

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

By

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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 suggest some ways that the connection between them can be rediscovered to address more effectively some complex challenges before the agency today and in the years ahead. The thesis presented herein is that (a) BC can advance competition policy objectives by reconceptualizing some of its theories with creative uses of BCP's unfairness and deception doctrines; and (b) BCP can advance consumer protection policy objectives by reconceptualizing some of its initiatives with creative uses of BC's antitrust authority.

Past

The history of the connection has been a roller-coaster from the earliest years of the agency's existence to our day. From 1914 to 1936, when Section 5 proscribed only unfair methods of competition, deception and other practices deemed to be "oppressive" to consumers were common targets of Commission activity even as the Supreme Court flip-flopped over the

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 separate bodies of law under each part of the amended statute.

The 1960s were a period of considerable expansion in the scope and application of both jurisdictions. Precedents such as Atlantic Refining,² Brown Shoe³ and Grand Union⁴ developed the principle that unfair methods of competition could reach practices offending the “spirit” even if not the letter of other antitrust laws; the Commission’s own acclaimed Statement of Basis and Purpose for the Cigarette Rule held that a practice neither in violation of the antitrust laws nor deceptive could nonetheless be proscribed as unfair if found to be “oppressive,” “exploitive,” “inequitable” or otherwise “detrimental to consumers or others.”⁵ The Supreme Court embraced but also markedly broadened these ideas in 1972 in S&H,⁶ a case involving the agency’s challenge to a trading stamp company’s suppression of independent stamp exchanges. In language suggesting almost unlimited agency authority under both jurisdictions, the Court said the Commission “does not arrogate excessive power to itself if, in measuring a practice against the elusive . . . standard of fairness, it, like a court of equity,

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, the Commission of the 1980s devoted considerable energy to establishing objective definitions of both “unfair” practices and “deceptive” practices. The definitions as conceived and applied over several years came to be seen as both broad enough to reach serious abuses and structured enough with “limiting principles” to be accepted by courts and the business community alike. The 1980 Unfairness Statement defined a practice as unfair if it is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits.¹¹ The 1983 Deception Statement

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 (2^d 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

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).

and deception powers (faithful to their 1980s definitions) in addressing new issues in new settings.

Future

Having now brought history to the present, let me suggest a possible next chapter for the years ahead as BC in its competition policy mission and BCP in its consumer protection policy mission confront new challenges that implicate core concerns across both missions and where the distinct institutional expertises of the two Bureaus could be brought together in fashioning solutions. The general idea is that the time has come for (a) BC to recognize that tools available to it in addressing new competition policy issues include more than the unfair methods of competition authority limited to existing Sherman Act standards; and (b) BCP to recognize that tools available to it in addressing new consumer protection policy issues include more than the unfair and deceptive practices authority as interpreted over the past two decades. They can do so through collaborative initiatives that combine both authorities, reconceptualize some of each Bureau's standard theories of Section 5 violation to incorporate doctrines developed by the other Bureau, and thereby address more effectively problems that implicate both policy missions.

I have four examples to suggest in this regard, all of which borrow importantly from other participants on this panel. In particular, all four examples are inspired by Neil Averitt's and Bob Lande's several writings on "consumer choice" theory including their latest paper on how it can become a "new paradigm of antitrust law" generally.²¹ I begin, however, by building a bit on Commissioner Leary's recent remarks on "Self-Regulation and the Interface Between Consumer Protection and Antitrust."²² I adopt and incorporate by reference herein the entirety of

²¹ Averitt & Lande, "Consumer Choice: Operationalizing A New Paradigm of Antitrust Law" (Draft as of June 15, 2004).

²² Remarks of January 28, 2004. See also Pitofsky, "Self-Regulation and Antitrust," February 18, 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 Dental²³ 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).

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.

As Commissioner Leary has suggested, there is considerable room for new kinds of self-regulation to address emerging consumer concerns and advance consumer protection policy objectives in the years ahead, and it can occur without material risk of antitrust liability. Obvious examples include internet marketing and email spam, threats to privacy and data security presented by new internet technologies, inadequate disclosures about costs and risks associated with new consumer credit and payment mechanisms. FTC and state enforcement proceedings may not be the most effective solutions to problems in these areas, particularly in an era of serious strains on agency budgets and thus limits on resources available for enforcement activity. The private sector can and should fill what will surely be a growing gap between consumer protection needs and government responses to them.

The Commission can encourage industry associations to move in these directions by providing more guidance on how to do so without running into antitrust trouble. It can do so in particular through development of a more proactive advisory opinion procedure, one that encourages more requests for assistance by ensuring more expeditious as well as more meaningful agency responses than has been the general experience over the past several decades.

There are roles for both BCP and BC on this front, with BCP promoting industry initiatives and contributing ideas to the evolution of specific proposals for consideration and with BC providing the advice on approaches that avoid antitrust concerns.

