In the Matter of Rambus, Inc.
Docket No. 9302

Remedy Statement of Commissioner Pamela Jones Harbour Concurring in Part and Dissenting in Part[1]

I join Parts I, II, IV.A., and (subject to the exception described below) IV.B. of the majority's remedy opinion. In particular, I strongly agree that the Commission's remedial authority in Section 2 cases extends beyond narrowly constrained cease-and-desist orders and includes the ability to order compulsory, royalty-free licensing.

Along with Commissioner Rosch, I dissent from Part III of the majority opinion and the above-zero royalty rate licensing provisions described in Part IV.B. of the majority opinion (and also from the Order, to the extent it is based on those portions of the majority opinion), because I believe the Commission should have imposed a royalty-free remedy in this case. With one exception, I join Commissioner Rosch's dissenting statement, and I elaborate further in Part I below.

As explained in Part II below, and unlike Commissioner Rosch, I also dissent from Part IV.C. of the majority opinion. I do not believe the remedy adopted by the majority goes far enough to restore competition. Given the Commission's remedial authority and the current "actual market realities"[2] for SDRAM technologies, the Commission can and should impose a remedy reaching the DDR2 generation of SDRAM. A remedy extending to DDR2 would be a legitimate and appropriate exercise of the Commission's remedial discretion.

I. THE REMEDY SHOULD BE ROYALTY-FREE

All five Commissioners agree that the Commission has the authority to require royalty-free licensing under certain circumstances.[3] Commissioner Rosch sets forth compelling arguments why the Commission should exercise that authority in this case. I write separately to highlight one key reason why I concur with Commissioner Rosch on this point: Rambus's argument for an above-zero royalty rate is premised on a flawed logical construct regarding the incentives of Rambus and other JEDEC members in a plausible "but for" world.

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[1] This opinion uses the same abbreviations used in the majority's opinion on remedy [hereinafter Majority Remedy Opinion].

[2] *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[3] Majority Remedy Opinion at II.A.-B.; Dissenting Statement of Commissioner J. Thomas Rosch [hereinafter Rosch Remedy Dissent].

Rambus would have us believe that – if faced with a choice between collecting RAND royalties or no royalties at all – Rambus would have offered JEDEC a RAND commitment, in order to entice JEDEC to adopt Rambus technologies as part of the SDRAM standards.[4] Based on the record before us, I cannot agree.

As noted by Commissioner Rosch in his dissenting statement,[5] RDRAM was Rambus's flagship technology. In its unanimous liability opinion, the Commission found that Rambus's goal was the adoption of its proprietary RDRAM technology as the *de facto* industry standard.[6] The Commission also found that a primary objective of the JEDEC standard-setting process was to establish a royalty-free alternative to RDRAM. The industry resisted RDRAM precisely because of the high royalties Rambus was expected to charge,[7] in keeping with the company's business model of earning its revenue through patent licensing.[8]

If Rambus had decided to offer a RAND commitment to JEDEC, presumably Rambus would have offered something less than the full package of technology comprising RDRAM, because Rambus would have wanted to continue to push for industry adoption of RDRAM. Rambus also would have known that its RAND rates for this package of technology must be proportional to the anticipated cost of alternative technologies under consideration by JEDEC, or else the RAND commitment would not be an attractive proposition to manufacturers of DRAM components. The RAND rates for this technology package, however, would have represented a significant discount off of the RDRAM rates Rambus was expected to charge. As a result, manufacturers would have been able to forgo the pricier RDRAM standard, yet still license some portion of Rambus's DRAM technology – at the discounted RAND rates – for incorporation into rival JEDEC-compliant devices. But this outcome would have been fundamentally inconsistent with the Rambus business model, because it would have reduced even further the industry's incentives to adopt RDRAM as a *de facto* standard. Therefore, it is difficult to conclude on this record that Rambus would have offered RAND terms in a plausible "but for"world.

Even if we were to suppose, nevertheless, that Rambus would have offered a RAND commitment, the inquiry cannot end there. We must ask, as well, how the JEDEC members would have responded. Again, based on the record before us, it is implausible to conclude that the JEDEC

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4 RBR at 3, 10-12 & n.9; RRBR at 10-11.

