

**Protecting Markets and Consumers  
in a High-Tech World**

called for the agency's abolition. In sum, although clearly not perfect by any means, the message I heard on the occasion of its anniversary is that the agency is doing a strong job of ensuring that America's model marketplace runs freely, fairly and truthfully to serve American consumers.

The FTC is charged with promoting competition and consumer welfare and enforcing our

industry, the consumer protection side was looking at how to encourage greater disclosure of information about defects in cars. When competition advocates were looking at how to break down regulatory barriers to interstate lending, the consumer protection side was looking at how to more meaningfully disclose credit terms to spur greater competition in the marketplace. More recently, as the debate about peer-to-peer file sharing has reached a fever pitch, the FTC convened a public forum to air issues relating to P2P's current or potential impact on competition and consumers.

Today, I will briefly discuss how we are approaching issues that are important to your industry in both the competition and consumer protection programs.

## **II. ANTITRUST**

### **A. Overview**

Not surprisingly, antitrust enforcement in technology markets is a large and significant part of the Commission's competition work. (We do, of course, share civil antitrust jurisdiction with the Antitrust Division of the Department of Justice, dividing investigations according to expertise in the product market through a process known in the trade as the "clearance process.") Our antitrust work includes reviewing mergers, evaluating potentially anticompetitive business conduct, engaging in competition policy research and development, and advocating for competition in the courts, in federal and state agencies, in Congress and in state legislatures, and around the world.

### **Standards of Antitrust Analysis**

There is no doubt that today's high-tech companies produce products and services that are vastly different than those produced by more traditional "brick and mortar" firms. The mere

speed with which new products and services are introduced, gain acceptance, and then perhaps are overtaken by

assets of the merging parties and the likely reaction, if any, of other competitors to the merger,  
including any enhanced ability

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<sup>1</sup> Allocution de Monsieur Jacques Chirac, President of France, Jan. 4, 2005,

more rapid and less predictable change than traditional sectors of the economy. Consequently, we take care to determine whether any impact on competition produced by a merger of (or conduct by) high-tech companies is merely a brief transitory blip or more sustained competitive harm. Markets are usually self-correcting. In some technology markets, a market may correct itself in a shorter period of time than is required to prosecute an antitrust case.

Finally, as you know, technology markets often are characterized by what economists call “network effects.” Network effects are produced when one person’s use of a product or service increases the value to another person of using the same product or service. At an early point in time, there may be several different technologies that can (or have the potential to) provide a particular functionality at comparable prices – *e.g.*, VHS and Betamax. If one of those technologies, however, becomes an industry standard, and if there are considerable costs to adoption and to after-the-fact switching, the provider of the chosen technology may obtain substantial after-the-fact market power – especially if the licensees failed to anticipate that result and negotiate a price before the adoption. Determining whether or not the provider of the technology did anything other than compete to acquire such market power requires careful analysis. Because the acceptance of a single standard may spawn efficiency benefits for consumers, we must tread cautiously before condemning the provider of the “winning” standards technology.

#### **B. Examples Of The FTC’s Recent Antitrust Work In High-Tech Markets**

Clearly, an ever increasing percentage of the value of U.S. companies is comprised of various forms of IP and human capital, rather than hard assets, and the FTC’s recent work reflects that shift. You may know that in December, the Commission resolved its challenge to

AspenTech's acquisition of the Hyprotech software assets, just weeks before the scheduled start of an administrative trial.<sup>2</sup> The consent order resolving the matter requires AspenTech to divest the intellectual property rights to the Hyprotech products, and the Commission has approved Honeywell's acquisition of these rights.<sup>3</sup> Under the order, AspenTech is permitted to license back the rights to these products so that it too can remain a viable competitor. (The consent order also requires AspenTech to divest its integrated engineering software business to Bentley Systems.)<sup>4</sup> The Commission's handling of the AspenTech matter is an excellent example of how a detailed fact-intensive investigation led to a highly-tailored solution that will preserve competition in an important software market.

An illustrative, ongoing, non-merger case is the *Rambus* matter, which also puts the focus on intellectual property rights, rather than hard assets. The staff's Complaint in *Rambus* alleged that Rambus had engaged in unlawful exclusionary conduct by failing to disclose to a standard-

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<sup>2</sup> Decision and Order, *Aspen Technology Inc.*, Docket No. 9310 (Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221do.pdf>.

<sup>3</sup> Letter from Donald S. Clark, Secretary, Federal Trade Commission to George S. Cary (Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221ltr.pdf>.

