could have lawfully obtained monopoly power. Of course, JEDEC could not have known in advance whether, in this hypothetical, Rambus would repudiate. Indeed, at the limit, the possibility that JEDEC might have selected Rambus’s IP even if JEDEC had known in advance that Rambus would repudiate cannot be absolutely eliminated, as a matter of factual proof – but that is beside the point. We are here pursuing a logical exercise, just as the court has instructed, and we need not engage in a futile exercise of divining an ultimately unknowable hypothetical ‘fact’ where overwhelming contrary evidence extinguishes any such possibility.

It is a virtual certainty that JEDEC would not have selected Rambus’s IP had JEDEC known in advance that Rambus would repudiate. First, if Rambus had refused to make the commitment, upon demand, then JEDEC would have been prohibited by its rules from choosing Rambus’s technology. Second, it would be absurd to think, and the FTC never said, that JEDEC would choose Rambus’s technology if it knew in advance that Rambus would repudiate its (hypothetical) RAND commitment.17 Given the entire purpose and structure of JEDEC’s disclosure and licensing rules, it should therefore resolve to a legal certainty that JEDEC would not have selected Rambus’s IP had JEDEC known in advance that Rambus would repudiate. And this is why it is impossible for Rambus, under any logical scenario, to have lawfully acquired a monopoly. This refutes the court’s rationale and shows why it is fundamentally incorrect. In short, the court failed to complete the very analysis, the very hypothetical, around which it structured its decision.

The essential condition of the FTC’s patent hold-up case was the allegation that Rambus charged non-RAND royalties. Rambus’s deception thus lay not simply in the non-disclosure of relevant IP but also in its non-RAND royalties. Indeed, to put this in a slightly different light, the FTC would have had no case to begin with if Rambus’s royalties had satisfied the RAND requirement. The critical part of Rambus’s deception, then – the necessary condition for the FTC even to make out a claim – was the allegation that Rambus charged non-RAND, supracompetitive rates. The hypothetical assumes, counterfactually, that Rambus would not avoid its disclosure obligation, and then would

17 All that the FTC acknowledged, it should be recalled, was that it could not say for sure whether JEDEC would have picked an alternative technology or gone ahead and selected Rambus’s technology, if Rambus (hypothetically) had disclosed its relevant IP, and assuming Rambus gave RAND assurances.
give a RAND commitment – and in that case, JEDEC might have selected Rambus’s technology for the standard. But the hypothetical must also contain the one piece of information that is not hypothetical – namely, the fact that Rambus charged rates that the FTC found not to comport with RAND. Therefore, it follows necessarily that assuming Rambus (hypothetically) made the RAND commitment which its counsel contended it would give, then it violated that RAND commitment.

The counterfactual scenario: - if Rambus had in fact charged RAND royalties. To better appreciate what the court missed in its analysis, it may help to describe the counterfactual event. In this hypothetical scenario, JEDEC knew of Rambus’s IP rights, it standardized its DRAM technology anyway after seeking and then obtaining RAND assurances, and Rambus ultimately honored those hypothetical RAND assurances. In this scenario, Rambus would indeed have obtained its ‘monopoly power’ subject to the constraints imposed and intended by JEDEC to prevent any eventual owner of IP rights encompassed by a standard from exercising those rights to the full extent allowed under the patent laws (i.e., effectively without any limits on royalties). This would have been a lawful acquisition of ‘monopoly power’ – more exactly, a ‘negotiating away’ of monopoly power – because Rambus would have honored the commitment intended to constrain the power it otherwise would have acquired in the absence of such a commitment. But this is not how the events unfolded in fact, and that hard fact – Rambus’s repudiation – should have precluded the court from assuming that Rambus might have lawfully acquired its monopoly power.

