

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of RAMBUS INC., a corporation.
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Docket No. 9302

**OPPOSITION IN PART TO RESPONDENT’S REQUEST FOR OFFICIAL NOTICE OF
UNITED STATES PATENTS**

I. Introduction

On July 28, 2003, a day before Respondent Rambus Inc. (“Rambus”) rested its case and after Complaint Counsel had already committed itself to a specifically limited rebuttal case,¹ Respondent filed a Request for Official Notice of twenty-eight United States patents. Complaint Counsel does not object to Respondent’s request for official notice of certain facts that it identifies in the second sentence of its Request, namely: (1) the existence of each patent; (2) the issue and filing dates of each patent; and (3) the identity of the assignee of each patent, as it appears on the face of the patent. (*See* Request for Notice at 1.) Complaint Counsel strongly objects, however, to any attempt to use official notice as a method to engage in any interpretation of the subject matter or scope of coverage of any of the patents in question because such interpretation is not the proper subject of official notice. In particular, Complaint Counsel objects to any attempt to use official notice in connection with Respondent’s unsubstantiated interpretation and categorization of these patents appearing on pages two and three of the

¹See Notice of Complaint Counsel’s Anticipated Rebuttal Case, filed on July 24, 2003.

Request for Official Notice.

Complaint Counsel further objects to Respondent's untimely and inappropriate attempt to use official notice to seek admission of the patents into evidence. Respondent's attempt to introduce into evidence a stack of 28 patents, that "aren't tethered to witnesses" (Perry, Tr. 11,385) on the afternoon before Respondent rested its case and after Complaint Counsel had already filed its Notice of Anticipated Rebuttal Case, raises the same fairness and due process issues that Respondent raised when Complaint Counsel sought, unsuccessfully, to introduce exhibits as part of its rebuttal case.

II. Argument

A. RAMBUS CANNOT REQUEST OFFICIAL NOTICE OF FACTS THAT EITHER CANNOT BE CHARACTERIZED AS COMMONLY ACKNOWLEDGED FACTS OR DO NOT FALL WITHIN THE SCOPE OF THIS AGENCY'S EXPERTISE.

Commission Rule of Practice § 3.43(d) authorizes Your Honor to take official notice of a "material fact not appearing in evidence of record." The types of facts that are the proper subjects for official notice, however, are strictly limited to two categories. *See Sykes v. Apfel*, 228 F.2d 259, 272 (3d Cir. 2000). First, adjudicators can take official notice of "commonly acknowledged facts." *Id.* In the context of patents, examples of commonly acknowledged facts are the existence of a patent, when the Patent and Trademark Office granted the patent, and the list of publications on the patent's cover page. *See Hogan AB v. Dresser Industries, Inc.*, 9 F.3d 948, 954 (Fed. Cir. 1994). Second, official notice allows the Commission to notice facts that it has established through its "accumulated knowledge and experience." *Manco Watch Strap Co.*, 1962 WL 75828 (F.T.C.) at *10 (Commission affirmed hearing examiner's use of official

notice of the fact that consumers prefer American goods over imports because “this is not a case of first impression; rather, it follows scores, if not hundreds, of others involving fundamentally the same general factual issues.”); *accord, Dayco Corp. v. Federal Trade Comm’n*, 362 F.2d 180, 186 (6th Cir. 1966) (Sixth Circuit remanded case to the Commission for further proceeding because the noticed facts relating to the method of operation of a third party company “did not rest upon its ‘accumulated knowledge’ or its experience or expertise, but rather upon testimony of individual witnesses in a particular prior case.”).

The difficulty in responding to Respondent’s motion for official notice is that it is unclear what facts Respondent is requesting that Your Honor take notice of or what findings of fact it subsequently will request Your Honor to make.

