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ABSTRACT

Computer & Communications Industry Association

ANTITRUST / COMPETITION POLICY

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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.*
- *CCIA supports acquisitions that will foster innovation and competition. Telecommunications and new technology mergers sometimes produce healthier companies that can help the United States compete in the global communications marketplace. Dynamic markets, however, must not be sacrificed in pursuit of ephemeral efficiencies of scale.*
- *In computer software and hardware, tying and bundling arrangements require close attention. Enforcement authorities must guard against anticompetitive attempts to leverage market power into adjacent markets, giving due weight to the economic consequences of network effects and tipping.*
- *Patent, copyright, and related rights should not be used to unfairly leverage market position or freeze competition out of secondary markets.*

Background: For over 30 years, CCIA has supported competition policies and enforcement that ensure a level playing field for all participants in computer and communications markets. It is increasingly clear that antitrust and competition policy is playing and will play a growing major role in the shape and operation of our industry.

CCIA's Position: Competition and vibrant markets fuel economic growth and reinforce our industry's leadership in innovation and technology development. CCIA advocates for open markets, open systems, open networks, and full, fair and open competition. Public antitrust and competition policy should be designed to advance this goal.

On Telecommunications and New Technology

Technological innovation, lighter regulatory restrictions, and the emergence of viable competitive models are transforming the telecom industry. Simultaneously, telecom mergers and acquisitions have boomed. The search for new business models in a changing world motivates this activity. Some merger activity may inspire increased inter-modal competition and help the United States compete more effectively in the global marketplace.

Nevertheless, market power may result from consolidation and the abuse of such power is unacceptable. To ensure robust competition in the communications marketplace, policymakers

must protect against undue discrimination and ensure that all market participants have access to the national information infrastructure.

On Tying and Bundling in Software and Hardware

While tying and bundling practices may efficiently combine two distinct products into one, more desirable product, antitrust enforcement in the information technology markets must be especially stringent in punishing anticompetitive leveraging. Software and hardware markets are particularly susceptible to such misconduct. A robust technology marketplace requires vigilance against attempts to leverage market power into adjacent markets.

On Intellectual Property

Intellectual property grants are limited ‘monopolies,’ but should not be used to construct monopolies in fact. Dominant companies are increasingly using patent, copyright and related rights to leverage themselves and freeze competition out of secondary markets or “aftermarkets.” CCIA has participated as *amicus curiae* in patent and copyright litigation in order to bring attention to anticompetitive behavior. CCIA has also petitioned government policy makers to protect against the anticompetitive use of intellectual property rights.

Intellectual property rights surrounding hardware and software interfaces are particularly susceptible to anticompetitive purposes. 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. An appropriate antitrust framework must account for these risks.

AMD v. Intel

Intel Corp. has held a dominant position in the market for desktop microprocessors and “x86-based” servers since IBM awarded the company one of two contracts for its original personal computers. IBM, wisely, insisted that another company – AMD – also have access to the same technology that runs PCs today.

Intel has been embroiled in antitrust controversies since the early 1980s. Most recently, the company has engaged in a series of increasingly aggressive and legally suspect acts designed to disadvantage AMD, its sole remaining competitor in the marketplace. AMD, accordingly, has lodged complaints in the U.S. Court for the District of Delaware, with the Federal Trade Commission and the Japanese Fair Trade Commission as well as competition authorities in Korea and the European Union. Each complaint differs in the details, but all concentrate on a pattern of practice that, if proven, is clearly anticompetitive, illegal and anti-innovation.