<sup>4</sup> To ensure restoration of pre-merger competition levels, however, the order goes beyond simply requiring divestitures. With respect to the process engineering software assets purchased by Honeywell, the order also requires AspenTech to, among other requirements: (1) divest a related operator training business; (2) allow current customers to void their current contracts; and (3) support the assets divested to Honeywell for two years. In addition, for five years, AspenTech must provide Bentley with updates, upgrades, and new releases of AspenTech's engineering and other products on terms as favorable to those provided to other persons. The consent order further directs AspenTech to provide both Honeywell and Bentley with lists of relevant employees, remove impediments deterring current AspenTech employees from switching to either buyer, and, for two years, refrain from soliciting any former AspenTech employees who choose to work for the buyers. Decision and Order, *Aspen Technology Inc.*, Docket No. 9310 (Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221do.pdf>.



setting organization in which it participated that it had obtained “blocking” patents with respect to a computer memory standard under evaluation by the organization. After a two-month trial, the Administrative Law Judge agreed with *Rambus* and held that the staff had not proven the case.<sup>5</sup> The matter is now before the full Commission for decision.

To complement our work on individual matters, the Commission, together with the Antitrust Division, has devoted substantial resources to learning more about how intellectual property rights impact competition. In October 2003, the FTC issued a 300-page report on patents and competition, entitled “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.”<sup>6</sup> It was based on over twenty-four days of hearings, with more than 300 stakeholder panelists and roughly 100 written submissions.

The hearings confirmed that patents play different roles, and thus may pose different competitive issues, in different industries. Pharmaceutical companies reported that patents were indispensable to protect the enormous financial investments required by innovation toward drug products containing new chemical entities. Similarly, biotech companies spoke about the crucial importance of patents in attracting venture capital to fund the extremely costly, high-risk R&D that biotech involves. Computer hardware and software and Internet companies highlighted the special issues that arise in industries characterized by incremental, cumulative innovation and by products requiring a great many, separately held patents. Panelists described thickets of overlapping patents through which firms must maneuver to achieve product commercialization.

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<sup>5</sup> Initial Decision, *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 23, 2004), available at <http://www.ftc.gov/os/adjpro/d9302/040223initialdecision.pdf>.

<sup>6</sup> *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

They noted the increase in defensive patenting – that is, developing many patents of your own, not necessarily to protect your product innovations, but rather to keep as trading chips to use when other companies demand that you license their patents to avoid alleged infringement.

The FTC proposed ten recommendations to improve patent quality. In particular, we recommended the use of administrative post-grant review of patents and the imposition of certain limits to liability for willful infringement, as well as adequate funding for the PTO – a recommendation on which everyone agreed.

In April 2004, the FTC continued its intellectual property focus when it co-sponsored a conference on patent reform with the National Academies' Board on Science, Technology, and Economic Policy.

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working to encourage and facilitate private market innovations. Last November, the Commission convened an Email Authentication Summit, cosponsored by the National Institute of Standards at the Commerce Department.<sup>9</sup> The Summit enabled the Commission to gather a wide spectrum of interested parties, capable of finding a solution to the problem of email anonymity, with the goal of invigorating the search for and agreement on an authentication standard.

I implore the industry to quickly put aside differences and work diligently in developing a compatible authentication standard that will provide accountability for email communication. The stakes are high, and all involved have an interest in ensuring the continuing viability of email communications.

### **C. Spyware**

Just when we were getting a good start on addressing spam, spyware popped up. The term spyware may be amorphous, but there is no doubt that its negative impact is real. It is hard to find any computer user who has not struggled for hours to remove spyware from his computer.

Like spam, much harmful spyware is distributed illegally. We filed our first spyware case in October 2004,<sup>10</sup> and more are in the pipeline. In that law enforcement action, we challenged spyware that changed consumers' home pages, changed their search engines, and triggered a barrage of pop-up ads. According to our complaint, the spyware also installed additional software, including spyware that can track a consumer's computer use. As a result of the

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<sup>9</sup> See [www.ftc.gov/bcp/workshops/e-authentication/index.htm](http://www.ftc.gov/bcp/workshops/e-authentication/index.htm).