On page one of its Request, in the second sentence, Respondent implies that it seeks official notice of the existence of these patents and the dates of filing and issuance. These facts appear to be commonly acknowledged facts as that term has been used in connection with patents, and thus within the appropriate scope of official notice. In that same sentence, Respondent implies that it seeks official notice of “all other material set forth on [the] face” of the patents. Request for Notice at 1. The request that Your Honor take official notice that certain specific words appear in the patent is unobjectionable, as it would also fall within the category of commonly acknowledged facts and thus within the appropriate scope of official notice. It is unclear, however, to what material Respondent refers. The only specific material identified in Respondent’s Request for Notice relates to the identity of the assignee. Complaint Counsel does not oppose Respondent’s Request for Official Notice insofar as such notice is limited to the existence of the patents, the dates of filing and issuance, and the identity of the

assignee.

On page two of its Request for Official Notice, however, is a much more troubling statement. Respondent groups the twenty-eight patents at issue into three categories: (1) Micron's burst EDO patents; (2) various patents covering JEDEC standards; and (3) various Rambus patents. It is unclear whether Respondent is seeking official notice of its unilateral interpretation and categorization of these patents. If it is, Complaint Counsel strongly objects to any attempt to request Your Honor to accept and adopt this unsupported interpretation and categorization of these patents under the guise of official notice. The first two of these categories – so-called burst EDO patents and patents covering JEDEC standards² – are not commonly acknowledged facts, nor do they fall within the Commission's "accumulated knowledge and experience." Rather, such conclusions depend on complicated interpretation of patent claims containing specific and detailed technical terms. Such interpretation is appropriate only by a person reasonably skilled in the art of DRAM design, and requires a specific claims analysis (typically done in the form of a claims chart) following extensive review of the patent's prosecution history, the entirety of the specification and claims of the patent, and other sources such as technical dictionaries, treatises and articles that define how certain technical terms are commonly understood in the industry.³ Indeed, Respondent's second category – various patents

²For example, Complaint Counsel does not object to official notice that a particular patent lists "Rambus, Inc." as the "Assignee."

³*See, e.g., Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed. Cir. 1995) (en banc) (a claim term means "what one of ordinary skill in the art at the time of the invention would have understood the term to mean."); *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201 (Fed. Cir. 2002) (dictionaries, encyclopedias and treatises provide information on the meaning of claim terms in the pertinent art); *Vitronics Corp. V. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (a court looks to the claims, the specification and the

covering JEDEC standards – is even more problematic, in that it would also require Your Honor to adopt, through the means of official notice, Rambus’s interpretation of the technical content of JEDEC standards and its legal conclusion that certain claims cover the technical content of those standards.⁴ Any attempt to seek official notice adopting or otherwise accepting Respondent’s interpretation and categorization of these patents is, therefore, an inappropriate use of official notice.

B. RAMBUS CANNOT REQUEST THE USE OF OFFICIAL NOTICE AS A MECHANISM BELATEDLY TO ADMIT DOCUMENTS INTO THE EVIDENTIARY RECORD.

Respondent’s Request for Notice discusses only official notice. In the proposed order attached to its Request for Official Notice, however, Respondent has added a separate, critical request: that the identified patents be admitted into evidence as trial exhibits. *See* [Proposed] Order Granting Respondent Rambus Inc.’s Req. For Official Notice at 1. Complaint Counsel objects to this request as untimely, an improper use of official notice, and for failure to establish relevance.

On August 1, 2003, Complaint Counsel sought to introduce 19 documents into evidence as part of its rebuttal case. Respondent objected on grounds of fairness, in part because they

prosecution history in construing the claims).

⁴The danger of taking official notice of any aspect of these patents that involves interpretation is demonstrated by Micron’s 5,598,376 patent. Respondent characterizes this as a “burst EDO” patent. Request for Notice at 2. Brian Shirley testified, however, that the ‘376 patent related to a specific write enable circuit. (Shirley, Tr. 4179-84.) He further testified that none of Micron’s internal specifications for burst EDO, SDRAM, or DDR SDRAM requires a write enable circuit. (Shirley, Tr. 4184-86.) Mr. Shirley’s testimony is at odds with Rambus’s asserted characterization of the ‘376 patent. In light of Mr. Shirley’s testimony, any request for Your Honor to adopt, by means of official notice, Rambus’s interpretation of this patent as a burst EDO patent would be a highly inappropriate use of official notice.