5 Rosch Remedy Dissent at 8.

6 Rambus Liability Opinion at 8.

7 *See, e.g.*, CX 961 at 1 (quoting a September 1997 Intel e-mail to Rambus Chief Executive Officer, expressing concern that "absolute cost is the critical factor" at least for the low end of the market and warning that, upon analyzing the royalty obligations attached to RDRAM, the industry would develop alternatives).

8 *See* Rambus Liability Opinion at 7 ("Rambus develops, secures patents on, and licenses technologies to companies that manufacture semiconductor memory devices. Rambus is not a manufacturing company; rather, Rambus earns its revenue through the licensing of its patents.") (citations omitted); CX 2106 (Farmwald FTC Dep.) at 220 (*in camera*) ("[r]oyalties are the lifeblood of Rambus"); *see also* Rosch Remedy Dissent, notes 29-30 and accompanying text.

members would have accepted Rambus's RAND offer and incorporated Rambus technology into the JEDEC standards. The record demonstrates that JEDEC members not only were wary of adopting patented technology generally, but also went out of their way to avoid Rambus's patented technology specifically.[9]

Moreover, as the Commission's unanimous liability opinion explains in detail, the Commission assumes a "but for" world where lock-in had not yet occurred and where viable, cost-effective alternative technologies were available to JEDEC[10] – all the more reason why the JEDEC members likely would have rejected a RAND offer by Rambus in a plausible "but for" world.[11]

II. THE REMEDY SHOULD EXTEND TO DDR2

All of the other Commissioners have chosen to limit the scope of the remedy to the SDRAM and DDR SDRAM standards. The Commission's unanimous liability opinion found lock-in only with respect to the two earlier standards; therefore, my colleagues conclude, the remedy should go no further. I disagree.

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[9] *See, e.g.*, Rambus Liability Opinion at 74 & n.403 ("Indeed, the one time that JEDEC members had advance knowledge that a Rambus patent was likely to cover a standard under consideration, the members took deliberate steps to avoid standardizing the Rambus technology."); Rosch Remedy Dissent at II.C.

[10] *See, e.g.*, Rambus Liability Opinion at 76 ("Alternative technologies were available when JEDEC chose the Rambus technologies, and could have been substituted for the Rambus technologies had Rambus disclosed its patent position."), 82 ("We find that the evidence does not establish that Rambus's technologies were superior to all alternatives on a cost/performance basis."), 97-98 ("No matter what the specific outcome might have been [if Rambus had disclosed its patent position], the consequences of incorporating Rambus's patented technologies into the standards would have been identified and weighed *before* the standards were adopted, *when Rambus's technologies were competing with the alternatives*. That 'but for world' would have been more competitive than the current DRAM marketplace, in which Rambus has monopoly power and can charge whatever royalties it chooses.") (emphasis in original).

[11] *See* Rambus Liability Opinion at 63-65 (various industry participants believed that the JEDEC standards under consideration would be Rambus-free and royalty-free). Their beliefs were consistent with Rambus's behavior, in light of the Commission's findings regarding Rambus's course of exclusionary conduct. The Commission found that Rambus's business strategy included amending its patent applications to cover JEDEC-compliant products, based on information gleaned during Rambus's participation in JEDEC while the standards were under development. *Id.* at 4 ("through its participation in JEDEC, Rambus gained information about the pending standard, and then amended its patent applications to ensure that subsequently-issued patents would cover the ultimate standard"), 40-48 (detailing the chronology of Rambus's conduct, including relevant amendments), 67 (holding that Rambus's amendment program was deceptive); *see also* CX 837 at 2 (internal email advising Rambus management that the company should "redouble [its] efforts to get the necessary amendments completed, the new claims added and make damn sure this ship is watertight before we get too far out to sea."). It is entirely possible that the JEDEC standards *were* Rambus-free at some point, before Rambus repeatedly amended its patent applications to cover them.