At the same time, the agency need not allow the Supreme Court's California Dental decision to inhibit enforcement initiatives against associations that cross the line between

desirable and undesirable self-regulation activity. Indeed, BC can develop stronger means of inducing associations to accept responsibility for addressing consumer concerns in enlightened ways; it can invoke BCP's unfairness doctrine as a supplement to the unfair methods of competition authority to challenge associations whose codes of conduct impede rather than facilitate evolution of marketplace solutions to consumer concerns. In short, the Commission can pursue a robust program of encouraging more of the "good" kinds of private concerted consumer protection efforts while also acting against anticompetitive abuses in this area through a more fullsome integration of BCP's and BC's tools.

Patents and Standard-Setting

My second example is BC's initiative to address the growing problem of "patent holdups" or "patent ambush" situations plaguing industry standard-setting throughout the information technology sector. The problem arises from the interaction of (i) proliferating patents generally and (ii) proliferating needs for standards to enable interoperability among both competing and complementary products seeking to exploit new technologies. The result is many situations where desired specifications for a proposed standard would infringe one or more patents in the absence of licenses from the owners. And, when a standard implicates multiple undisclosed patent claims, the cumulative effect (from the resulting multiple royalty demands) can be severely exclusionary. There appears to be a general consensus in the standard-setting community on the desirability of disclosures about potential patent claims during standard-setting so that participants are properly informed when they vote on affected specifications. That consensus, however, evaporates on the question of how to ensure that meaningful and timely disclosures occur.²⁴

²⁴ See generally Skitol, "Concerted Buying Power in Standard-Setting: Part of a Solution to the Patent Holdup Problem," American Antitrust Institute Conference on Buyer Power, June 22, 2004, at 4-7.

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 encourage patent disclosures in one manner or another. Most groups refrain from expressly requiring disclosures in a way that would necessitate burdensome patent searches to ensure full knowledge of everything within a participant's portfolio that might be asserted at a later time. Few groups go so far as even encouraging disclosures of pending patent applications even though such applications might be more significant and more threatening to the "open" standard-setting objective than already issued patents.²⁵ The result is that, while many patents do get disclosed during standard-setting, others surface only months or years after a standard is adopted and widely employed, that is, when it is too late to choose an alternative technology. And, even where the patent owner actively participated in the standard-setting process, it may often be difficult to discern whether the owner (i) knew of the patent but deliberately withheld information about it during the process or (ii) failed to disclose the patent earlier as a result of "innocent" unawareness.²⁶

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

A related and in some respects even larger problem that the agency has not yet begun to address is that, even when a patent claim is disclosed during standard-setting, the owner withholds meaningful information on its intended license terms until after the standard in question is adopted and an entire industry is locked into use of it in developing compliant products. Standard-setting participants are, in essence, forced to vote on “buying” the patented input into the proposed standard without knowing what the input will cost compared to alternatives that might be considered if license terms were disclosed prior to the voting stage. The result is that a patent owner thereafter extracts exclusionary rents from all standard users that it would not have been able to extract if standard-setting participants knew the license terms before voting to adopt the patent owner’s solution. Standard-setting organizations have declined to require disclosure of license terms under misdirected fears that such a requirement would in itself invite antitrust trouble.²⁷

In short, there are serious problems of inadequate disclosures about patent claims and intended license terms that threaten to subvert open standards objectives and enable patent owners to misuse standards processes to the detriment of competitors and consumers alike. BC might more effectively address these problems if it looks beyond the confines of its antitrust authority and employs BCP’s consumer protection authority as a supplemental tool in this area. BCP has considerable experience in defining circumstances in which failure to disclose

majority in her view created highly mischievous confusion over the “antitrust-based duty of care for” standard-setting participants; and the majority’s attribution of “constructive” knowledge to the Dell employee involved in the standard-setting there in question led in her view “to a strict liability standard under which a company would place its intellectual property at issue simply by participating in the standard-setting process.” *Id.* at 627, 629-30.

²⁷ See Skitol paper at 8-19.

“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. Here the problem is similar to that in **California Dental** because it involves concerted action among both competing sellers and competing buyers of patent rights to suppress competitive bidding or indeed any competition over price and related license terms. The unfairness doctrine could be invoked to extend to this problem principles derived from the Supreme Court’s decision 22 years ago in **American Society of Mechanical Engineers v. Hydrolevel Corp.**³⁰ The Court there established a standard-setting group’s strict antitrust liability in circumstances where anticompetitive harm occurs as a result of the group’s failure to implement procedures aimed at preventing abuse of its processes. The **Hydrolevel** rule of “strict” liability may not survive the new Standards Development Organization Advancement Act of 2004 and its assurance of rule-of-reason treatment for standards development activity generally. But, even without strict liability, standards groups could be held liable under an unfairness theory for their employment

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).

of procedures that enable patent owners' manipulation of standard-setting processes in ways that create exclusionary effects.

