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ABSTRACT

Computer & Communications Industry Association

ANTITRUST / COMPETITION

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- *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.*
- *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.*

Background: For over 30 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. Some argue that it is this very trait that obviates the need for antitrust enforcement in the technology industry; however, even a quick examination of this bumper sticker ideology proves this notion wrong. In reality, certain characteristics of computer and communications markets necessitate proactive, targeted competition policy. 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.

Intellectual property rights surrounding hardware and software interfaces are particularly susceptible to anticompetitive practices. Since interoperability is essential to competition in high-technology industries, IP disputes concerning proprietary interfaces merit special consideration. Prohibiting competitors from accessing a *de facto* standard interface specification

can lock users into a particular operating system, software platform, or network software environment. Furthermore, attempts by companies to subvert official standard setting processes to gain and misuse market power are increasingly becoming a problem.

A key event shaping recent jurisprudence and policy was the Federal Trade Commission's (FTC) ruling that computer memory maker Rambus' "patent ambush," in which the company did not disclose relevant patents until after the industry settled on a standard in an effort to gouge higher licensing fees out of its competitors, was anticompetitive and illegal. Regrettably, to the detriment of innovation and the standard setting process, the DC Circuit overturned the FTC decision and the Supreme Court refused to hear the case.

Current Status:

The Worldwide Case against Intel

Intel has been embroiled in antitrust controversies since the early 1980s. Most recently, the company has engaged in a series of aggressive and legally suspect acts designed to disadvantage AMD, its sole remaining competitor in the marketplace for "x86-based" microprocessors—computer chips that power the vast majority of PCs, laptops and servers.

Competition authorities in Europe, Korea and Japan have ruled that Intel's anticompetitive practices violated competition law, including: (a) offering large discounts to companies for refusing to deal with AMD; (b) paying retailers not to stock computers with AMD products; and (c) paying manufacturers to delay the release of products that run on AMD chips.

The last several months have seen U.S. authorities continue this trend with both the New York State Attorney General and the FTC officially charging Intel with running afoul of antitrust law and engaging in unfair and deceptive trade practices. The most important of these, the FTC's complaint, was significant because it not only charged Intel with violating traditional antitrust law (the Sherman Act) but also accused the computer chip maker of unfair and deceptive trade practices under Section 5 of the FTC act. Also of note in the FTC's complaint was the inclusion of Intel's actions directed against makers of graphics processing units (GPUs), notably NVIDIA. This technology holds great promise and threatens to minimize the importance of Intel's chokehold on the computer chip market. The case is currently proceeding before an Administrative Law Judge at the FTC and the trial is expected to begin in September 2010.

The use of Section 5 by the FTC is particularly significant as a means of countering some of the procedural failings of traditional antitrust law. It may also thwart anticompetitive practices outside the scope of traditional antitrust law, particularly as courts have significantly whittled away antitrust precedent over the last decade. Chairman Leibowitz and Commissioner Rosch addressed this issue in their joint statement on deciding to proceed with a case against Intel:

Despite the long history of Section 5, until recently the Commission has not pursued freestanding unfair method of competition claims outside of the most well-accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct. However, concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a "free pass" under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason,

we have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.

If the Commission is successful and its case survives a likely appeal to the DC Circuit, the precedent established could be a useful tool in solving other anticompetitive issues that have harmed the high-tech industry as of late, particularly the deceptive gaming of the standard setting processed best illustrated by the *Rambus* case.

IBM Mainframe Market

IBM's record of run-ins with antitrust authorities predates even the electronic computer itself, stretching as far back as the days of its dominant mechanical punch card systems. Consent decrees and other legal actions in the 1950s, 1960s, and 1970s were important chapters in the evolution of high-tech markets. In fact, it was only when IBM was prevented from tying its hardware to its software that independent software makers flourished and the modern computer industry as we know it was born.

Although the mainframe market is not perceptible to the average consumers, these large expensive computer systems power most Fortune 500 companies, governments, and financial institutions. IBM mainframes, which have been in use for over a half a century, are the most popular platform for business computing today. It is estimated that \$5 trillion of corporate and government data and applications are stored on mainframes. They serve as the backbone for 70-80% of the world's computer-based transactions involving ATM sessions, airline bookings, tax filings, health records, and other essential services. However, the realities of the mainframe market make it virtually impossible for longtime mainframe users running legacy workloads to migrate to more modern computer systems.