When the Commission fashions a remedy, it should strive to restore, as completely as possible, the competitive environment that would have existed in the "but for" world.[12] In this case, the Commission can and should impose a remedy that would apply to technologies included in all JEDEC standards that were developed, *or in development*, at the time Rambus began enforcing its patents. This test would yield a remedy covering DDR2 (but not DDR3 or successive generations).

This formulation would reflect an appropriate use of fencing-in relief – consistent not only with existing jurisprudence regarding the scope of the Commission's remedial authority, but also with burden-of-proof requirements during the remedy phase. A DDR2 remedy would more completely and effectively mitigate the likely and foreseeable effects of Rambus's exclusionary conduct and would create an opportunity for the market to establish a competitive equilibrium.

The proposed test also recognizes the need for a clearly articulated limiting principle. The remedy would be purely prospective and reasonably bounded in breadth, yet aggressive enough to prevent Rambus from being unjustly enriched by the lingering effects of its unlawful conduct.

Finally, such a remedy would enhance the deterrent effect of the Commission's enforcement action by sending a forceful message: companies will not be allowed to profit from monopoly power obtained by hijacking a standard-setting organization.

A. <u>The Commission's Liability Opinion Does Not Rule Out The Possibility of DDR2 Lock-In</u>

In its unanimous liability opinion, the Commission held that "[t]he record does not support a finding that lock-in conferred durable monopoly power over DDR2 SDRAM by 2000" – subject to the caveat expressed in footnote 621: "Although we do not, on this record, find durable monopoly power as to DDR2 SDRAM, neither do we rule it out. It is possible that Rambus did, in fact, obtain durable monopoly power over DDR2 SDRAM."[13]

As footnote 621 recognized, the Commission "might have found lock-in with respect to DDR2 SDRAM if the record had demonstrated, for example, that backward compatibility concerns were a substantial determinative factor in JEDEC's DDR2 SDRAM standard-setting decisions."[14] For purposes of establishing liability, however, the record was deemed insufficient to make such a finding.

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[12] *See* Majority Remedy Opinion at 6 ("[T]he Commission's authority extends to restoring, to the extent possible, the competitive conditions that would have been present absent Rambus's unlawful conduct.").

[13] Rambus Liability Opinion at 110, 114 & n.621.

[14] *Id*. at 114 n.621.

B. The Commission Has The Authority to Reach DDR2

When the Commission finds that the law has been violated, the Commission has three responsibilities: to stop the unlawful conduct; to prevent the unlawful conduct from recurring; and, importantly, to restore competition lost as a result of the unlawful conduct. As the majority opinion explains, the Commission has the authority to order relief that goes beyond a cease and desist order – including the prohibition of otherwise lawful conduct – if such relief is necessary to alleviate competitive harm and prevent future harm from occurring. The Commission is exercising this authority by prescribing maximum royalty rates that Rambus may charge for SDRAM and DDR SDRAM. The same core principles that support the majority's remedial choice also would justify a remedy extending to DDR2.

The Supreme Court in its 1946 *Jacob Siegel* decision described the Commission as "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."[15] As discussed in the majority opinion,[16] the Court further stated that the Commission "has wide latitude for judgment"[17] and "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in . . . trade and commerce."[18] The Court concluded that "the courts will not interfere except where the remedy selected has no *reasonable relation* to the unlawful practices found to exist."[19] The Supreme Court and lower courts consistently have affirmed the breadth of the Commission's remedial authority under Section 5 of the FTC Act.[20]

As the majority opinion explains, the Court repeatedly has upheld the Commission's authority to go beyond a cease and desist order. The Commission may require relief that prohibits otherwise lawful conduct, if such relief is necessary to prevent ongoing harm to competition. As the Court explained in *Ruberoid*,

> the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.[21]

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15 Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

16 Majority Remedy Opinion at 6-7.

17 *Siegel*, 327 U.S. at 613.

18 *Id.* at 611.

19 *Id.* at 613 (emphasis added).

20 *See, e.g.*, FTC V. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); FTC v. Nat'l Lead Co., 352 U.S. 419, 428-30 (1957); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

21 *Ruberoid*, 343 U.S. at 473.

