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HOW BC AND BCP CAN STRENGTHEN THEIR RESPECTIVE POLICY MISSIONS THROUGH NEW USES OF EACH OTHER'S AUTHORITY

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There is a rich history of interaction between the Commission's "unfair methods of competition" authority and its "unfair or deceptive acts or practices" authority. In recent decades, however, this interaction has disappeared; BC's competition policy mission and BCP's consumer protection policy mission have developed in virtually complete isolation of each other. My intention is to esc 0 Tw f002 -27.6000 g5.72 0 Td (ISSI)g(e)Tj 0 (ISSI)(e)Tj 5.28 0 Td st(o sc 015.72 0 Tdomere

central issue whether the agency had authority to reach these practices without a showing of adverse effect on competition or competitors.[1] The addition of unfair and deceptive practices authority in 1936 ended that debate; the agency thereupon proceeded over the next seven decades to develop largely separ

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[1] *Compare FTC v. Gratz*, 253 U.S. 421 (1920), *and FTC v. Raladam Co.*, 283 U.S. 643 (1931), *with FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934).

[2] *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

[3] *FTC v. Brown Shoe Co*., 384 U.S. 316 (1966).

[4] *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

[5] *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8355 (1964).

[6] *FTC v. Sperry & Hutchinson Co*., 405 U.S. 233 (1972).

considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws" (with an approving citation to the Cigarette Rule Statement).[7]

That open-ended language invited or at least contributed to an ensuing decade of "over-exuberance" as the agency tested the outer limits of both of its jurisdictions. The unfair methods of competition authority was used to attack "shared monopolies" in the cereal and oil industries; the unfair practices authority became the basis for the Kid-Vid rule; disaster struck on both fronts. The 1980s brought set-backs in the courts as decisions such as **Boise Cascade,**[8] **Official Airline Guides**[9] and **Ethyl/duPont**[10] could be seen as undercutting the whole previously established idea that unfair methods of competition encompass practices not reachable under other antitrust laws. The 1980s story on unfair and deceptive practices development is a bit different and that difference is instructive for the BC-BCP integration idea as will be explained shortly.

Specifically in t

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[7] *Id*. at 244.

[8] *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

[9] *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2nd Cir. 1980).

[10] *E.I. duPont deNemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

[11] *FTC Statement on Consumer Unfairness*, 4 Trade Reg. Rep. (CCH) ¶13,203 (Dec. 17, 1980).

defined a practice as deceptive if it is likely to mislead consumers acting reasonably in the circumstances to their material detriment.[12] The Commission thoughtfully applied these concepts in such cases as **Horizon,**[13] **International Harvester**[14] and **Orkin**[15]; it also refined both the unfairness and deception elements of the "reasonable basis" doctrine (as first enunciated in **Pfizer**)[16] through its 1984 Advertising Substantiation Policy and ensuing advertising enforcement actions.[17]

Both the 1980s set-backs on unfair methods of competition and the 1980s happier experience with unfair and deceptive practices have importantly influenced the agency's competition and consumer protection missions throughout the 1990s and 2000s to date, largely apart from each other. Thus, throughout the past 15 years, BC's agenda (apart from merger enforcement) has been almost entirely limited to anticompetitive practices that could be challenged under Sherman Act standards; the only exception has been staking out ground on "invitations to collude" in such cases as **Quality Trailer Products,**[18] **YKK**[19] and **Stone Container**[20]. During this same period, BCP has aggressively pursued new kinds of consumer concerns in the emerging Internet economy; it has thereby shown the robustness of its unfairness

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[12] *FTC Statement on Deceptive Acts and Practices*, 4 Trade Reg. Rep. (CCH) ¶13,205 (Oct. 14, 1983).

[13] 97 F.T.C. 464 (1981).

[14] 104 F.T.C. 949 (1984).

[15] 108 F.T.C. 263 (1986).

[16] 81 F.T.C. 23 (1972).

[17] 4 Trade Reg. Rep. (CCH) ¶39,060 (Aug. 2, 1984).

[18] 115 F.T.C. 944 (1992).

[19] 116 F.T.C. 628 (1993).