<sup>10</sup> *FTC v. Seismic Entertainment Productions, Inc.*, Civil No. 04-377 (D. N.H. filed October 6, 2004), available at [available at www.ftc.gov/opa/2004/10/spyware.htm](http://www.ftc.gov/opa/2004/10/spyware.htm).

spyware and other software the defendants installed, many computers malfunctioned, slowed down, or crashed, causing consumers to lose data stored on their computers. Then, after having created these serious problems for consumers, the

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<sup>11</sup> The consumer alerts are available at [www.ftc.gov/bcp/online/pubs/alerts/spywarealrt.htm](http://www.ftc.gov/bcp/online/pubs/alerts/spywarealrt.htm); [www.ftc.gov/bcp/online/pubs/alerts/idsalrt.htm](http://www.ftc.gov/bcp/online/pubs/alerts/idsalrt.htm); [www.ftc.gov/bcp/online/pubs/buspubs/secureyourserver.htm](http://www.ftc.gov/bcp/online/pubs/buspubs/secureyourserver.htm); and [www.ftc.gov/bcp/online/pubs/buspubs/security.htm](http://www.ftc.gov/bcp/online/pubs/buspubs/security.htm).

<sup>12</sup> See [www.ftc.gov/bcp/workshops/spyware/index.htm](http://www.ftc.gov/bcp/workshops/spyware/index.htm).

encouraging. We encourage industry to give priority to developing easy-to-use technology to ensure that consumers maintain control over their own computers.

#### **D. Information Security**

Finally, the FTC has given priority to protecting consumers' privacy, and nothing today is more fundamental to privacy than information security. We have brought a series of cases challenging allegedly false security claims. In each of the cases, we charged that the companies promised that they would take reasonable steps to protect sensitive information obtained from consumers, but failed to do so.<sup>13</sup> With an estimated 9 million cases of identity theft last year, quite frankly, it is alarming to see, in two of the FTC's enforcement actions, allegations of websites with unencrypted credit card information or without defenses to even the most basic hacker attack. We also are bringing cases against companies that have failed to comply with the security requirements of the Gramm Leach Bliley Act.<sup>14</sup>

We have promoted information security through a practical and plain language consumer and business education campaign, which includes outreach through the FTC's website, through speeches, "nege Gramm Leasona.ns(easu7.5n use"ng)erts47.6parin ipy

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<sup>13</sup> See [www.ftc.gov/privacy/privacyinitiatives/promises\\_enf.html](http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html).

<sup>14</sup> See [www.ftc.gov/opa/2004/11/ns.htm](http://www.ftc.gov/opa/2004/11/ns.htm).

<sup>15</sup> See [www.ftc.gov/bcp/online/edcams/infosecurity/index.html](http://www.ftc.gov/bcp/online/edcams/infosecurity/index.html).

the public about emerging issues in the privacy and security arena. In 2003, for example, we held a two-session workshop, “Technologies for Protecting Personal Information: The Consumer and Business Experiences,” to examine the challenges and possible technological solutions to protecting consumers’ personal information.<sup>16</sup> What emerged from the workshop was a basic agreement that privacy solutions depend on four critical elements working in sync: people, policies, process, and technology.<sup>17</sup>

\_\_\_\_\_ Time and again, we are told that if protective technology is to be effective for consumers, it has to be easy. And it should be comprehensive. Although from a policy development standpoint, we discuss online security as discrete topics – viruses, spam and spyware -- consumers do not. Many consumers will not adequately protect their computers if they have to shop around for separate security products, read complex user manuals, and even change the default settings to their systems. They just want to be able to surf and use the Internet safely. Now, one can argue that consumers should be taking greater responsibility for their own computer safety. But I would think that the important point for you is not whether they should; it is whether they actually will, if securing themselves is not made easy. Given that we all have a tremendous stake in the security of – and consumer confidence in – the online world, it seems that making that world safer should be a priority for all stakeholders.

For our part, we are taking a big-picture look at how we communicate with consumers about online security, privacy, and fr

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<sup>16</sup> See [www.ftc.gov/privacy/privacyinitiatives/promises\\_wkshp.html](http://www.ftc.gov/privacy/privacyinitiatives/promises_wkshp.html).

<sup>17</sup> See *Staff Workshop Report: Technologies for Protecting Personal Information*, available at [www.ftc.gov/bcp/workshops/technology/finalreport.pdf](http://www.ftc.gov/bcp/workshops/technology/finalreport.pdf).



about three dozen interviews with representatives of trade associations, consumer advocates, other federal agencies, and corporations – including several of your member companies – to get a sense of what messages and tactics are most effective for reaching consumers. What we have learned has confirmed that consumer education is a key part of the solution. We heard time and again that we need to keep it simple. In the coming weeks, we are going to develop a plan for the next phase of our consumer education program on online issues. I hope that you will find the themes, strategies, and outreach tools that we develop to be useful in your own consumer outreach activities. We certainly would like to continue working with you.

#### **IV. CONCLUSION**

Thank you again for the opportunity to speak to you today