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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, it is important that U.S. regulators reaffirm their commitment to competition and revive 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: Competition and vibrant markets fuel economic growth and reinforce our industry's leadership in innovation and technological development. 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 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 becoming an increasing problem.

A key event shaping recent jurisprudence and policy was the FTC's 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 competitors into higher licensing fees, 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. This court ruling cast a shadow over the technology community that needs to be legislatively addressed in order for high-tech markets to function properly.

Current Cases of Importance:

AMD v. Intel: 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 for "x86-based" microprocessors—computer chips that power the vast majority of PCs, laptops and servers. Accordingly, AMD has lodged complaints in the U.S. Court for the District of Delaware, with the Federal Trade Commission, the Japanese Fair Trade Commission, and 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 anticompetitive and illegal.

As of the printing of this document, Japanese and Korean Antitrust authorities have already taken action against Intel. According to news reports, the European Commission is circulating a draft decision against Intel that includes a ban on their anticompetitive practices and a substantial fine.

In the U.S., both the Attorney General of New York and the FTC have opened up formal investigations of Intel. CCIA is encouraged by regulators' increased scrutiny of Intel's actions internationally, and hopes that the U.S. authorities will continue their investigation to show their commitment to the importance of competition in this critical sector.

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 plug-compatible mainframe (PCM) computers, 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.

IBM's almost unassailable lead in mainframe computers led the Justice Department to open that market to competition in the 1970s through a series of actions that compelled IBM to make

available 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 significantly more expensive IBM mainframes.

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; however, IBM refused. Rather than recognizing the legal obligations still incumbent upon it, IBM claimed it had no responsibility to license either operating systems or patents to PSI. For years IBM declared its willingness to license any patent in its portfolio on reasonable and non-discriminatory terms. Interestingly enough, it made similar promises to PSI in 2001, 2003, and 2004.

IBM reneged on that promise 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 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 decided that it was in their best interests to purchase one of their last remaining competitors in the mainframe arena. In early July, IBM announced they had purchased PSI in a deal that was structured to avoid specific thresholds that would trigger an automatic antitrust review. In return PSI dropped its lawsuit and withdrew its complaints to regulatory agencies.

Despite PSI's disappearance, the European Commission announced that they would continue their investigation of IBM. Shortly thereafter, T3 Technologies, another small mainframe competitor to IBM, announced that they were in the process of filing a formal complaint against IBM in Europe for the same type of behavior alleged by PSI. T3's complaint corroborates PSI's accounts 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 for the lower end of the market, IBM turned hostile, failed to renew T3's patent licenses, and threatened T3's customers with lawsuits.

It is important for regulators to pay close attention to this vital market. Although this case may seem relatively unimportant, its ramifications are 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. It is vitally important that competition not be illegally snuffed out in this critical economic sector.