

D.C. Circuit Overturns Federal Trade Commission Orders in *Rambus*

On April 22, 2008, the District of Columbia U.S. Circuit Court of Appeals in *Rambus, Inc. v. FTC* overturned a decision of the Federal Trade Commission that held that Rambus had violated Section 2 of the Sherman Act by intentionally failing to disclose to a standard-setting organization that it had patent interests in technology that was ultimately adopted into a standard set by the organization.

In its decision, the D.C. Circuit determined that Rambus's failure to disclose its patents to the standard-setting organization, although possibly deceptive, did not violate the antitrust laws. The Court reasoned that the Commission did not determine that the standard-setting organization would have excluded Rambus's patented technologies from the standard if Rambus had made full disclosure. Rather, the Commission's decision allowed for the possibility that if Rambus had disclosed its patent rights in the technology, the standard-setting organization may have required assurances from Rambus that it would license its technology on reasonable and non-discriminatory terms. The D.C. Circuit held that merely avoiding such assurances, even by deception, would not amount to an antitrust violation. Specifically, the Court stated: "[If the standard-setting organization], in the world that would have existed but for Rambus's deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws; [the standard-setting organization's] loss of an opportunity to seek favorable licensing terms is not as such an anticompetitive harm." For consideration on remand, the Court also found that the Commission's evidence of deception was very weak and the Court questioned whether the standard-setting organization required disclosure of contemplated amendments to existing patent applications as a part of a participant's patent rights disclosure.

The *Rambus* decision has significant implications for antitrust claims based on the non-disclosure of intellectual property rights in the standard-setting process. According to the decision, a plaintiff must demonstrate that the non-disclosure of intellectual property rights to a standard-setting organization causes anti-competitive effects in the marketplace. In this regard, the plaintiff must prove that the standard-setting organization would have adopted a different standard but for the non-disclosure of intellectual property rights. The fact that a defendant engaged in deceptive behavior that prevented a standard-setting organization from securing commitments by the patent holder to license on reasonable terms is not sufficient to prove an antitrust violation. The Court also relied on an expansive view of the Supreme Court's holding in *Discon v. NYNEX* and stated that high prices, even when coupled with deceptive behavior, do not necessarily give rise to a Section 2 monopolization claim. Accordingly, the Court's decision in *Rambus* raises the bar for private actions or enforcement actions against holders of intellectual property rights that are incorporated into a technology standard.

If you have any questions regarding the *Rambus* decision, please call your regular Ropes & Gray lawyer or contact [Cary Armistead](#), [Mit Spears](#), or [Jane Willis](#) in the Antitrust Practice Group.

Our upcoming *Patent and Standards-Setting Post-Rambus* teleconference will offer thoughts on how the *Rambus* decision may impact standard-setting activities. Please [click here](#) to learn more about this presentation and to register.

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