The court’s analysis implicitly rests on the entirely implausible and illogical scenario in which JEDEC standardizes Rambus’s IP in the expectation, not that it would charge RAND royalties, but that it would charge non-RAND royalties. The court’s analysis therefore rests on a failure to distinguish between the plausible scenario in which JEDEC standardizes Rambus’s IP upon disclosure and after demanding and extracting RAND assurances, and the entirely implausible scenario in which Rambus discloses its relevant IP, JEDEC demands RAND assurances and then, knowing that Rambus would repudiate such assurance, goes ahead and standardizes Rambus’s IP anyway. Whereas JEDEC might have standardized Rambus’s IP, upon disclosure, and sought a RAND assurance, it never would have standardized Rambus’s IP had Rambus refused to give a RAND assurance (for JEDEC’s rules prohibited it from doing so) or if it had known that Rambus would repudiate its commitment. Instead of selecting Rambus’s IP for the standard, and exposing its members and other potential licenses to non-RAND royalties, JEDEC would have picked an alternative (proprietary or non-proprietary) technology – or none at all. A non-RAND royalty charged by Rambus would not constitute a supracompetitive price increase by an otherwise lawful monopolist because repudiation renders the prior acquisition of monopoly power unlawful.

If the D.C. Circuit had taken the repudiation by Rambus into account, Rambus would have been in the same posture, legally, as Qualcomm. At this point in the analysis, Rambus would be in no different position than Qualcomm, which the Third Circuit found deceptively induced the SSO in that case to believe that it would abide by its FRAND obligation. There, the court found that Qualcomm’s deceptive inducement affected the
competitive structure of the relevant wireless technology market because the other members of the SSO relied on Qualcomm’s FRAND commitment – not just the giving of the commitment, of course, but the act of fulfilling the commitment, rather than repudiating it. In more formal terms, in choosing Qualcomm’s technology for the standard, the SSO relied on Qualcomm’s FRAND commitment as a condition precedent for making that choice, rather than choosing an alternative technology, and on Qualcomm’s following through and fulfilling that commitment, as a condition subsequent.

As the D.C. Circuit panel itself stated in describing Qualcomm, “the [Third Circuit] held that a patent holder’s intentionally false promise to a standard-setting organization that it would license its technology on RAND terms, ‘coupled with [the organization’s] reliance on that promise when including the technology in a standard,’ was anticompetitive conduct, on the ground that it increased ‘the likelihood that patent rights will confer monopoly power on the patent holder’.”18 Failure of the condition subsequent vitiates the basis for the choice in the first place; and just as it constitutes a material breach as a matter of contract, so it vitiates the lawfulness of any power otherwise derived by the IP holder as a result of the selection of its IP for the standard. As in Qualcomm, so, logically, in Rambus – if the court had reasoned correctly: Rambus’s acquisition of monopoly power, based – in the hypothetical – on reliance ultimately undercut through repudiation of RAND assurances, would be no more lawful than Qualcomm’s repudiated FRAND assurances would be (if Broadcom were to sustain its factual case). Assuming the D.C. court had reasoned correctly, then Rambus and Qualcomm would be on the exact same legal footing.

The D.C. Circuit misconstrues Qualcomm: contrary to the D.C. Circuit, the Third Circuit held that an IP holder which falsely induced an SSO to standardize its technology on the basis of a FRAND commitment which it subsequently repudiated acquires monopoly power unlawfully. Having seemingly grasped the significance of the Qualcomm decision, the Court of Appeals then reverses course and appears to prop up its rationale by misconstruing the decision. The court explained the effect of the Qualcomm ruling on its own analysis in two parts. First, the court noted, correctly, “[t]o the extent the [Qualcomm] ruling . . . rested on the argument that deceit lured the SSO away from non-proprietary technology . . . , it cannot help the Commission in view of its inability to find that Rambus’s behavior caused JEDEC’s choice[.]”19 Now, assuming, again for the sake of argument, that the court’s causation standard is correct, then this statement is in fact correct.