[20] 125 F.T.C. 853 (1998).

his thesis that the Commission should encourage more rather than less self-regulation aimed at advancing consumer protection objectives but all subject to common-sense safeguards that can protect against anticompetitive abuse. I would, however, embellish as indicated below.

Self-Regulation

The history and ultimate outcome of the Commission's **California Dental**[23] proceeding could be construed as exposing problems in or lost opportunities from sole reliance upon the unfair methods of competition authority in the self-regulation area. The Commission applied relatively conventional Sherman Act standards in its determination that the California Dentist's advertising code was anticompetitive because it prohibited truthful advertising and inhibited both price and quality competition. The Ninth Circuit second-guessed the Commission's analysis and applied different standards in its affirmance of the result; the Supreme Court then second-guessed the Ninth Circuit and third-guessed the Commission, based in part on its own excessively deferential view of the dentists' purported justifications for what the Commission had found to be overbroad regulation. On remand the Commission was unable, on the previously established administrative record, to convince the Ninth Circuit to uphold the agency's order in accordance with the Supreme Court's application of antitrust-only principles to the issues at hand.

One is tempted to speculate whether the outcome might have been quite different if, at the outset, the Commission had invoked its unfair practices authority as an adjunct to its unfair methods of competition authority and had then also employed more fully BCP's experience in advertising regulation under its established deception standards. The restrictions in the dentists' code clearly prohibited far more than claims reachable under the Commission's own established and now well-accepted definition of a deceptive practice; and the resulting over-regulation could

[23] *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

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be shown to cause consumer injury of a kind meeting the Commission's own established and now well-accepted definition of an unfair practice, even if not so clearly also a violation of existing antitrust law standards.

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See generally Skitol, "Concerted Buying Powe

The Commission's efforts to date to address this problem under its unfair methods of competition authority have been controversial. The agency has struggled to define viable theories under which a patent holder's failure to disclose -- or "inadequate" disclosure of -- its patent claims during standard-setting can be found to create market power or otherwise to be sufficiently anticompetitive in conventional terms to amount to an antitrust violation.

Many standards groups have promulgated policies that encouraj12.72 0 Td(c)Tjn 0 Td36rx u.mk6rx u.ml

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[25] See Lemley, "Intellectual Property Rights and Standard-Setting Organizations", 90 Cal. L. Rev. 1889, 1903-08 (2002).

[26] The FTC's position on the extent to which a patent owner's disclosure duty rests on the knowledge of, or something akin to deliberate deception by, employees participating in the standard-setting has been unclear and the subject of conflicting perspectives ever since final action on the Dell consent order in 1996. The Commission majority's explanatory statement at that time said that "Dell failed to act in good faith to identify and disclose patent conflicts"; its failure to disclose was "not inadvertent"; the agency disclaimed any intent "to signal that there is a general duty to search for patents" and said its order "should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action." *Dell Computer Corp.*, 121 F.T.C. 616, 625-26 (1996). Dissenting Commissioner Azcuenaga disagreed: by "failing to take a clear stand on what legal standard it [intended] to apply," the

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"material" information can be considered both a deceptive and unfair practice.[28] The standard-setting context would be a novel and perhaps difficult application of BCP precedents in this respect but one well worth serious exploration. Proffered justifications for nondisclosures in many circumstances are at least questionable under close scrutiny; adverse effects on standard-setting processes and on the consuming public are often both obvious and serious. In situations of this kind, the Commission could move standard-setting in more enlightened (procompetitive) directions by fashioning rules under which failures to disclose information of this sort are deemed to be unfair and deceptive.[29]

BCP's unfairness doctrine may be particularly useful in addressing standard groups' explicit prohibitions on any consideration of license terms during the standard-setting process.

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[28] See, e.g., *International Harvester Corp.*, 104 F.T.C. 949, 1055-62 (1984).

[29] See Averitt & Lande paper at 112-13.

[30] 456 U.S. 556 (1982).

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[32] See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F.Supp. 2d 943 (E.D. Ky. 2003) (appeal pending); *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, __F. Supp. 2d __ (N.D. Ill. 2003) (appeal pending).

[33] See, e.g., H.R. 107, S. 2560, recent hearings on them, etc.