The general idea of invoking the Commission's unfairness doctrine as a supplement to antitrust principles in the standard-setting area is not new and is not original to this writer. Tim Muris suggested this very course 21 years ago in his comments on the Final Staff Report Regarding the Commission's Proposed Standards and Certification Rule (a BCP initiative): "the **Hydrolevel** case dramatically illustrates [that] standard-setting can be misused to exclude competitors unreasonably, injuring consumers"; the "Commission can pursue anticompetitive restraints as unfair methods of competition, using a rule of reason approach, or as unfair acts or practices under the Commission's unfairness protocol, in each case weighing the benefits and costs of the challenged activity."³¹

Digital Rights Management

My third example involves the mushrooming mess of digital rights management ("DRM") in our emerging all-digital world. Multi-pronged wars proliferate around us among content providers, consumer electronics and computing device vendors, content protection technology developers, original equipment manufacturers and aftermarket rivals, and consumer interests over line-drawing between piracy versus consumer fair use, criminal circumvention of IP laws versus legitimate reverse-engineering, desirable protection of innovation incentives versus undesirable suppression of competition. Weapons of choice employed in these wars include (a) new kinds of questionable (less than open) collaboration among leading competitors within one or more of these sectors to promote and employ DRM solutions fashioned to preempt opportunities for competing solutions and to disadvantage competitors in related product spaces;

³¹ Timothy J. Muris, Standards and Certification Rule, Statement Accompanying the Final Staff Report, Bureau of Consumer Protection, 43 Fed. Reg. 57269 (1983).

and (b) lawsuits reaching new heights of aggressiveness and abuse based on what can only be described as extreme interpretations of IP rights and of the Digital Millennium Copyright Act in particular, thereby suppressing competition through the mere pendency and weight of these litigation processes generally.

Courts,³² Congress³³ and the FCC³⁴ have been struggling mightily over all of these issues. The FTC has been “missing in action” with no visible input to date. This is unfortunate because the Commission has much to contribute to policy evolution in this area generally. The American Antitrust Institute (“AAI”) highlighted a range of competition policy issues at stake in DRM-related FCC proceedings in an AAI submission to the Commission as well as other agencies earlier this year.³⁵ The relevance of BC’s competition policy expertise is obvious, particularly since much of the problem lies at the intersection of IP and antitrust law where the Commission has invested considerable resources in recent years. Perhaps less obvious but equally relevant is BCP’s consumer protection policy expertise since core parts of the problem implicate issues of consumer expectations regarding affected devices or technologies and the absence of material information at the point of consumer purchase about use restrictions. Indeed, consumers are getting locked into particular DRM solutions imposed by concerted industry actions unknown to them but adversely affecting utilization of not only newly purchased products but previously purchased products as well. In short, there is a growing problem of nondisclosure or inadequate (untimely) disclosure of information about adverse effects of DRM solutions on product

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 policy objectives.

Installed Base Opportunism

My fourth example concerns the “Kodak Doctrine” and its use to protect locked-in consumers in “aftermarkets” for service, consumables or other products that are complementary to durable goods purchases. The private plaintiffs’ antitrust bar has had a tough time, to say the

³⁶ See Averitt & Lande paper at 113-16.

least, in its efforts to turn insights from the 1992 **Kodak** decision³⁷ into wins for aftermarket clients against original equipment manufacturers (“OEMs”).³⁸

On the one hand, the Supreme Court established the general proposition that OEMs “may” exercise power and bring about exclusionary effects in aftermarkets, to the detriment of aftermarket rivals and equipment owners alike, in circumstances involving both pre-purchase information imperfections and post-purchase switching costs. On the other hand, plaintiffs have consistently failed in their burden of proving the existence of these conditions in litigated cases. More fundamentally, attempts to prosecute OEM conduct as Section 1 “tying” violations or Section 2 “refusal to deal” violations have faltered in the wake of evolving and increasingly restrictive jurisprudence with regard to some elements of these offenses. The main problem facing aftermarket plaintiffs in many of these cases has been their inability to obtain access to OEMs’ proprietary intellectual property needed for effective aftermarket competition. But antitrust law has now moved decisively against the whole idea of an OEM’s duty to share its IP with other parties.³⁹ Indeed, in the wake of the Supreme Court’s January 2004 **Trinko** decision,⁴⁰ there will be very few if any situations in which a court can be persuaded to require an OEM to assist or cooperate with its rivals in any manner. **Trinko** undercuts past uses of the essential facilities doctrine and of leveraging theories in aftermarket cases.⁴¹

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 kinds of information regarding durable equipment of various kinds. There are many challenges to any effort aimed at fashioning industrywide, uniform and meaningful disclosures of these kinds; one size will not fit all product categories and all circumstances. But industry associations could be encouraged to develop their own appropriate solutions through open standard-setting or similar procedures. The Commission could then mandate the manner in which the disclosures would occur. The result would be empowerment of consumers to make equipment choices among competing options with post-purchase concerns in mind. A consumer problem would be solved through this information remedy; OEMs may even benefit from it because the disclosures would strengthen their defenses against any future Kodak-style antitrust claims (to whatever extent aftermarket rivals continue to pursue them in the post-Trinko environment).

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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 pursuing 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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