The Court later gave a name to this concept: "those caught violating the [FTC] Act must expect some fencing in."[22] The Commission – with the approval of the courts – has included a variety of fencing-in provisions in its remedial orders.[23] The Commission may use its fencing-in authority as long as the relief is reasonably related to the illegal conduct and is not punitive.[24]

In this case, extending the relief to the DDR2 SDRAM standard would be reasonably related to Rambus's deceptive and exclusionary conduct. The Commission's unanimous liability opinion found that Rambus's course of deceptive conduct was causally linked to Rambus's acquisition of a monopoly position in technologies used in products compliant with JEDEC's SDRAM and DDR SDRAM standards. By the time Rambus began enforcing its patents against JEDEC-compliant products, the industry already had begun to develop the third-generation SDRAM standard – *i.e.*, DDR2. DDR2 was based on the existing SDRAM and DDR SDRAM standards, reflecting JEDEC's preference for "evolutionary" progression from one generation to the next. Given the industry's desire for backward compatibility,[25] Rambus reasonably could have anticipated – and would have hoped – that its technologies also would be incorporated into DDR2.

In the "but for" world, the SDRAM and DDR SDRAM standards would have been Rambus-free. Due to the path-dependent nature of JEDEC standard-setting, the inclusion of Rambus technologies in the first- and second-generation standards made it all but inevitable that Rambus technologies also would be included in DDR2. Rambus's exclusionary conduct therefore facilitated the creation of Rambus's DDR2 monopoly. This would satisfy the "reasonable relation" test.

As for the "punitive" prong of the analysis, courts have upheld a variety of fencing-in provisions as not punitive,[26] and a remedy reaching DDR2 also would pass muster. By extending

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22 *Nat'l Lead*, 352 U.S. at 431.

23 *See, e.g.*, Litton Industries, Inc. v. FTC, 676 F.2d 364, 370 (9th Cir. 1982) (quoting ITT Continental Baking Co. v. FTC, 532 F.2d 207, 223 (2d Cir. 1976)) (multi-product order to address "all products in a broad category, based on violations involving only a single product or group of products," to prevent respondent from transferring unlawful conduct to other products); Toys "R" Us, Inc., 126 F.T.C. 415, 615 (1998), *aff'd*, 221 F.3d 928, 939-940 (7th Cir. 2000) (respondent enjoined from making certain otherwise lawful requests for information from suppliers, because the requests were "the means used by TRU to implement and police the illegal restraints of trade").

24 *See* Majority Remedy Opinion at 7 (a compulsory licensing order that attempts to replicate the "but for" world is not punitive).

25 *See* Rambus Liability Opinion at 112 & n.613-14 ("Several industry witnesses expressed concerns that changing DDR2 SDRAM to avoid Rambus's patents would have disrupted backward compatibility. One witness testified that an effort to maintain backward compatibility after eliminating dual-edge clocking would have had 'a big impact' from the perspective of design and that a desire to maintain backward compatibility was the reason that a sub-unit of JEDEC's task group . . . chose to maintain dual-edge clocking.").

26 The courts have upheld fencing-in provisions that prohibit otherwise lawful conduct, finding that they are not punitive. *See, e.g.*, L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971) (affirming divestiture order in §5 case, by implication finding remedy not punitive)**;** Golden Grain Macaroni Co. v. FTC, 472 F. 2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973) (same); *see also* Curtis Publ'g Co. 78 F.T.C. 1472 (1971) (Commission

the remedy to technologies included in all JEDEC standards developed or in development at the time Rambus began enforcing its patents against JEDEC-compliant products, the Commission would do no more than restore the competitive *status quo ante*. Rambus would not be deprived of the entire value of its intellectual property, because Rambus still would have total freedom to enforce its patents with respect to all non-JEDEC-compliant uses (such as RDRAM). True, a royalty-free remedy would "hurt" Rambus more than the remedy endorsed by the majority. But one must be careful not to equate financial pain with excessive punishment. If a remedy is proportional to the underlying offense, it is not punitive, regardless of whether it inflicts pain. In contrast, if a remedy is not proportional to the offense, the Commission's remedial goals are unlikely to be fully achieved. The wrongdoer will benefit; the remedy will not restore the *status quo ante*; and future violations may be encouraged rather than deterred.