But the second part of the court’s explanation of the Qualcomm ruling is incorrect. There, the court explains that “to the extent that [the Qualcomm ruling] may have rested on the supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist’s deceit has the effect of raising prices, (without an effect on competitive structure), it conflicts with NYNEX.”20 As explained above, however, the

18 Rambus, 522 F.3d at 466 (citing Qualcomm, 501 F.3d at 314).
19 Id.
20 Id.
FTC, while acknowledging that JEDEC might have gone ahead and standardized Rambus’s IP upon disclosure and after extracting RAND assurances, never said that JEDEC would have gone ahead and standardized its IP had it known that Rambus would repudiate the RAND commitment – and it would have been entirely illogical for JEDEC to have done so. This, again, is why the court is wrong in concluding that Rambus acquired its monopoly power lawfully, as New York Telephone did in NYNEX; and this is why the court is wrong in concluding that Rambus’s subsequent royalty demands, analogous to New York Telephone’s price increases, cannot sound in antitrust (even if they may give rise to a claim in contract or tort), on the grounds that they did not affect the competitive structure of the market. The court’s reliance on NYNEX is entirely misplaced: Rambus obtained its monopoly power unlawfully, whereas New York Telephone acquired its monopoly power in a lawful manner. Furthermore, the Third Circuit’s decision did not rest on any supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist’s deceit has the effect of raising prices.21 Indeed, the Third Circuit made it clear that a finding of deceptive inducement, based on repudiation of a RAND commitment, would support a monopolization claim precisely because the IP-holder would not thereby have acquired monopoly power in a lawful manner.

**Lessons from Rambus for SSOs.**

What, then, does Rambus mean for the application of antitrust law to standard setting, as a normally procompetitive, efficiency-enhancing process? There is reason to believe that in the long run, the outcome in Rambus, and the court’s analysis, will prove to have been a speed bump on the road to a broader, deeper appreciation by courts and enforcement agencies that manipulation of standard setting can have antitrust consequences. Among other developments, new leadership at the Antitrust Division of the U.S. Department of Justice has unequivocally indicated its commitment to antitrust enforcement against patent hold-up conduct, marking a clear departure from the DOJ’s posture over the past eight years in this area. And, not surprisingly, the new FTC Chairman, Jonathan Leibowitz, has also committed to continued vigorous enforcement by the Commission, notwithstanding the loss in Rambus.

Consensus is likely to continue forming around the following points:

- standard setting is an organized competition for a standard, usually among rival technology owners;
- it has antitrust implications because it pre-empts market choices and thus can ‘determine’ a relevant market;
- selection of a technology for a standard can confer market or even monopoly power on the SSO participant-IP holder; and
- the IP holder’s intentional avoidance of SSO’s disclosure and/or repudiation of licensing rules intended to ensure that such power is constrained through

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21 Quite apart from whether or not such a supposition would be defensible, on the grounds that such conduct might, depending on the conduct and the circumstances, constitute monopoly maintenance, the Third Circuit made no such supposition in its decision.
obligatory licensing on RAND terms may thereby enable it to acquire monopoly power, by making unrestrained royalty demands. The IP holder thereby acquires monopoly power through deception or other manipulation of the standard setting process, rather than on the merits, with the result that other competing proprietary (or non-proprietary) technologies will have been excluded as possible choices for the standard, in violation of antitrust law on monopolization.

More concretely:

- Plaintiffs bringing cases governed by D.C. law on standard setting will need to navigate around Rambus carefully in order avoid the same fate as the FTC. On the other hand, SSO participants (and their assignees) contemplating or engaging in possible patent hold-up conduct would be ill-advised, as a business strategy, to rely on Rambus for antitrust cover for such conduct.

- Some uncertainty and confusion may surround the questions of whether Rambus can be reconciled with Qualcomm on the issue of antitrust patent hold-up, and whether SSO licensing and disclosure rules could be adjusted to avoid a Rambus-type outcome. From the perspective of a critic of the court’s analysis in Rambus, it would be convenient and desirable to argue that the case can be clearly distinguished from Qualcomm and that SSOs could avoid the potential Rambus-type patent hold-up trap by requiring a blanket up-front RAND commitment. The foregoing analysis suggests, however, that such an argument would not withstand closer scrutiny.