were offered at the end of trial and in part because the documents “aren’t tethered to witnesses.” (Perry, Tr. 11,385.) Respondent also protested that, because of the late date at which these documents were being offered, they would have no opportunity to cross examine witnesses with respect to these documents. (Perry, Tr. 11,195 (“We anticipate offering strong opposition to this, Your Honor. We can’t cross-examine an exhibit.”); Stone, Tr. 11,239 (“I object. I object. We have no ability to cross-examine anybody about this document when they bring it in through their last witness who never saw it at the time it was prepared. I object to the document. It’s improper. It’s not within the scope of proper rebuttal.”).) Despite the fact that the documents were offered in rebuttal to specific testimony of Rambus’s witnesses,⁵ the documents in question were all created and produced by Rambus and therefore constituted party admissions, and that Rambus didn’t produce a number of the documents in question to Complaint Counsel until June 23, 2003, nearly a year after Complaint Counsel served its document request on Rambus and just one week before Complaint Counsel rested its case in chief, the Court nevertheless upheld Respondent’s objection and ruled that the documents would not be entered into evidence.

By contrast, Respondent does not seek to introduce documents of Complaint Counsel (which might be party admissions), but rather its own and third party patents. Respondent does not claim that the documents became relevant or important only after certain testimony; instead, it appears that Respondent intended to introduce these documents from the outset of the case.

⁵The documents in question contained statements contrary to or inconsistent with the testimony of Dr. Farmwald, Dr. Rapp or Professor Teece. Complaint Counsel was unable to use the documents during trial after they became relevant because there was no indication that these witnesses had seen the documents in question and because Rambus made the strategic decision to shield from cross-examination at trial the most senior members of its management – namely, the Chairman of the Board, Mr. Davidow, the Chief Executive Officer, Mr. Tate and the President, Mr. Mooring.

Respondent chose to wait, however, until the afternoon before it rested to file its motion. By waiting until after all relevant witnesses had completed their testimony, and until after Complaint Counsel had already filed its Notice of Anticipated Rebuttal Case identifying its planned rebuttal witnesses and schedule, Respondent denied Complaint Counsel notice that these patents would be used in this manner. Complaint Counsel thus lost the opportunity to question Mr. Mark Kellogg, Mr. Gordon Kelley or Ms. Betty Prince with respect to the IBM and Texas Instruments patents contained in Respondent's list. Complaint Counsel did not realize at the time Mr. Brian Shirley testified that it would have to have him clarify the true scope and nature of an entire list of Micron patents. And when Respondent filed its motion, it was too late for Complaint Counsel to call Mr. Charles Donohoe, Senior Vice President and General Patent Counsel of Samsung (who was included on Complaint Counsel's Rebuttal Witness List), to testify with respect to the Samsung patents contained in Respondent's list. All of Respondent's complaints about not being able to respond to the documents offered by Complaint Counsel in its rebuttal case apply in reverse, but even more strongly, since the documents in question are not party admissions but rather third party documents.

Additionally, Complaint Counsel objects to the method by which Respondent seeks to introduce these documents into evidence. The doctrine of official notice is not a means to admit exhibits into evidence. Rather, official notice is defined as a method to recognize facts that are *outside* of the evidentiary record. *See Sykes*, 228 F.3d at 272 ("Office notice is the proper method for agency decisionmakers to apply knowledge *not included in the record.*" [emphasis added]). Case law supports the official notice of certain carefully identified facts. *See Castillo-Villagra v. Immigration and Naturalization Service*, 972 F.2d 1017, 1028 (9th Cir. 1992) (Ninth

Circuit affirmed the INS's official notice of the fact that a new president in Nicaragua had been elected; that a non-Sandinista coalition had gained the majority in parliament; and that the Sandinistas were no longer in power). This serves to put the opposing party on notice of what facts the moving party seeks to establish and provides the opposing party the opportunity to provide rebuttal evidence. Respondent's attempt to use official notice to move documents into evidence, so that they can then be used in support of various requested findings of fact that Complaint Counsel cannot anticipate, turns the doctrine of official notice on its head and deprives Complaint Counsel of any means to respond. Respondent should not be allowed to use official notice for this purpose.⁶

