

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
  
RAMBUS INCORPORATED,  
  
a corporation.

Docket No. 9302

**COMPLAINT COUNSEL'S REVISED REPLY FINDINGS**  
**NUMBERED 192 AND 969**

Of Counsel:

Malcolm L. Catt  
Robert P. Davis  
Michael A. Franchak  
Andrew J. Heimert  
Theodore A. Gebhard  
Charlotte Manning  
Suzanne T. Michel  
Ernest A. Nagata  
Lisa D. Rosenthal  
Sarah E. Schroeder  
Jerome A. Swindell  
John C. Weber  
Cary E. Zuk

M. Sean Royall  
Geoffrey D. Oliver  
Patrick J. Roach

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580  
(202) 326-2275  
(202) 326-3496 (facsimile)

COUNSEL SUPPORTING THE COMPLAINT

Dated: October 10, 2003

192. IBM informed JEDEC members and JEDEC leaders on several occasions between 1992 and 1996 that it would not disclose its intellectual property position at JEDEC meetings. (JX 15 at 6; RX 420 at 1; JX 18 at 8; JX 19 at 4).

**Response to Finding 192:** This proposed finding is inaccurate, misleading, contrary to the weight of the evidence, and ignores substantial evidence in the record because IBM representatives stated that they would disclose pending or issued patents of which IBM's representatives were aware. *See* CCF 325-29. As explained by Mr. Kelley and Mr. Kellogg, IBM could not commit to providing a list of all its relevant patents because such a search of the company's patent portfolio would be difficult and, even if undertaken, could not be guaranteed to find all relevant patents. IBM did, however, agree to evaluate any purported patent or patent application that other participants could identify. *See* CCF 327-28. The testimony of Mr. Kelley and Mr. Kellogg is consistent with contemporaneous IBM business documents. *See, e.g.,* G. Kelley, Tr. 2455-58. This is in direct contrast to the conduct of Rambus, which intentionally concealed applicable patents and patent applications. CCF 813-16, 909, 927, 931, 944, 953, 961, 974, 976, 980, 986, 999, 1017, 1027, 1033, 1038, 1048, 1063, 1067, 1082, 1098-99, 1111, 1238-59, 1676-1700.

In addition, RPF 192 does not support the conclusion that JEDEC "leaders" understood the patent disclosure policy to be anything other than mandatory. Such a conclusion is contrary to the overwhelming weight of contemporaneous evidence (including the 21-I Manual, the Townsend presentations, the Townsend memoranda, and the sign-in sheets) and witness testimony (including testimony of Messrs. Kelly, Rhoden, Lee, Sussman, Landgraf, Williams, Brown, Calvin, Meyer, and Kelley) that confirms that JEDEC intended the disclosure obligation to be mandatory. *See* CCF 318-19, 324, 330, 360, 363, 367, 370, 378.

969. JEDEC-compliant SDRAM parts use two of the four Rambus technologies at issue:

programmable CAS latency and programmable burst length. In order to determine whether the use of alternatives to the Rambus technologies used in SDRAM is more costly than paying the Rambus royalties, one can determine the additional variable costs associated with the alternatives and compare them to the Rambus royalties that would be paid under the a license from Rambus. (Rapp, Tr. 9830-33). Costs for alternatives to different features are additive; that is, to calculate the costs associated with implementing alternatives to more than one feature simultaneously, one would simply add the costs associated with the individual alternatives. (Geilhufe, Tr. 9614).

**Response to Finding 969:** The statement in RPF 969 that “[i]n order to determine whether the use of alternatives to the Rambus technologies used in SDRAM is more costly than paying the Rambus royalties, one can determine the additional variable costs associated with the alternatives and compare them to the Rambus royalties that would be paid under the a license from Rambus” is misleading and contrary to the weight of the evidence because it implies that each member of JEDEC is faced with the same costs to comply with the standard. However, JEDEC is composed of broad array of companies and individuals. (*See, e.g.*, CCRF 4). These companies represent a broad cross-section of the semiconductor supply chain from around the world and so would experience costs differently depending on where they are in the semiconductor supply chain. (CCFF 212-213). Furthermore, the comparison of manufacturing costs and royalties is misleading because that comparison does not take into account the differences between the two types of costs. In particular, manufacturing costs are not subject to hold-up and royalties are. (McAfee, Tr. 11241-11243). Finally, there is no evidence in the record that JEDEC members conducted this type of analysis in making decisions regarding what technologies to put into the standards. Mr. Geilhufe did nothing to ensure that the analysis that he did was the type of analysis done at JEDEC. (CCFF 2121). Similarly, Dr. Rapp simply assumed that JEDEC would perform the same type of analysis that he *did*. (CCFF 2825-2827).

Mr. Geilhufe’s opinions regarding the costs of alternative technologies are not actual costs but estimated costs. (Geilhufe, Tr. 9665). As a result of the fact that Mr. Geilhufe was

presenting estimates, all of the information presented in his testimony was approximate. (Geilhufe, Tr. 9665). Mr. Geilhufe agreed at trial that the margin of error for each of the cost elements described in his presentation is as high as 25 percent. (Geilhufe, Tr. 9665). Mr. Geilhufe did not compare his projections in this case to any actual results to see if the results actually were within 25 percent of actual cost. (Geilhufe, Tr. 9665-66 (“Well, since the vast majority of these never got implemented, it was not possible to test them.”)). Since many of the alternates Mr. Geilhufe evaluated never got implemented, it would be impossible for even a DRAM manufacturer to verify the costs of many of the alternatives. (Geilhufe, Tr. 9666). But to the extent that they were implemented in some fashion, one way to verify Mr. Geilhufe’s cost estimates would be to ask a DRAM manufacturer. (Geilhufe, Tr. 9666). Mr. Geilhufe never attempted to verify the numbers he came up with the DRAM manufacturers. (Geilhufe, Tr. 9666-67). Mr. Geilhufe never asked Rambus to conduct discovery from DRAM manufacturers relating to his cost estimates. (Geilhufe, Tr. 9667). Because the costs that he estimated are based on his experience, he cannot say what the actual costs were for any of the DRAM manufacturers in the relevant time period. (Geilhufe, Tr. 9667 (“Clearly -- as I stated, cost information is highly confidential, and I cannot speak for the actual costs at a DRAM manufacturer. I can only speak for the model that I feel is a credible model that I used.”)).