Computer & Communications Industry Association
Tech Advocacy Since 1972

ABSTRACT

ANTITRUST / COMPETITION **APRIL 2014**

Our economy depends upon open markets, open systems, open networks, and full, fair and open competition to promote innovation and benefit consumers.

Competition is a vital component of our modern economy. As we emerge from the economic downturn, we are pleased that U.S. regulators have reaffirmed their commitment to promote competition and revive consumer-oriented antitrust enforcement, especially in regard to monopolistic behavior. However, regulators must be careful not to deter companies from innovating in fast-moving markets.

Sound antitrust enforcement is of particular importance to high-tech industries. Characteristics underlying technology markets—complicated patent portfolios, network effects, economies of scale, standardization, and interoperability—make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation. However, not all high-tech markets are created equal. For example, barriers to entry are much higher in markets for computer chips than they are for websites or social platforms. Regulators must be highly cognizant of both current and potential competition when evaluating behavior and suggesting remedies.

***Background*:** For over 40 years, CCIA has supported antitrust laws that ensure a level playing field for all participants in computer and communications markets. It is clear that competition policy will play an increasingly larger role in the shape and operation of our industry.

***CCIA's Position*:** CCIA advocates for open markets, open systems, open networks, and full, fair and open competition. Antitrust and competition policy should be designed to advance these goals. Competition and vibrant markets fuel economic growth and reinforce our industry's leadership in innovation and technological development.

Competition Policy and the High-tech Industry: The competitive dynamic is especially important in high-tech industries where rapid innovation is a defining characteristic. To a greater extent than most markets, high-tech and internet-centric industries are characterized by a heavy reliance on complicated patent portfolios, network effects, economies of scale, standardization, and interoperability. These inherent features often make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation. However, high-tech markets, particularly Internet websites and services, are highly susceptible to disruptive innovation. If antitrust regulators become too fixated on static views of

the current markets, they might disregard potential competitive threats or prevent current firms from evolving their products in ways that are beneficial to consumers. As a result, antitrust enforcers must be ever vigilant, but also disciplined in their use of the powerful legal tools at their disposal.

Current Status:

The last year has been an active year for high-tech antitrust enforcement and policy. 2013 got off to a quick start as Google and the FTC announced that they had reached a settlement that would end the agency's two year investigation of the Mountain View company. The FTC determined that that the core complaints regarding "search bias" were without merit, while Google agreed to make it easier for advertisers to export their ad campaigns to other online platforms, to give websites the ability to "opt out" of their vertical products (i.e. Google Places), and the company also agreed to limitations on its ability to seek injunctions on its standard-essential patents (SEPs). In February 2014, Google reached a settlement with the European Commission where the company agreed to give its rivals more prominence in specialized search results. In both cases, Google escaped fines or any findings of wrongdoing.

In the wake of the investigations, there are many unanswered questions about how antitrust agencies will deal with key questions presented by Internet services. As the Google investigation illustrated, questions of market definition and market share for websites and services that are rapidly evolving the way they operate and the services they provide is not a black and white issue.

One vestige of the Google antitrust case, on which CCIA filed comments to the FTC, is how to deal with SEP injunctions going forward. SEP lawsuits, although part of the greater patent litigation landscape, attract the scrutiny of competition regulators as patents that read on standards are deemed to confer market power when the broader market has coalesced around a particular standard, thus - in theory - making them ripe for anticompetitive abuse. Competition authorities are particularly sensitive to cases where injunctions are sought that are arguably in violation of pledges made to standard bodies during the standard making process. Besides Google, Samsung was also investigated by the European Commission on similar grounds. The EC's final ruling on whether to accept Samsung's proposed settlement is expected soon.

Actions in both the U.S. and Europe have indicated that competition authorities are moving to prevent companies from seeking injunctions on their SEPs, at least before mandated arbitration or a finding that the other party is not negotiating in good faith. Unlike prior examples of antitrust authorities investigating SEP injunctions, the parties to the current investigation (Google/Motorola and Samsung) were not using their patents offensively, but instead were suing companies that had already attacked them using software and design patents that are controversial in their own right. Given the ambiguity of the "fair and reasonable" licensing pledges that accompanied the SEPs in question, the settlements are not without controversy. Some industry players think that the FTC and EC's interpretation of those pledges was misguided and potentially hurts incentives to participate in standards bodies, as companies

would not be able to use those patents to defend themselves if sued.

Besides investigations of particular companies, FTC Chairwoman Edith Ramirez announced at a CCIA-hosted panel that the agency was conducting a "6b" investigation of patent assertion entities (so-called "patent trolls"). A 6b study is a broad study of an industry, which allows the FTC to seek information from companies without starting an official investigation of them. In the past, these studies have shed light on controversial industry practices. Frequently, these studies lead to follow-on agency action, and even legislation. Of particular concern to the agency's antitrust enforcers in this study are the relationships PAEs have with operating companies, which are currently veiled by NDAs and of which little is known.

Going forward, many competition and policy questions are primed for resolution in the coming year. The most prominent case on the horizon is the Comcast/Time Warner merger. When Comcast announced its intention to buy rival cable company Time Warner in February, it also ignited a firestorm of controversy. Although Comcast and Time Warner don't compete directly in any geographic markets, the merger presents potential anticompetitive problems on the buyer side of the market (aka monopsony), as the merged entity would have significant market share on the demand side for content. When you consider that both Comcast and Time Warner possess significant amounts of their own "must have" content (especially stemming from Comcast prior merger with Universal and control of much of the local sports programming), the merger also implicates vertical questions, as the merged entity would have even more incentive to favor its own content and services. With the legal future of the FCC's Open Internet rules in question, these concerns take on a heightened sense of importance.