C. <u>The Burden Of Proof Must Be Properly Allocated</u>

The Commission's unanimous liability opinion found insufficient proof of a causal linkage between Rambus's exclusionary conduct and its DDR2 monopoly. But the burden of proof in the remedial phase is less stringent than in the liability phase, and the evidence must be weighed accordingly. Finding a "reasonable relation" to the unlawful practices requires less evidence than would be needed to establish the violation.

For remedial purposes, Complaint Counsel should not bear the burden of proving the "but for" world with absolute certainty. Yet, the other Commissioners would limit the Commission's remedial reach to anticompetitive effects directly caused by the unlawful conduct. In effect, therefore, my colleagues seek to restore the "but for" world only to the extent Complaint Counsel has proven what that world would have looked like. I believe their approach incorrectly allocates the burden of proof.

In our liability opinion, the Commission unanimously agreed that, for purposes of establishing Section 5 liability, Complaint Counsel needed to prove a causal relationship between Rambus's unlawful conduct and Rambus's acquisition or maintenance of monopoly power in the relevant technology markets. The Commission found that Complaint Counsel had satisfied its burden with respect to the SDRAM and DDR SDRAM standards, but not with respect to DDR2. Significantly, however, the Commission found *no* proof of *Rambus's* portrayal of the "but for" world. The Commission explicitly rejected Rambus's contention that the JEDEC members would have chosen to include the Rambus technologies in the SDRAM standards, even if Rambus had not engaged in its course of deceptive conduct and JEDEC had full information about Rambus's intellectual property. Moreover, as discussed above, footnote 621 preserved the possibility that Rambus's exclusionary conduct might have been causally linked to Rambus's monopolization of the four relevant technologies with respect to the DDR2 standard.

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required restitution of monopoly profits, describing remedy as prospective only and not punitive).

It is black-letter Supreme Court law that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[27] Areeda and Hovenkamp reflect this principle when they state:

> [T]he monopolist bears the risk of the uncertain consequences created by its exclusionary acts. Thus, at the least, equitable relief properly goes beyond merely "undoing the act"; the proper relief is to eradicate all the consequences of the act and provide deterrence against repetition; and any plausible doubts should be resolved against the monopolist.[28]

As discussed, but not decided, in the Commission's unanimous liability opinion, Rambus intentionally destroyed a large volume of documents, including documents regarding Rambus's participation in JEDEC and Rambus's patent prosecution litigation.[29] While the Commission found it unnecessary to resolve the spoliation issue for purposes of determining liability, Rambus's alleged spoliation of evidence should not be wholly ignored for remedy purposes. Rambus destroyed contemporaneous records that might have corroborated Complaint Counsel's position on remedy. In particular, on July 17, 2000, Rambus Vice President and in-house counsel Neil Steinberg instructed Rambus executives to destroy all documents, other than executed contracts, that referred or related to patent licensing negotiations.[30] Clearly, such records would have been particularly relevant to the Commission's consideration of what the real world might have looked like and, thus, what the "but for" world should be. Instead, Rambus's systematic and successful document destruction campaign has enhanced doubts regarding how DDR2 should be treated in the "but for" world.

The proper relief in this case must eradicate all consequences of Rambus's exclusionary conduct. Rambus's monopoly power with respect to DDR2 is reasonably related to Rambus's exclusionary conduct. Because "any plausible doubts" are to be resolved against Rambus – especially doubts exacerbated by Rambus's destruction of documents – the Commission may extend its remedy to DDR2.

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27 United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316, 334 (1961) (Commission entitled to decree directing complete divestiture in merger case, to remedy violations of Clayton Act § 7), *quoted in* Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (upholding divestiture and various other injunctive provisions in Commission order in §7 case).

28 III PHILLIP E. AREEDA & HERBERT HOVENCAMP, ANTITRUST LAW ¶ 653f (2d ed. 2002).

29 Rambus Liability Opinion at 115-18.

30 CX 5020 (July 17, 2000 email from Neil Steinberg to "exec"). This directive was issued after Rambus had begun to enforce its patents against DRAM manufacturers and only days before Rambus filed an additional enforcement action against Infineon.

