UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
RAMBUS INCORPORATED,	)	Docket No. 9302
Respondent.	)	

ORDER ON RESPONDENT'S REQUEST FOR OFFICIAL NOTICE

I.

On July 28, 2003, Respondent Rambus, Inc. filed a Request for Official Notice. Complaint Counsel filed its opposition on August 5, 2003. On August 8, 2003, Respondent filed a motion for leave to file a reply brief and its reply brief. Respondent's motion for leave to file a reply brief is **GRANTED.** For the reasons set forth below, Respondent's request for official notice is **GRANTED in part and DENIED in part.**

II.

Respondent requests the Court to take official notice of 28 issued United States patents. Respondent asserts that the existence of these patents, their dates of filing and issuance, and all other material set forth on their face, are matters of public record. Respondent argues that the patents are official government records, similar to government records and publications that the Commission has taken official notice of in the past. Respondent further asserts that federal courts regularly take judicial notice of issued patents. Although Respondent's opening motion did not disclose that Respondent seeks admission of the 28 patents into evidence, Respondent's proposed order included a request that the identified patents be admitted into evidence as trial exhibits. Respondent's reply brief requests that, "[b]y means of official notice, the patents themselves should be admitted and made part of the record of this proceeding." Reply at 9.

Complaint Counsel does not object to Respondent's request for official notice of the existence of each patent; the issue and filing dates of each patent; and the identity of the assignee of each patent, as it appears on the face of the patent. However, Complaint Counsel does object to what Complaint Counsel characterizes as Respondent's 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. Complaint Counsel asserts that the types of facts that are the proper subject for official notice are "strictly limited to two categories": (1) "commonly acknowledged facts;" and (2) facts

that the Commission "has established through its 'accumulated knowledge and experience.'" Complaint Counsel Opposition at 2. Complaint Counsel further objects to Respondent's attempt to use official notice to seek admission of the patents into evidence.

III.

Commission Rule of Practice 3.43(d) states: "When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor." 16 C.F.R. § 3.43(d). *See also* 5 U.S.C. § 556(e). Because the Commission Rule does not define official notice, it is appropriate to look to Federal Rule of Evidence ("F.R.E.") 201(b). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." F.R.E. 201(b).

Under Commission precedent, official notice may be taken of references "generally accepted as reliable." *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). Further, it is appropriate to take official notice of government records where there is a guarantee of trustworthiness. *E.g., In re Beauty-Style Modernizers, Inc.*, 83 F.T.C. 1761, 1780-81 (1974) (taking official notice of a Federal Reserve Board publication); *In re Avnet, Inc.*, 82 F.T.C. 391, 464 n.31 (1973) (taking official notice of U.S. census data).

Federal courts interpreting F.R.E. 201 have held that district courts have discretion in determining whether to take official notice of patents. *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251, 259 n.1 (2nd Cir. 1962). Exercising that discretion, courts may properly decline to take judicial notice of "evidence that could have been but was not offered at trial." *Hoechst Celanese Corp. v. BP Chemicals, Ltd.*, 78 F.3d 1575, 1582 (Fed. Cir. 1996). In *Hoechst Celanese*, the court declined to take judicial notice where defendant directed the court's attention to a patent that was not introduced at trial. *Id.* In *Lubrizol Corp. v. Exxon Corp.*, 696 F. Supp. 302, 324 n.3 (N.D. Oh. 1988), the court noted that "[w]hile [it had] no objection to taking judicial notice of the existence of the patent, it is entirely improper that any such notice be taken of the teachings of this patent."

In this case, it is appropriate to take official notice of the existence of each patent; the issue and filing dates of each patent; and the identity of the assignee of each patent, as it appears on the face of the patent. These are all facts that are generally accepted as reliable and have a guarantee of trustworthiness. However, official notice may not be used 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 neither (1) within the expertise of the Commission, nor (2) generally accepted as reliable. Accordingly, Respondent's request to take official notice of the entire contents of the 28 patents is denied.

Respondent's request for admission of these patents into evidence, "by means of official notice," (Reply at 9) is untimely and inappropriate. As plainly stated by the Commission Rule, official notice relates to "a material fact not appearing in evidence of record." 16 C.F.R. § 3.43(d). *See also Sykes v. Apfel*, 228 F.3d 259, 272 (3rd Cir. 2000) (judicial notice as a method to recognize facts that are *outside of* the evidentiary record) (emphasis added); *York v. AT&T Co.*, 95 F.3d 948, 958 (10th Cir. 1996) ("Judicial notice is an adjudicative device that alleviates the parties' evidentiary duties at trial, serving as 'a substitute for the conventional method of taking evidence to establish facts.'") (citation omitted). Even if official notice were taken of the substance of the 28 patents, this would not result in the admission of the evidence. *See Nix v. Hedden*, 149 U.S. 304, 306-07 (1893) (upon the question of the ordinary meaning of particular words, "dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court"). Accordingly, Respondent's request to have these patents admitted into evidence through official notice is denied.

IV.

For the above stated reasons, Respondent's Request is **GRANTED in part and DENIED in part.** For the 28 patents subject to Respondent's motion, official notice will be taken only of: (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. 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 28 patents in question.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

August 27, 2003