AMD’s Delaware suit fairly represents the sort of actions AMD and others have observed in the marketplace worldwide. Among other things, AMD alleges that Intel:

- coerced major customers such as Dell, Sony, Gateway and others into Intel-only deals in return for cash, discriminatory pricing or marketing subsidies;

- forced other major customers such as NEC, Acer, and Fujitsu into partial exclusivity agreements by awarding rebates, allowances and market development funds (MDF) in exchange for limiting or eliminating entirely all AMD business;
- threatened retaliation against customers that use AMD microprocessors, particularly in strategic market segments such as commercial desktop;
- established and enforced quotas among key retailers such as Best Buy and Circuit City, thereby artificially limiting consumer choice;
- required PC makers and tech partners to boycott AMD product launches or promotions; and
- abused its market power by forcing on the industry technical standards and products which have as their main purpose the handicapping of AMD in the marketplace.

All these allegations are highly disturbing. Besides being illegal, the accusations contained in the complaint would hamper the dynamic of innovation worldwide. The complaint lays out a powerful case that Intel has willfully maintained a monopoly in violation of Sherman Act Section 2, offered secret discriminatory rebates and discounts in violation of California Business and Professions Code and interfered with a prospective economic advantage in violation of Calif. Business and Professions Code.

CCIA urges a swift conclusion to this proceeding and a formal investigation by the Federal Trade Commission. Other governments, in the meantime, are moving: In Japan, the Fair Trade Commission recently declared Intel liable for anticompetitive actions. Competition authorities in Europe and Korea have tentatively found Intel liable for anticompetitive business practices. New York State Attorney General Andrew Cuomo has also mounted his own investigation. Federal officials should be at least as interested in the matter.

IBM vs. PSI

IBM's record of run-ins with antitrust authorities predates even the electronic computer itself, stretching as far back as the days of its similarly dominant mechanical punch card systems. Consent decrees and other legal actions in the 1950s, 1960s and 1970s were important chapters in our industry's history. Eventually the Justice Department lifted most restrictions on the mainframe monopoly's behavior in 1994. The Department did so, however, with the understanding that IBM was not to return to its former ways. It now appears that the company is once again monopolizing the market, unfairly shutting out innovative companies that could interject real competition into the mainframe market.

IBM's almost unassailable lead in mainframe computers led the Justice Department to open that market to competition in the 1970s. The Department did so through a series of actions that compelled IBM to make available to others technical specifications that would let other manufacturers' computers exchange data with theirs. Details of interfaces and other technical data, including patented technologies, made possible a small but profitable aftermarket in IBM-compatible mainframes and accessories.

The exit of Fujitsu and Hitachi from this market in the late 1990s left IBM almost alone. It

stayed that way until the early 2000s, when Platform Solutions Inc. began work on servers based on Intel microprocessors that, despite their low cost, could mimic the behavior of IBM mainframe computers costing tens, even hundreds of times as much.

Given the legal assurance provided by the agreements between IBM and Justice Department, PSI repeatedly requested copies of IBM's operating system and certain technical information on reasonable and non-discriminatory terms. IBM, however, refused. Rather than recognizing the legal obligations still incumbent upon it as a monopolist, IBM claimed it had no responsibility to license either operating systems or patents to PSI. IBM, interestingly enough, had declared for years its willingness to license any patent in its portfolio on reasonable and non-discriminatory terms. It made similar promises to PSI in 2001, 2003 and 2004.

That promise disappeared in 2006, however. A short time later IBM 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 intellectual property. Given that so much of PSI's business rests on the legitimacy of the licenses it bought from Amdahl, such claims seem improbable.

The November 2006 suit was met with a countersuit by PSI that laid out in plain terms the anticompetitive impact of IBM's actions. PSI asserts that IBM has violated the Sherman Antitrust Act and other competition laws by, among other actions:

- tying its z/OS operating system to mainframe hardware;
- changing its historic RAND licensing practices in order to maintain monopoly;
- denying access to an essential facility as defined by the nation's antitrust laws;
- leveraging its mainframe operating system to keep its monopoly over IBM-compatible mainframes;
- interfering with a contract to sell PSI to another company.

PSI's counterclaims are compelling and shocking given IBM's long history of predation. CCIA urges a swift conclusion to the U.S. case and further investigations by competition authorities worldwide.