[34] See, e.g., Digital Broadcast Content Protection, FCC Dockets 02-230, 04-64.

[35] See AAI Letter of March 22, 2004 [cite].

functionality implicating a growing array of consumer electronics, computing and communications devices.

So, most immediately, the Commission could constructively provide its perspectives -- with input from both BC and BCP -- on all of these issues through amicus briefs in pending litigation, appearances at hearings on pending legislation, and comments to the FCC on pending proceedings in this area. BC could also begin close scrutiny of some of the new kinds of collaborative activity under which industry groups are creating standards, technology pools and collective licensing schemes for DRM solutions without safeguards against anticompetitive abuse of the sort the Commission has long encouraged in activities of these kinds. These groups, for example, are often led by limited combinations of content providers and device manufacturers; competitors in affected content and device markets are accorded no opportunity to participate in the deliberations. Either BC or BCP should take a hard look at abusive industry litigation strategies; while a purely antitrust attack on them may collide with the Noerr-Pennington doctrine, an unfairness theory of the sort BCP has employed successfully against oppressive uses of legal process could be effective in this area.[36] BCP also can and should take a lead role -- with BC input -- in addressing above-described information disclosure needs; this might best be undertaken through a rulemaking proceeding that could effectively connect these issues of deception and unfairness to broader competition policyœbje.3200127.59n and unfalitig Td(an)Tj12 0 T

[36] See Averitt & Lande paper at 113-16.

least, in its efforts to turn insights from the 1992 **ever**

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[37] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

[38] See [New Kodak article in forthcoming ABA Antitrust Law Journal]; see also Grimes, "Antitrust and the Systemic Bias Against Small Business: Kodak, Strategic Conduct, and Leverage Theory," 52 Case Western Reserve L. Rev. 231 (2001).

[39] See, e.g., *In Re Independent Service Organizations' Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000).

[40] *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 124 S. Ct. 872 (2004).

[41] See Skitol, "Correct Answers to Large Questions About Verizon v. Trinko," Antitrust Source, May 2004.

One result of these antitrust developments is that equipment owners -- lots of consumers including both individuals and small businesses – are now vulnerable to significant injury from post-purchase opportunistic conduct without effective means of protecting themselves from it. They might well have purchased the product in question without access to meaningful information on life-cycle costs and are now subject to high switching costs; they are locked into an installed base that the OEM can exploit in the absence of open aftermarket competition. The situation implicates both competition policy and consumer protection policy concerns; it is accordingly one that BC and BCP might undertake to address together through a combination of their respective unfair methods of competition and unfair practices authorities.

Consider, for example, a rulemaking proceeding designed to explore the feasibility of pre-sale disclosures of life-cycle and related-kindTd(i-455.16 -moj3Tj0..24001 0d(asibilit8 0 Td(c)Tj8.a31.2 0 T

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Let me conclude with an organizational suggestion. Serious and sustained integration of BC and BCP missions to advance common or complementary policy objectives is unlikely to occur without delegation of an integration role to an office and person committed to it. The Commission's former Office of Policy Planning, particularly as led by Caswell Hobbs during the 1970s, performed this function in a prodigious manner. Mr. Hobbs' paper for this Symposium delineates the history, including many rulemaking initiatives that served both competition and consumer protection objectives through a variety of information disclosure and related remedies. Such an office should be recreated for the Commission's tenth decade.

The proposed new Office of Competition and Consumer Protection Policy would be independent of but work closely with policy officials in both BC and BCP. The Director of the Office would report directly to the Chairman on a regular basis. He would be assisted by a staff of economists along with consumer behavior, business strategy and marketing experts dedicated to inter-disciplinary research and development into emerging marketplace problems. It would fashion proposals for both new case initiatives and rulemaking proceedings to address issues cutting across both Bureaus.

The Office might also take a lead role in pursing the initiatives that it develops with personnel assignments from both of the Bureaus. In short, these projects could be staffed by integrated teams of lawyers borrowed from both BC and BCP operating under the general supervision of the Office Director and his deputies. The Office would issue an annual report on its activities, inviting public comment and input. Such an Office could become an invaluable incubator of policy innovations for the years ahead.

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