IBM's anticompetitive conduct and mainframe market dominance led the Justice Department and the European Commission to open that market to competition in the 1970s and 1980s. Through a series of actions they compelled IBM to make available technical specifications that would let other manufacturers' computers interoperate with IBM's mainframe operating system. Details of interfaces and other technical data, including patented technologies, sustained a small but profitable market in IBM-compatible mainframes and accessories.

In reaction to the news the DOJ was in the process of removing IBM from its Consent Decree obligations, Fujitsu and Hitachi exited from the compatible mainframe market in the late 1990s and left IBM almost alone. It stayed that way until the early 2000s, when Platform Solutions, Inc. (PSI) began work on servers based on Intel microprocessors that, despite their low cost, could replace the significantly more expensive IBM mainframes in many instances. Given the legal assurance provided by IBM's statements to the Justice Department when the Consent Decree was lifted and prior licenses that PSI had obtained from IBM, PSI repeatedly requested permission to license copies of IBM's operating system that its customers needed. After some back and forth and mixed messages, IBM eventually refused.

IBM reneged on its licensing commitments in 2006, and a short time later filed suit against PSI. IBM asserted that licenses PSI had already purchased from Amdahl, a division of former mainframe competitor Fujitsu, violated licenses for IBM's intellectual property. The November 2006 suit was met with a countersuit by PSI that laid out the anticompetitive impact of IBM's

actions in plain terms. Instead of letting the legal proceedings play out, IBM purchased the company, eliminating one of their last remaining competitors in the mainframe arena. In early July, IBM announced the acquisition, which was structured to avoid legal thresholds that would trigger antitrust review by the federal government. In return, PSI dropped its lawsuit and withdrew its complaints to regulatory agencies.

Despite PSI's disappearance, the European Commission announced that it would continue its investigation of IBM. Shortly thereafter, T3 Technologies, another small mainframe competitor that relied on PSI's software, announced that it had filed a formal complaint against IBM in Europe for the same type of behavior alleged by PSI. T3's complaint corroborated PSI's account of IBM's anticompetitive actions. As a former IBM reseller and partner, T3 Technologies started out on friendly terms with IBM; however, when T3 tried to branch out and provide smaller products using emulation software and non-IBM hardware, IBM turned hostile, refused to renew T3's patent licenses, and threatened T3's customers with lawsuits.

Currently, the Justice Department is investigating IBM's anticompetitive behavior in the mainframe market, and two other companies have either brought complaints or court cases against IBM. Neon Enterprise Software filed a suit against IBM for unfair business practices and anticompetitive behavior in the Western District of Texas and a European open-source company, TurboHercules SAS, filed a formal complaint against IBM in the European Union.

It is important for regulators to pay close attention to this vital market because the ramifications of competition, or the lack thereof, will be far reaching. IBM's actions have walled off vital corporate and government applications and data from the rapidly evolving high-end server market. Having large swaths of mission-critical data locked into one platform presents a wide array of problems and retards innovation.

DOJ Section 2 Report

In May of 2009, the Department of Justice withdrew a report issued by the former Assistant Attorney General for Antitrust on single firm conduct that had taken a more lenient stance on monopolistic conduct. In doing so, the current AAG for Antitrust, Christine Varney, signaled that the agency would revert to prior agency practice and aggressively pursue conduct detrimental to competition and innovation.

Horizontal Merger Guidelines

On April 20, the Department of Justice and the Federal Trade Commission circulated proposed updates for their Horizontal Merger Guidelines. After a month long public comment period, the agencies plan on solidifying the new guidelines. Once completed the revisions will reflect the first major changes to the merger guidelines in over a decade. Substantively, they call for a more flexible and adaptable approach that focuses more on consumer harm and less on rigid market definitions. The proposed guidelines also update HHI thresholds, which measure market concentration, to reflect current economic thinking, focus more on non-price affects such as innovation and state that the agency will give more weight to consumer harm rather than operational efficiency.