Respondent's attempt to offer into evidence its own Patent No. 6,591,353 at this time is particularly egregious. Mr. Craig Hampel is listed as one of the inventors on the patent. Respondent chose to wait until after he had testified to try to introduce it into evidence, however, thus ensuring that he could not be cross-examined on the patent. Instead, Respondent tried to offer testimony of their patent expert, Mr. Fliesler, with respect to this patent, although that patent was not covered in his expert report and Complaint Counsel had no notice that Respondent intended to offer any such testimony. This testimony was properly excluded. (See Tr., 8880-82.) Now, apparently in an effort to be able to cite to the patent directly for the

⁶Furthermore, Respondent has made no attempt to establish the relevance, if any, of the 28 patents on its list. Commission Rule 3.43(b)(1) permits evidence to be admitted only if it is relevant, material and reliable. At this time, the only means for Your Honor to determine whether the patents in question are in any way relevant to this proceeding is to engage in an analysis and interpretation of the language of the specification and claims. For all of the reasons set forth in Section II.A above, Respondent's request for Your Honor to engage in this type of implicit patent interpretation is wholly improper.

propositions as to which its patent expert was not permitted to testify, Respondent seeks to have this patent admitted into evidence. The fundamental issue remains, however – this patent was not on Respondent’s exhibit list, and Complaint Counsel had no prior notice that Respondent intended to attempt to use the patent in this manner. Furthermore, Respondent’s purpose in having this patent admitted into evidence can only be to request that Your Honor do what Mr. Fliesler was prohibited from doing – namely, interpret the terms of the patent and reach specific conclusions. Such a result would be improper not only for all of the other reasons set forth above, but also because it would effectively nullify Your Honor’s ruling at the time of Mr. Fliesler’s testimony. Such a result would be grossly unfair to Complaint Counsel.

III. Conclusion

Even though there is no evidence in the record to support that these patents are relevant to this case, Complaint Counsel does not object to Respondent’s request for official notice of three categories of indisputable facts: (1) the existence of twenty-eight United States patents; (2) their issue and filing dates; and (3) the identity of the assignee listed on the face of each patent. As explained above, however, any request for official notice beyond these specific facts would be improper. Complaint Counsel asks Your Honor to expressly limit any order granting Respondent’s request for official notice to only the three categories of indisputable facts listed above.

Complaint Counsel strongly opposes Respondent’s attempt belatedly and improperly to use a request for official notice as a back-door means to try to introduce the underlying patents into evidence. If Respondent wanted Your Honor to make findings of fact based on analysis and interpretation of the substance of the patents in question, it should have presented such evidence

at trial through knowledgeable witnesses on a timely basis, in order to provide Complaint Counsel with a reasonable opportunity to cross examine such witnesses and to present rebuttal evidence. Respondent's attempt to misuse a request for official notice for the purpose of belatedly slipping into evidence patents to which Respondent subsequently could cite without limitation would, if successful, cause substantial prejudice to Complaint Counsel. For the reasons set for above, Complaint Counsel respectfully urge that Respondent's request to have the 28 patents attached to its Request for Notice admitted into evidence be DENIED.

Respectfully Submitted,

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**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

Public Version

In the Matter of

RAMBUS INCORPORATED,
a corporation.

Docket No. 9302

PROPOSED ORDER

Upon Consideration of Respondent Rambus Inc.'s Request for Official Notice of Various United States Patents, IT IS HEREBY ORDERED THAT Respondent's Motion is GRANTED IN PART AND DENIED IN PART. This Court hereby takes official notice, pursuant to the Commission's Rule of Practice 3.43(d), 16 C.F.R. § 3.43(d), of (1) the existence, (2) the filing and issuance date, and (3) the assignee, of the 28 patents listed in Respondent's Motion. The Court declines to take official notice of what the patents in question relate to or cover, and declines to engage in any analysis or interpretation of the substance or content of the patents in question. The Court DENIES Respondent's motion to have the 28 patents in question admitted into evidence in this matter.

Stephen J. McGuire
Chief Administrative Law Judge

Dated: _____, 2003