D. Marketplace Realities: A DDR2 Remedy Will More Effectively Restore Competition

Enforcement litigation in complex antitrust cases presents an inherent paradox: by the time any remedy is achieved, the market may have moved on. This is especially true in fast-moving technology markets. The *Rambus* case was worthwhile, irrespective of remedial issues, because the Commission's unanimous liability opinion will provide valuable guidance.[31]

But having said that – and given that the Commission *can* rightfully reach DDR2 – the Commission *should* do so.

It is impossible to ignore what has happened in the SDRAM marketplace since the Commission voted out its administrative complaint in June 2002. The market is now rapidly migrating to DDR2. Therefore, the Commission's remedial order applies only to products that soon will be obsolete. A quick check of retail websites of major computer system manufacturers confirms that even entry-level computers – targeted to the price-sensitive consumer segment of the market – overwhelmingly feature DDR2 components.[32] It has been projected that DDR2 will achieve a market share of over 77 percent of DRAM revenues in 2007, and over 84 percent by 2008.[33]

If the Commission's remedy does not reach DDR2, it will fail to eradicate the lingering effects of Rambus's illegal conduct.[34] Consumers deserve more effective and complete relief,

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31 *Cf.* United States v. Microsoft Corp., 253 F.3d 34, 48-49 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001):

> [It] is somewhat problematic . . . that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. . . . [But we] do not mean to say that enforcement actions will no longer play an important role in curbing infringements of the antitrust laws in technologically dynamic markets, nor do we assume this in assessing the merits of this case. Even in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not.

32 As of January 2007, the lowest-priced "home and home office" desktop computers from Dell, Hewlett Packard, Gateway, and Apple all featured DDR2 SDRAM, according to their retail websites.

33 Semico Research Corp., *Computing Applications Dominate DRAM Volume: The Growth of White Box*, Appx. Table 6 (June 2004, Report No. VM-102-04). According to this report, DDR2 DRAM has been projected to account for nearly $25 billion out of a total of $32.2 billion in DRAM revenues in 2007, and $33.6 billion out of $39.9 billion in 2008.

34 "A public interest served by such civil [antitrust] suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947),

wherever possible. Complaint Counsel correctly assert[35] that a DDR2 remedy would help to "creat[e] a breathing spell during which independent pricing might be established without the hang-over of the long existing pattern of [anticompetitive conduct]."[36] By extending the remedy to DDR2, the Commission would give the market an opportunity to consider alternative technologies for DDR3 and subsequent standards.

E. Unjust Enrichment and Deterrence: Rambus Should Not Be Allowed to Profit From Its Unlawful Conduct

A remedy that fails to reach DDR2 will leave Rambus free to extract royalties on sales of a vast majority of JEDEC-compliant components currently, and soon to be, in the SDRAM marketplace. If Rambus is allowed to keep all of its DDR2 royalties on a going-forward basis, Rambus's exclusionary conduct will continue to be rewarded, as it already has been. This constitutes unjust enrichment, which is unfair to consumers.

It also may hamper effective deterrence, which should be one of the primary objectives of any remedy. As Areeda and Hovencamp state, "the goal of antitrust remedies is general deterrence, not simply destruction of a single monopoly for whatever social good that in itself might impose."[37] The Commission has sent a strong message in its liability opinion, and most participants in standard-setting organizations will take this message to heart. But the bottom-line result of the Commission's remedy is this: Rambus will continue to reap financial benefits that are reasonably related to its successful subversion of JEDEC's standards.

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quoted in Ekco Products Co., 1964 FTC LEXIS 115, 125 (1964).

[35] CCBR at 18.

[36] Assoc. of Conference Interpreters, 123 F.T.C. 465, 659-60 (1997) (quoting FTC v. Nat'l Lead, 352 U.S. 419, 425 (1957).

[37] III AREEDA & HOVENCAMP, *supra* note 28, at ¶ 710b4(C).