In Broadcom v. Qualcomm, the Third Circuit found that Broadcom stated a claim for monopolization based on Qualcomm’s alleged deceptive manipulation of a wireless telephony standard by committing to license its IP essential to the standard on fair, reasonable and nondiscriminatory (FRAND) terms and then repudiating that promise by demanding non-FRAND royalties. The court found that the SSO relied on that promise when including Qualcomm’s IP in the standard and that Qualcomm’s conduct was anticompetitive on the ground that it “increased the likelihood that patent rights will confer monopoly power on the patent holder.”

There is of course a clear factual difference between Qualcomm and Rambus: members of the wireless telephony SSO in Qualcomm (ETSI) had to give the equivalent of a ‘blanket’ up-front FRAND commitment, so that if it were determined, or they asserted, that their IP was encompassed by the standard, then they would automatically be obligated to license that IP on FRAND terms. Under such a licensing rule, SSO members could not deceptively avoid giving a FRAND (or RAND) commitment.

In an SSO governed by a disclosure-and-then-RAND licensing rule such as JEDEC’s, however, a participant, like Rambus, could avoid making a RAND commitment by failing to make the required disclosure. On the authority of the D.C. Circuit in Rambus, a plaintiff’s inability to establish with certainty what the SSO would have done had the IP-holder instead disclosed its relevant IP, leaves open the possibility that it might have standardized that IP anyway, with the result that any non-RAND
royalty charged by that entity would be a ‘mere’ price increase, or supracompetitive royalty, not sanctionable under antitrust law.

On the authority of the D.C. Court of Appeals, then, an entity in Rambus’s situation would incur no liability for acquiring monopoly power through deceptive avoidance of a RAND obligation – which the entity may be assumed hypothetically to have given nonetheless, but which it also effectively repudiates by charging non-RAND royalties.

Even under the authority of Rambus, if the SSO requires a blanket up-front RAND commitment and an entity refuses to give it, then assuming the SSO is prohibited from adopting as a standard the IP of a member who refuses to give a RAND commitment, it is certain that the SSO would have selected an alternative technology. But assuming no such refusal by a member/holder of essential IP, then the factual difference between the disclosure-then-RAND rule in Rambus and the blanket RAND rule in Qualcomm is of little or no legal consequence. As explained above, in the court’s hypothetical in Rambus, Rambus’s legal posture after JEDEC demands and extracts a RAND commitment is equivalent to the posture of SSO members governed by a blanket RAND rule: at this point, it is uncertain whether Rambus will follow through on its (hypothetical) RAND commitment, or not, just as it is uncertain whether the entity governed by the blanket RAND rule will fulfill its commitment, or not. On the D.C. Court of Appeals’ analysis, even if there is a blanket commitment, repudiation would constitute no more than a supracompetitive price imposed by a ‘legitimate’ monopolist. This, of course, directly conflicts with the Third Circuit’s analysis in Qualcomm.

Because Rambus involved a disclosure-then-RAND rule, the decision, strictly speaking, should not be binding, even under D.C. Circuit law, on a claim of patent hold-up involving a blanket RAND rule, as in Qualcomm. Cold analysis, however, suggests that a court applying D.C. Circuit law would be guided to the same conclusion in addressing a blanket RAND rule as the Court of Appeals reached in Rambus, especially considering its dictum criticizing the decision in Qualcomm – and on the D.C. Circuit’s erroneous analysis, I believe that a court would be correct in reaching that conclusion. Consequently, however alluring the theory that SSOs might avoid potential Rambus-type hold-up with a blanket RAND commitment rule, any greater antitrust protection ostensibly afforded by such a rule is largely illusory.

SSOs and participants will need to remain vigilant and putative complainants, whether private parties or the government, should steer clear of D.C. Circuit law if at all possible in bringing antitrust patent hold-up claims.

In the meantime, proponents of the views expressed herein on the untenability of the logic of the Court of Appeals in Rambus may find opportunities to persuade other courts that it is erroneous and that the conflicting rationale of the Third Circuit in Qualcomm is valid and superior.